19014

AN
INSTITUTE
OF
The Laws of England:

OR, THE
LAWS of ENGLAND in their *Natural Order*, according to Common Uſe.

PUBLISHED

For the DIRECTION of Young *Beginners*, or *Students* in the Law; and of *Others* that deſire to have a *General Knowledge* in our *Common* and *Statute* Laws.

In Four BOOKS.

By THOMAS WOOD, L. L. D. *and Barriſter at Law.*

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The **Tenth Edition**, reviſed, corrected, and enlarged by conſiderable Additions from the New *Reports* and *Manuſcript Caſes*, as alſo from the *Statutes*, which are brought down to the preſent Time, and by upwards of one thouſand additional References: *By a Serjeant at Law.*

Miſera Servitus eſt, Ubi Jus eſt VAGUM aut INCOGNITUM.
4 Inſt. 246, 332.

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M.DCC.LXXII.

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THE PREFACE.

IT has been thought impracticable to bring the Laws of *England* into a *Method*; and therefore a Prejudice has been taken up againſt the Study of our Laws, even by Men of Parts and Learning, as if there was no Way to attain to the Knowledge of them, but by a tedious Wandering about, or with the greateſt Application and long Attendance on the Higheſt Courts of Juſtice. Now, when I conſidered the Requiſites in Teaching by *Method*, *(viz.)* That there muſt be *Knowledge* and *Judgment* in the Art which one is to teach; that great *Skill* is neceſſary to lay it in Order; and that *Care* and *Diligence* is required, to comprehend all the uſeful Parts of it: I was utterly diſcouraged from the Attempt, by the Senſe of my own Inabilities, and the many Diſadvantages I lay under in a private Country Life; eſpecially by being barr'd from the Aſſiſtance of learned Lawyers, to conſult with upon any Doubt, or to reviſe the Work; though I was fully perſuaded that even an *imperfect* Performance of that Kind might be of Uſe.

But when I ſaw, that many Parts of our *Common* and *Statute* Laws were *diſuſed* or *abrogated*; that the *Niceties* in *Pleadings* and *Practice* were leſſened by Statutes or by new Inventions; I entertain'd Hopes, that *now* it might not be impoſſible, to *ſort*, or to put in ſome *Order*, this Heap of good Learning; and that a *general* and *methodical* Diſtribution, preparatory to a more large and accurate Study of our Laws, might now be made, as well as an *Inſtitute* of *Civil* or *Canon* Law, or of the Laws of *other* Nations; which were once too, heap'd up together without Beginning or End, before they were unravell'd and reſcued from their firſt Confuſion and Intricacy.

'Tis true, the *Exactneſs* now demanded in *Conveyances*, or in Deeds and Inſtruments to transfer Eſtates from one to another, beyond the Practice of former Times, the remaining Niceties expected in drawing up our *Pleadings*, and the preciſe *Form* in managing Cauſes thro' many *Offices*, from the Writ to the Execution, in the practical Part of the Law; and above all, the extraordinary

Number and Length of our *Statute-Laws* (ſince the Beginning of the Reign of *H.* 8.) did ſtill make an Appearance of Difficulty to come up to the neceſſary Rules laid down for true *METHOD*, and eſpecially in the laſt Inſtance, to avoid Tautology; where one Statute muſt be mentioned again and again under *diſtinct* Titles.

It is to be wiſhed, that the *ſame* Conſtructions were allowed in *Conveyances*, as upon * *Acts of Parliament*, *Laſt Wills*, or *Teſtaments*, and *Awards*, following the Intention and Meaning of the Makers or Parties, without Regard to *Strictneſs* of Expreſſion; eſpecially when no good Reaſon can be given, why equal Allowances ſhould not be made, in underſtanding the Meaning of Words in one Caſe as well as in another, having always the ſame or the like Signification, when they are applied the ſame Way.

Alſo, if there was a further *Amendment* of the Law in Reference to the Subtilties of *Pleadings*, and the Management of the practical Part of a Suit, it would be good News to all wiſe and diſintereſted Men, and Lovers of their Country. For it muſt occaſion melancholy Reflections, to hear great Men inſiſt, † *That it is the moſt honourable, laudable, and profitable Thing in our Law, to have the Science of Well Pleading*; and that *good Pleading is the* ‡ *Heart-ſtring of the Common Law*; when at the ſame Time it is confeſſed, § *that more Jangling and Queſtions grow upon the Manner of Pleadings, and Exception to Form, than upon the Matter itſelf*; *and that infinite Cauſes have been loſt* (God forbid it ſhould be ſo any longer) or *delay'd for Want of good Pleading*. But it is a Comfort, that our Legiſlators are of another Opinion, and ſeem reſolved to break this *Heart-ſtring* of the Law, and to baniſh from our Courts, the Arts of Petty-fogging, Sophiſtry, and Cavil; which have flouriſhed too long amongſt us ††.

As our *Statute-Laws* are monſtrouſly overgrown, (‖ tho' very many Statutes are omitted in the printed Books) they too want the Skill of our Legiſlators, to bring them to a proper Shape. If many of our Statutes, with others continuing, enlarging, explaining, correcting, repealing, and reviving them, were under their proper Heads thrown into *one* ſhort and plain *Act*, it would render the Study of our Laws more inviting, and the Statutes more intelligible, to all thoſe that are to be guided by them.

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* 3 Rep. 27. 8 Rep. 119. 10 Rep. 57, &c.

† Lit. 534.

‡ 1 Inſt. Pref. 2. b.

§ 1 Inſt. 303. a. Hiſtory of the Common Law, p. 173, 174, 175.

†† It may now be ſaid with Truth, that our learned Judges, for more than 30 Years paſt, have rather been *aſtuti* to do Juſtice, than to find out little Slips in Pleadings.

‖ 4 Inſt. 50, 51, 52.

Then (in my Opinion) when *equitable* Conſtructions may be made upon *Deeds* or *Inſtruments*; when a little more Regard may be allow'd to the *Merits* of a Cauſe, and to Matter of *Subſtance*, than to *Form* in the *Pleadings*; when our *Statute-Law* is brought into a ſhorter Compaſs (and all this may be done under a *KING* greater than *JUSTINIAN*, with the Advice of as wiſe and impartial *Judges* as ever adorn'd the Benches) the Study of our Laws muſt be eaſy and diverting. And upon this View, let me add, when we have *Juries* of the better Sort of Men, according to the original Deſign; when *Judgment* may be obtained with a moderate Attendance and Expence; and at laſt a ſpeedy and certain *Execution* made by miniſterial Officers; that Men may not be ruined by the Law, when they ſeek Redreſs from it; no People under Heaven can have Laws better ſuited to the publick Conſtitution, and their private Wants, or be more Happy under the Adminiſtration of them.

Many of our Lawyers are Men of ſound and ſolid Reaſon, and as in other Countries, Admirers of polite Learning, excellent Orators, and often called to manage the Affairs of the Commonwealth in the higheſt Stations. And ſurely ſuch great Capacities muſt be willing that the Study of our Laws ſhould be made more eaſy, than they found it; and muſt have a ſecret Averſion to Chicanery, as a low Employment, tho' never ſo profitable; and muſt afford their Help, to make the Youth, that are following after them wiſe and good Men, and truly uſeful to the Publick.

Seeing then, at preſent, the Way to the Knowledge of the Laws of our Country is dark and rugged, full of Turnings and Windings; I hope for Pardon, if I muſt not expect Approbation in making this *ESSAY* or Attempt, to ſhew a Student a more light, ſmoother, and nearer Way than has hitherto been diſcovered; tho' not the cleareſt, ſmootheſt, and neareſt that might be made: However I have endeavoured, that at his firſt ſetting out, he may ſee *directly* to the End of his Journey, and that he may travel in a ſtrait Line. This being my Aim, he muſt not expect to be entertained in his Paſſage with choice Caſes of greater Learning than real Uſe in the Occaſions of Life; or with the remaining Niceties of Pleading and Practice. For that would be a nauſeous and an endleſs Taſk; and was never undertaken in a Work of this Nature. When the Student is well acquainted with theſe *Elements*, touching only upon common Buſineſs, he may aſterwards from *Reports*, *Common-Place-Books*, the moſt accurate *Treatiſes* upon *particular* Subjects, and the beſt *Precedents* and *Pleadings*, work upon this *Sketch*, and improve and fill up each Title, according to his Fancy. And then he may rectify my Miſtakes where neceſſary Parts are overlooked, or too much contracted; where any Thing, which is taken Notice of, is miſrepreſented thro' Inadvertency; or where the Law is not confirmed by ſufficient Authorities; tho' the Author had his Eye chiefly upon the Works of Sir *Edward Coke* throughout, as the firmeſt and ſureſt Foundation to build on. For he is ſtill allowed to be the *Oracle*; tho' many of his Opinions have of late been queſtioned or contradicted; or tho' it is now growing into Faſhion with ſome to ſpeak ſlightly of him. But without doubt, that *Sage* of the Law is the moſt methodical, cleareſt, moſt judicious, and moſt authentick *Reporter*; and his *Inſtitutes* (ſo call'd, but more properly *Commentaries*) will be held in the higheſt Eſteem, while there are learned Lawyers amongſt us. In *his* Works you will ſcarce find Opinions *Obiter*, or the *Sayings* of a Judge upon a ſudden Motion at the Bar, or in the Hurry of an Aſſizes, ſet down for *Reſolutions*; which is too frequent amongſt the *Moderns*.

My Intention, by this *Inſtitute*, is not only to help the Students in the *Inns* of *Court* and *Chancery*, but moreover to recommend the Study of the *Engliſh* Laws to our young *Nobility* and *Gentry*, and to the Youth in our *Univerſities* (not excepting thoſe who are deſigned for the *Clergy*, but for many Reaſons, earneſtly inviting them to it) by ſupplying them with a *Method* to help their Memories; and to convince them that the Study of our Laws is now of leſs Difficulty, and of more Uſe in publick and private Buſineſs, than they are aware of. A ſufficient Knowledge may be attained by *them* at leiſure Hours, without neglecting other Exerciſes or Studies. They may have enough to ſerve their Turns, if they learn only to underſtand the *Terms*, the *Definitions* and *Diviſions*, with ſome *common* Caſes, and the moſt uſeful *Acts* of Parliament. Chancellor *Forteſcue* was of Opinion, that a ſufficient Knowledge for *his Prince* might be acquired within the ſpace of *one Year*, when he endeavoured to perſuade him, to make an Inquiry into our Laws. And why may not his Words be directed to a moſt *Hopeful Prince* now ſhining on the Line of Succeſſion to the *Britiſh* Monarchy?——" * Noſco namque Ingenii TUI Perſpicacitatem,

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* *Forteſcue de Laudibus Legũm Angliæ*, c. 8.

" ſpicacitatem, quo audactèr pronuncio, quod in legibus illis
" (licet earum, peritia, qualis judicibus neceſſaria eſt, vix viginti
" annorum lucubrationibus acquiratur) TU doctrinam Principi
" congruam in ANNO UNO ſufficientèr nanciſceris; nec in
" terim militarem diſciplinam (ad quam tam ardentèr anhelas)
" negliges; ſed ea recreationis loco, etiam anno illo, TU ad
" libitum perfrueris."

Hardwick, Bucks;
March, 1722. T. W.

ADVERTISEMENT.

ALTHOUGH this Book hath been corrected and improved in former Editions, yet as there are a great many Determinations of Caſes in the Reports publiſhed ſince our learned Author wrote, and thoſe by * Men of great Abilities, and deſervedly Eminent in the Profeſſion; the preſent Proprietors, willing to oblige the Publick, have prevailed on a Serjeant at Law thoroughly to reviſe and correct this VALUABLE INSTITUTE, and render it the moſt complete Work of its Kind, by inſerting not only the Caſes from the printed Books, but alſo from various Manuſcript Adjudications never yet publiſhed: He has been careful alſo to amend the Errors and Miſtakes of former Editions, to inſert the additional Statutes, to examine the old, and to add a Multitude of new References.

It is proper likewiſe to obſerve, that by throwing many of the References into the Margin, which were formerly in the Body of the Work, and by printing the whole ſomewhat cloſer, room is hereby made for theſe large Additions, without enhancing the Price to the Purchaſer.

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* Lord Raymond's Ld. Chief Baron Comyn's, Sir John Strange's, Atkyn's, Burrow's, Wilſon's Reports, and Blackſtone's Commentaries, *&c. &c.*

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AN INSTITUTE OF THE LAWS OF ENGLAND, &c.

THE INTRODUCTION.

Black. Com. Introd. Sect. 4. 93 to 110.

Of *England* and of its *Laws*.

I. THAT Part of *Great Britain* called *England* (being the *Subject* of our *Engliſh* Laws) comprehends *England*, *Wales*, and Part of the Sea. [a] The Principality of *Wales* [b], was incorporated and united to the Kingdom of *England*, by the 27 *Hen*. 8. *cap*. 26. The main [c] *Sea*, beneath the low-water Mark and round *England*, is Part of *England*; for there the Admiral hath Juriſdiction.*

Scotland was united by 5 *Ann*, *cap*. 8. but hath different Laws and Cuſtoms.

The Iſle of [d] *Man* is no Part of *England*, but a diſtinct Territory of itſelf, and out of the Power of our Chancery, or of original Writs which iſſue out of Chancery; and hath been granted under the Great

Of *England*.

[a] 2 Inſt. 195. 4 Inſt. 240. 7 Rep. 21.

[b] See of the Courts there B. 4. Ch. 2. poſt.

[c] 5 Rep. 107. 1 Inſt. 260. a. & b.

*See Admiralty Court B. 4. Ch. 1. poſt.

[d] 1 Inſt. 9. a. 4 Inſt. 284. 7 Rep. 21.

[*Iſle of Man.*] By the *Stat.* 5 *Geo*. 3. *cap*. 26. Upon Payment by his Majeſty of 70000 *l.* into the Bank, in the Names of the Duke and Dutcheſs of *Atholl*, Sir *Charles Frederick*, and *Edmund Hoſkins*, the Iſle of *Man*, and the Iſlands, *&c.* thereunto belonging, were veſted unalienably in the Crown; except the Right of Patronage of the Biſhoprick of *Sodor and Man*, of Hundreds, Manors, and many other Rights, reſerved by the *Statute* to the Duke of *Atholl*, *&c.* and not thereby veſted in the Crown: To be holden of the King, his Heirs and Succeſſors, by the uſual honorary Service of rendering to his Majeſty's Heir and Succeſſors, Kings and Queens of *England*, two Falcons on the Day of their reſpective Coronations; and under the yearly Rent of 101 *l.* 15 *s.* 11 *d.* to be paid at the Receipt of his Majeſty's Exchequer.

Seal to divers Subjects and their Heirs. No Act of Parliament extends to it, unleſs it is eſpecially named. It hath peculiar Laws and Cuſtoms.

[a] 4 Inſt. 286, 287.
7 Rep. 21.

Neither are the Iſles of [a] *Jerſey* and *Gurenſey* bound by our Acts of Parliament, except they are ſpecially named; neither do our original Writs run into theſe Iſlands. Yet the King's Commiſſion under the Great Seal runs there to redreſs any Injuries or Wrongs, as it does in the Iſle of *Man*: but the Commiſſioners muſt judge according to the Laws and Cuſtoms of thoſe Iſles. Other Writs too, that are not Originals, may be executed there.

[b] 1 Inſt. 141. a. & b.
2 Inſt. 2.
2 Inſt. 18.
4 Inſt. 351, &c.
7 Rep. 22,23.

[b] *Ireland* is ſtill a diſtinct Kingdom; tho' by *Poyning*'s Law, paſſed there 10 *H.* 7. All Statutes made in *England* before that Time, are of Force in *Ireland*; and by ſpecial Words our Statutes ſtill may bind them: Yet they have Parliaments of their own; but their Statutes are to be affirmed by the King and Council here. They have the ſame Courts of Juſtice, and the ſame Laws (for the moſt part) as we have in *England*.

By 6 *Geo.* 1. *ch.* 5. It is declared, *That the Kingdom of* Ireland *is ſubordinate and dependent, as inſeparably annex'd, to the Crown of* Great Britain, *and that the Parliament of* Great Britain *hath Authority to make Laws and Statutes to bind the Kingdom of* Ireland. *And that the Houſe of Lords of* Ireland *have no Power to affirm or reverſe any Judgment, Sentence or Decree, given or made in any Court within that Kingdom.*

Black. Com. Introd. Sect. 4, 111.
[c] 1 Inſt. 94, a.

England is divided into an *eccleſiaſtical* and *temporal* State.

1. The [c] *eccleſiaſtical* State is divided into two Archbiſhopricks, or Provinces, (*viz.*) *Canterbury* and *York*: Each Archbiſhop has within his Province ſuffragan Biſhops of every Dioceſs. The Archbiſhop of *Canterbury* hath under him twenty-one Biſhops, ſeventeen of ancient Foundation, and four more founded by King *Hen.* 8. out of the Ruins of diſſolved Monaſteries, (*viz.*) *Glouceſter*, *Briſtol*, *Peterborough* and *Oxford*. The Archbiſhop of *York* hath under him within his Province four Suffragans, (*viz.*) The Biſhop of the County Palatine of *Cheſter*, the Biſhop of the County Palatine of *Durham*, the Biſhop of *Carliſle*, and the Biſhop of the Iſle of *Man*.

Every Province is divided into Dioceſſes, every Dioceſs into Archdeaconries, every Archdeaconry into Deaneries, and every Deanery into Pariſhes; but there are ſome Places that are *extraparochial*. A Province is the Juriſdiction of an Archbiſhop; a Dioceſs is the Circuit of every Biſhop's Juriſdiction; an Archdeaconry of an Archdeacon; a Pariſh of a Parſon, or Vicar; for a † Pariſh is the Circuit of Ground in which the People that belong to one Church do inhabit. [d] [See 10 *Ann. ch.* 11. For building fifty new Churches in *London* and *Weſtminſter*, &c.]

[d] See of Church wardens Ch. 7. poſt.

2. The *temporal* State is divided into ſeveral Counties; every County into Hundreds; every Hundred into Towns and Villages.

[e] 1 Inſt. 50.a. 109. b. 168.a.
4 Inſt. 248.
Dav. 59.

1. A [e] *County* (*Comitatus à comitando*, from accompanying together, particularly at the Aſſizes and Seſſions held for the *County*, or as ſome ſay,

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† *Parochia eſt locus in quo degit populus alicujus eccleſiæ.* 5 Rep. 67.

[*Pariſh*] See Black. Com. Introd. Sect. 4. 111. & 2 Wilſon, 182. for the *Æra* of the Diviſion of Pariſhes.

[*Temporal State*] See Black. Com. Introd. Sect. 4. 113 to 119.

a comitando

à comitando Principem) or *Shire*, is a certain Circuit, or Part of the Kingdom, governed by an yearly Officer, called *Sheriff*, or *Shire-Reeve*, under the King; for a County cannot be without a Sheriff. The King, by his Letters Patent, may make a County with its two Courts[a], the *Torn* and the *County-Court*; and that no Part ſhould be exempt from the Authority of the Sheriff[b], every Parcel of Land lies in ſome County. Every County is, as it were, an entire Body by itſelf; ſo that regularly an Inqueſt, or Jury, ſhall not take Notice of any Thing done in another County.[c] There are three called Counties *Palatine*, (viz.) *Lancaſter*, *Cheſter*, and *Durham*.[d] Some *Cities* and Towns corporate are Counties; of theſe the famous City of *London* is one, as alſo *York*, *Cheſter*, *Canterbury*, *Norwich*, *Worceſter*, *Kingſton* upon *Hull*, &c.

[a] See B. 4. Ch. 1. poſt.
[b] See Ch. 7. poſt.
[c] See B. 4. Ch. 4, 5.
[d] 4 Inſt. 211, &c.

2. [e] *Hundreds* were ſo called becauſe there was a Juriſdiction over ten *Tithings*, or an Hundred Families dwelling in ſome neighbouring Towns. The People that live in a Hundred, are called *Hundredors*; and theſe Hundreds continue to this Day to ſome Purpoſes; but their Juriſdiction is transferred to the County-Court, ſome few excepted, which were annexed to the Crown, and granted to ſome great Men in Fee, and ſo remain in the Nature of a Franchiſe, and have Return of Writs, and wherein the Sheriff cannot meddle by his ordinary Authority.

[e] 1 Inſt. 168. a. 2 Inſt. 71. 1 Vent. 403, 404, 405. 3 Mod. 199.

In ſome Counties, Hundreds are called *Ridings*, *Rapes*, or *Wapentakes*.

There is a Chief Conſtable * and a Bailiff of every Hundred, to execute the Orders of the Sheriff, Juſtices, *&c.*

* See Ch. 7. poſt.

By 2 *Ed.* 3. *cap.* 12. 14 *Ed.* 3. *cap.* 9. *Hundreds, which had been ſeparated from Counties, are joined to them again, and are to be in the Sheriff's own Hands.*

[f] All Grants made ſince 14 *Ed.* 3. of the Bailiwicks of Hundreds, except ſuch as then were of Eſtate in Fee, are void. Such are Occaſions of

[f] 4 Inſt. 267. 1 Ventr. 399, 410.

[*Shire.*] From the Angloſaxon Word ſcir ſignifying a Share, Part or Portion, or from the *Saxon* Verb ſcirian or ſciran to ſhare, part, divide or limit.

[*Sheriff.*] From ſcirgerefa compounded of ſcir Shire, and gerefa *Præſes*, one who preſideth either alone, or with others in the Adminiſtration of Affairs, public or private, ſacred or civil; a Magiſtrate of what Name ſoever.

[*The Torn*] This was anciently called the *Scyre mote* (i. e.) the Shire meeting, and was held twice in the Year long before the Conqueſt; afterwards, before *Magna Charta*, it was called the Sheriff's *Tourn*, *Torn*, or *Turn*, and had that Name from the *French* Word *Tour*, ſignifying a *Circuit* or *Turn*, from the Sheriff his taking a *Circuit* or *Turn* about his Shire, and holding his Court in ſeveral Places; for the Word *Turn* doth not properly ſignify the Court of the Sheriff, but his Perambulation through his County or Shire.

[*Ridings.*] Where a County is divided into three of theſe intermediate Juriſdictions they are called *Trithings*, which were anciently governed by a *Trithing-Reeve*; theſe Trithings ſtill ſubſiſt in the large County of *York*, where by an eaſy Corruption of the Word *Trithing*, they are called *Ridings*.

[*Rape.*] Comitatûs portio, cujuſmodi ſunt ſex portiones in agro Suſſex; viz. *Chicheſter*, *Arundel*, *Brambre*, *Lewes*, *Pevenſey*, and *Haſtings*; Somnerus derivat a rap funis (i. e.) Portio funibus metata & diviſa. Ego malim (ſays Junius) derivare ab Iſl. repp. et ripp, quod, teſte Verelio, diſtrictum vel tractum terræ notat. Etimologicum Anglicanum Fran. Junij. Edit. E. Lye A. M. Oxon. 1743.

[*Wapentake*] Ab Angloſaxon. Waepen-getace, Centuria, Vox forenſis, non ab armorum aſſumptione, ut Hovedeno placet, ſed ut Somner ingenioſe pro ſolito divinat, ab armorum redditione quam Domino in Subjectionis ſignum præſtabant, ſcilicet ab Anglo Saxon Waepen arma, et getaecan tradere, reddere. Skin. verbo *Wapentake*. Vide Somner Dict. Anglo-Saxon. et Spelman in Gloſs. Kennet's paroch. Antiq. Gloſs.

[*Conſtable*] For a very learned derivation of this Word, and of the divers Names of petty Conſtables, Tythingmen, Borſholders, Boroheads, and Headborows, ſee 1 Burn Juſt. Edit. 11. 8vo. Tit. Conſtable. Sect. 1. 359.

Delay and Hindrances of Juſtice, when the Execution of Proceſs is taken from the Sheriff.

[a] Finch 80.

3. [a] A Town (*Villa* or *Vicus*) was a Precinct anciently containing *ten* Families, upon which account they are ſometimes called *Tithings:* Upland Towns, which are not ruled and governed as Boroughs, are but Towns, though they are incloſed with Walls.

[b] 1 Inſt. 115. b.

[b] It cannot be a Town in Law unleſs it hath, or had a Church, Celebration of divine Service, Sacraments and Burials. If a Town is decay'd ſo that it hath no Houſes left, yet it is a Town in Law. There ought to be in every Town a Petty Conſtable[c], or Tithing-man, or both.

[c] See Ch. 7. poſt.

[d] 2 Inſt. 669. 2 Vent. 31.

Several of theſe Towns have *Hamlets*, as there may be ſeveral Hamlets in a Pariſh; and ſome particular Places may be out of a Town or Hamlet, as out of a Pariſh, though not out of the County. [d] The Addition of a Pariſh in original Writs, if there are two or more Towns within it, is not good. But if there is but one Town, the Addition of Pariſh is good within the Statute of 1 *H.* 5. *ch.* 5. and it ſhall not be intended * (if it is not pleaded) that there are more Towns than one in a Pariſh.

Under the Name of a *Town*, or Village, *Boroughs* and *Cities* are contained; for every Borough or City is a Town, though every Town is not a Borough or City.

[e] 1 Inſt. 108. b. 109. a. 115. b. 2 Inſt. 93. 669.

A [e] *Borough* is ſo called, becauſe it ſendeth up *Burgeſſes* to Parliament: And this maketh the Difference betwixt a Village or *Town*, and a *Borough*. Some Boroughs are corporate, and ſome not corporate; if a Borough is decayed it ſhall ſend Burgeſſes to Parliament, as *Old Sarum* doth.

In old Time, the Towns that are now called *Cities*, or *Cities* and *Counties*, were Boroughs, and the ancient Boroughs were firſt of all Towns.

[f] 1 Inſt. 109. b. † See Ch. 8. poſt.

[f] A *City* is a † corporate Borough that hath had, or at preſent hath, a Biſhop; for if the Biſhoprick is diſſolved, yet the City remaineth. To have *Suburbs* proveth it to be a City. Some Cities are alſo *Counties*, as before-mentioned.

Of the Laws of *England*. 1 Black. Com. Introd. Sect. 3. 85 to 91.

II. † As *Law* in General is an Art directing to the Knowledge of Juſtice, and to the well ordering of civil Society; ſo the Law of *England*, in particular, is an Art to know what is Juſtice in *England*, and to preſerve Order in that Kingdom: And this Law is raiſed upon ſix principal Foundations.

[g] Dr. and Stud. Dial. 1. chap. 5. 7 Rep. 12, 13.

1. Upon the *Law* of [g] *Nature*, though we ſeldom make Uſe of the Terms, *The Law of Nature:* But we ſay, that ſuch a Thing is reaſonable, or unreaſonable, or againſt the Law of *Reaſon*.

[h] Dr. and Stud. Dial. 1. chap. 6. 2 Inſt. 625.

2. Upon the [h] *revealed* Law of God: Hence it is that our Law puniſhes Blaſphemies, Perjuries, &c. and receives the *Canons* of the Church duly made, and ſuppoſeth a ſpiritual *Juriſdiction* and *Authority* in the Church.

[*Borough.*] There are ſome Towns ſtiled *Boroughs* that do not ſend Members to Parliament, as *Kendall*, in *Weſtmorland*, which is ſtiled *Burgus de Kirkby in Kendall*, in the Charter of Incorporation, and in the Rolls of the Court of Record of that Town.

* *Pluralitas non præſumitur.* 2 Inſt. 669.

[City] *Cambridge* is an ancient City, 1 Inſt. 109. b. but Quære whether *Cambridge* ever had a Biſhop?

† *Lex eſt ſanctio juſta, jubens honeſta et prohibens contraria.* 2 Inſt. 588.

[g] *Jura naturalia ſunt immutabilia.* 7 Rep. 13.

3. The third Ground are ſeveral [a] *general Cuſtoms*; theſe Cuſtoms are properly called the *Common Law*: Wherefore when we ſay, [b] it is ſo by *Common Law*, it is as much as to ſay, by *common* Right, or of *common* Juſtice.

[a] Dr. and Stud. Dial. 1. chap. 7.
[b] 1 Inſt. 142. a.

Indeed it is many Times very difficult to know what Caſes are grounded on the Law of *Reaſon*, and what upon the *Cuſtom* of the Kingdom, yet we muſt endeavour to underſtand this, to know the perfect Reaſon of the Law.

Rules concerning *Law*.

[c] The Common Law is the abſolute Perfection of Reaſon: For nothing that is contrary to Reaſon is conſonant to Law.

[d] Common Law is common Right.

[e] The Law is the Subject's beſt Birth-right.

[f] The Law reſpects the Order of Nature.

[g] It always intendeth the Beſt.

[h] The Law forces no one to that which is impoſſible or vain.

[i] The Law provides a Remedy for every Wrong.

[k] Where one hath ſeveral Remedies, he may uſe which he will.

[l] Want of Right and Want of Remedy is all One. For where there is no Remedy, there is no Right.

[m] The Law hath a Delight in giving of Remedy.

[n] The Law favoureth Life, Liberty and Dower.

[o] Things of Neceſſity are to be excepted out of a general Law.

[p] The Ignorance of Law cannot excuſe.

[q] The Act of Law never doth Wrong.

Where the Conſtruction of any Act is leſt to the Law, the Law will never conſtrue it to work a Wrong.

[r] But it is better to ſuffer a Miſchief (peculiar to one) than a General Inconvenience.

[s] The Agreement of Parties cannot make that good which the Law makes void.

[c] 1 Inſt. 56.b. 319. b. 2 Inſt. 179.
[d] 1 Inſt. 142. a.
[e] 2 Inſt. 56.
[f] 1 Inſt. 92. a. 197. b.
[g] 2 Inſt. 669.
[h] 1 Inſt. 79. a. 92. a. 127. b. 197.b. 319. b.
[i] 1 Inſt. 197. b. 199. b. 2 Inſt. 55, 56. 405.
[k] 1 Inſt. 145 a.
[l] 1 Inſt. 95. b.
[m] Lit. 323. 1 Inſt. 54. b. 199.b. 200. a.
[n] 1 Inſt. 124. b.
[o] 2 Inſt. 168.
[p] 1 Inſt. 56. b. 173. b. Dr. and Stud. Dial. 2. Ch. 47.
[q] 1 Inſt. 88. b. 148. a. b. 379. a.
[r] 1 Inſt. 97. b. 152. b. 258. b.
[s] 1 Inſt. 51. b.

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[c] *Lex eſt ſumma ratio.* 1 Inſt. 319. b.
Lex ſemper intendit quod convenit rationi. 1 Inſt. 78. b.
Nihil quod eſt inconveniens eſt licitum. 1 Inſt. 97. b.
Qui rationem in omnibus quærunt, rationem ſubvertunt. 2 Rep. 75.

[h] *Impotentia excuſat legem.* 1 Rep. 96. 5 Rep. 22. 6 Rep. 21. 10 Rep. 139. 1 Inſt. 258. a.
Lex non cogit ad impoſſibilia. 1 Inſt. 92. a.
Lex non præcipit inutilia. 1 Inſt. 127. b.
Lex neminem cogit ad vana ſeu inutilia. 1 Inſt. 197. b. 310. b.

[i] *Lex non debet deficere conquerentibus in juſtitia exhibenda.* 1 Inſt. 197. b. 2 Inſt. 405.
Quod remedio deſtituitur, ipſa re valet, ſi culpa abſit. 6 Rep. 68.
Lex beneficialis rei conſimili remedium præſtat. 2 Inſt. 689.
Aliquid conceditur, ne injuria remaneret impunita, quod alias non concederetur. 1 Inſt. 197. b.

[p] *Ignorantia legis neminem excuſat* 1 Rep. 177. 2 Rep. 3. 6 Rep. 54.

[q] *Conſtructio et actus legis nulli facit injuriam.* 1 Inſt. 148. a. 183. a. & b. 2 Inſt. 287.

[r] *Lex citius vult tolerare privatum damnum quam publicum malum.* 1 Inſt. 252. b.

[s] *Conventio privatorum non poteſt publico juri derogare* 1. Inſt. 166. a.
Modus et conventio vincunt legem. 1 Inſt. 41. b. 166. a. 2 Rep. 73.
Pacto aliquid licitum eſt, quod ſine pacto non admittitur. 1 Inſt. 166. a.
Quod contra legem factum eſt, pro infecto habetur. 3 Rep. 74. 4 Rep. 31.

[a] 1 Inſt. 56. a. 2 Inſt. 423. 424, 501. [b]Lit. 378.

[a] When the Law giveth any Thing, it gives by Implication what is neceſſary for taking and enjoying the ſame.

[b] What is annexed to any Thing by Law, is ſtronger than if it were put in Writing.

[c] 1 Inſt. 282 b. [d] 1 Inſt. 115. b. 2 Inſt. 619. 1 Dr. and Stud. Dial. 1. ch. 8 and 9. [f] Inſt. 11. a. [e] Pref. to the 4th Rep.

[c] Judges ought not to change the Law which always hath been uſed.

[d] No Law can be abrogated but by Act of Parliament.

4. Certain [e] *Principles* and *Maxims* are another Foundation. Such Maxims are not only holden for Law, but all other Caſes that may be applied to them, are to be taken for granted; wherefore it is dangerous to [f] alter any of theſe Maxims or Grounds of Law; they are of the ſame Strength as Acts of Parliament when once the Judges have determined what is a Maxim; for this does not belong to a Jury. But if you pleaſe you may comprehend Maxims under *general* Cuſtoms, and take them for Part of the *Common* Law.

[g] Dr. and Stud. Dial. 1. chap. 10. 1 Inſt. 110. b.

5. [g] *Particular Cuſtoms* are a fifth Ground of our Law: Theſe may be uſed in ſeveral Counties, Hundreds, Towns, Boroughs, Cities, Honours, Manors and Hamlets in ſpecial Caſes.

Cuſtom is a Law not written, eſtabliſhed by long Uſe and Conſent. *Particular* Cuſtoms are always to be taken for Law, tho' they are always againſt the *general* Cuſtoms of the Kingdom, and the *Maxims* of the Law: Yet a Jury ſhall try whether there is a particular Cuſtom or no, and not the Judges, except the Cuſtom in Debate is of Record in the ſame Court.

[h] Lit. 210. 1 Inſt. 140. a. and b. See *Robinſon*'s Cuſtoms of *Gavelkind*. Black. Com. Introd. ſect. 3. 76. [i] 2 Ld. Raym. 1292. See of Coparcenary poſt. B. 2. Ch. 1. [k] Lit. 165. 211. 1 Inſt. 110. b. 140 b. 3 Cro. 410.

There is a Cuſtom in the County of *Kent* called [h] *Gavelkind*, (*Gave all Kind*) That all the Sons ſhall inherit as Siſters at the Common Law: And by Cuſtom when one Brother dies without Iſſue, All the other Brethren may inherit. Lands lying in *Kent* ſhall be preſumed *prima facie* to be of the Nature of Gavelkind, that being the general Tenure of that County; and it lies upon the other Side to prove them diſgavelled [i]. But ſee the 31 *H.* 8. *cap.* 3. 2 & 3 *Ed.* 6. a private Act. And there is a particular Cuſtom in ſome ancient Boroughs (called [k] *Burgh-Engliſh*, or *Borough-Engliſh*, becauſe this Cuſtom was firſt in *England*) where the youngeſt Son ſhall inherit before the eldeſt. And if the youngeſt Son die in the Life-time of his Father, leaving Iſſue a

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[a] *Quando lex aliquid alicui concedit, concedere videtur et id ſine quo res ipſa eſſe non poteſt.* 1 Inſt. 56. a. 2 Inſt. 309. 4 Inſt 111. 3 Rep. 12, 47. 11 Rep. 52.

[b] *Utique fortior et potentior eſt diſpoſitio legis quam hominis.* 1 Inſt. 234. a.

[c] *Principia probant, non probantur.* 3 Rep. 40.

Contra principia negantem non eſt diſputandum. 1 Inſt. 16. a. 343. a.

[Gavelkind (gave all kind)] It is ſaid by many learned Authors that the Word *Gavelkind* is compounded of theſe three Saxon Words **gif eal cyn** (i. e.) *omnibus cognatione proximis datum*; Sir *Edward Coke*, Sir *Henry Spelman*, *Verſtegan*, *Camden*, *Lambard*, Judge *Dodderidge*, Doctor *Cowel*, and many more, *longo Agmine*, agree in this Derivation of the Word *Gavelkind*, that it owes it's Name and Original to the Nature of the Land in Point of Deſcent: But that moſt learned Antiquary *William Somner*, in his Treatiſe of *Gavelkind*, both Name and Thing, hath clearly ſhewn that this is a popular Miſtake; that the Name of *Gavelkind* was not given, with, or in reſpect of the Nature of the Land in Point of *Deſcent*, that the Saxon Word **Gauel, gafol, gabel, gaful**, or however elſe it be written, ſignifies *Cens* (i. e.) Rent, either in Money, Proviſions, or Works, whether the Word be uſed ſingly, or in Compoſition with another Word. That *Gavelkind* is compounded of the Saxon Words **Gauel** and **gecynde** (i. e.) Nature, Kind, Sort, Quality or Condition, meaning that kind or ſort of Land which is charged with Payment of Rent. *Somner's* Treatiſe of *Gavelkind. Edit.* 1726, 4to, from fol. 2. to 41.

Daughter, ſhe ſhall take *Jure Repræſentationis*; and ſo as to *Gavelkind* Lands, if one of the Sons die in the Life-time of his Father, leaving iſſue a Daughter, the Daughter ſhall inherit the Purparty or Share of her Father; for the Right of Repreſentation holds in Inheritances deſcendable by *Cuſtom*, as well as at *Common* Law: And a Freehold-Leaſe, or Rent in Fee, created out of *Gavelkind* or *Borough-Engliſh* Lands, ſhall deſcend in the ſame Manner as the Lands themſelves would do[a]. *Gavelkind* and *Borough-Engliſh*[b] differ from all other Cuſtoms, inaſmuch as the Law takes Notice of them when generally alledged; whereas other Cuſtoms muſt be particularly pleaded.

In *London* there are many particular Cuſtoms relating to Trade, Apprentices, Orphans, Reformation of Manners, Actions and Pleas, and all againſt the general Cuſtom of the Kingdom. [See 8th *Rep.* 126, 2 *Danv. Abr.* 311. Tit. *Cuſtoms* of *London*, and thoſe *Authors* who have wrote on this Subject.]

In a[c] *Town* a Cuſtom to deviſe Lands in *Gavelkind*, or *Borough-Engliſh*, cannot be alledged; for theſe are Cuſtoms proper to Cities, Boroughs and Manors. And yet it appears from our beſt Authors, that all the Lands in *England* were of the Nature of *Gavelkind*, and deſcended equally to all the Iſſue, before the Conqueſt[d]. In ſpecial Caſes (I ſaid) a Cuſtom may be alledged within a Hamlet, Town, Borough, City, Manor, Hundred, County. In an Upland Town (which is neither City or Borough) a Cuſtom may be alledged to have a way to the Church or Market; for the Inhabitants to dance upon another's Land for their Recreation; or to make By-Laws for the Reparation of the Church, or for the well-ordering of their Common: Yet as to By-laws, theſe Differences muſt be obſerved; Inhabitants of a[e] Town, without any Cuſtom, may make By-Laws for the Reparation of the Church, Highway, or any Thing which is for the general Good of the Publick; for they are as it were incorporated by the Common Law for ſome Neceſſities; and in ſuch Caſes, the greater Part of the Inhabitants ſhall bind the reſt without any Cuſtom. But if the By-Law is for their own private Profit, as for the well-ordering of the Common; there, without Cuſtom, they cannot make By-Laws; and the greater Part ſhall not bind the leſſer, if that is not a Cuſtom too: For here every Act muſt be warranted by Cuſtom.

* To *Particular* Cuſtoms *two* Things are inſeparably incident, [f] *Uſage* and *Time*. 1. *Uſage* muſt be *Long*, *Continual* and *Peaceable*. [g] Non-uſage is a great Preſumption that the Law will not bear it. But an Act of Parliament cannot be antiquated by *Nonuſer*. For no Cuſtom can take away the Force of an [h] Act of Parliament, [i] unleſs the Cuſtom is ſaved by another Act; becauſe the Cuſtom cannot be beyond Memory, if there is a Record to the contrary; for Knowledge is as well by [k] *Proof*, as by one's own proper Knowledge. Neither does an Act of Parliament always take away a Cuſtom. An Affirmative Act does not take it away. And a Cuſtom may be alledged againſt a *Negative* Statute, which is made in Affirmance of the Common Law. 2. [l] *Time* muſt be beyond the Memory of Man.

[a] 2 Ld. Raym. 1024. 1 Wms. 63. 1 Salk. 243.

[b] Inſt. 175. b. 2 Ld. Raym. 1025. 1 Salk. 243.

[c] 1 Inſt. 33. b. 110. b. 6 Rep. 60. 1 Lev. 177.

[d] 2 Ld. Raym. 1024. 1 Wms. 64.

5 Rep. 63. 3 Cro. 497, 532.

* 1 Black Com. Intro. ſect. 3. 76.

[f] 1 Inſt. 113. b.

[g] 1 Inſt. 81. b.

[h] 1 Inſt. 113. a. 115 a.

[i] 2 Inſt. 21. 2 Inſt. 28.

[k] 1 Inſt. 115. a.

[l] 1 Inſt. 113. 6.

Rules

Rules concerning *Cuſtoms.*

Uſage and ancient Cuſtom make [a] Law.

Cuſtoms muſt be [b] reaſonable, and according to Juſtice, elſe void.

But the Reaſon of every Cuſtom cannot be aſſign'd.

Cuſtoms ought to be upon good Conſideration.

Cuſtoms ought to be compulſory, not left to the Liberty of every one to uſe them or not.

Cuſtoms ought to be certain.

Cuſtoms ought to be beneficial to him that alledgeth the Cuſtom.

If the Cuſtom is beneficial to [c] one, and injurious to a Multitude, it is void.

Things cannot be challenged by Cuſtom that are to be gained by Matter of [d] Record only.

Cuſtoms are to be taken ſtrictly, tho' not literally, becauſe they tend to the Derogation of the Common Law.

[e] They cannot extend to Things newly created.

Cuſtoms ought to be conſtrued according to vulgar Apprehenſion.

Cuſtom cannot exalt itſelf upon the King's [f] Prerogative. Yet

Cuſtom may [g] ſupport that which the King's Grant cannot ſupport.

A Cuſtom meerly in [h] the Negative is not good. If mixt with an Affirmative, it may be good.

A Cuſtom againſt [i] a Cuſtom cannot ſtand together.

[k] *Preſcription* is different from Cuſtom.

[l] Tolls, Taxes, *&c.* are ſometimes called *Cuſtoms.*

6. *Statutes*, or *Acts* of Parliament, are a ſixth Ground or Foundation of our Laws. Theſe are made by the King, Lords Spiritual and Temporal, and the Commons in Parliament; which before the Invention of Printing were [m] proclaimed by the Sheriff in every County, by Virtue of the King's Writ. [n] Several Statutes are penned like Charters or Letters Patent in the King's Name only; yet they were made by lawful Authority. The ſeveral Ways of drawing up *Acts* of Parliament appear in the *Prince*'s Caſe.

1 Black.Com. Introd.ſect. 3. 76 to 79.
[a] 1 Inſt. 155. a.
[b] 1 Inſt. 62. a. 140. a. 141. a. Coke's Compleat Copyh. Sect. 33. 2 Inſt. 664. See of Copyh. Cuſtoms poſt. B. 2. Ch. 1.
[c] Dav. 1. Taniſtry 32. b.
[d] Coke's Compleat Copyh. ſect. 33. 1 Inſt. 114. a. &. b. See of Franchiſes poſt. B. 2 Ch. 2.
[e] Coke's Cophy. S. 33. 2 Ld. Raym. 1024. Contra.
[f] Dav. 1. Taniſtry 33. b. 1 Inſt. 15. b.
[g] 8 Rep. 125. 127. 2 Inſt. 47. See of Corporations poſt. Ch. 8.
[h] 1 Roll. Abr. 565. 2 Roll. Abr. 270.
[i] 9 Rep. 58.
[k] 1 Inſt. 113. b. See of Preſcription poſt. B. 2. Ch. 3.
[l] 1 Inſt. 58. b. Dav. 8, 9, 10. &c.
[m] 2 Inſt. 526, 644.
[n] 4 Inſt. 25. Pref. to the 4th Rep. 8 Rep. The Prince's Caſe, 19, 20, 21.

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[a] *Conſuetudo eſt altera lex.* 4 Rep. 21.
Optimus interpres legum conſuetudo. 2 Inſt. 18, 228, 282. 4 Inſt. 75.
Conſuetudo loci eſt obſervanda. 6 Rep. 67.

[b] *Malus uſus abolendus eſt.* Lit. 212. 1 Inſt. 141. a. 4 Inſt. 274.
In conſuetudinibus non diuturnitas temporis, ſed ſoliditas rationis eſt conſideranda. 1 Inſt. 141. a.
Conſuetudo licet ſit magnæ authoritatis, nunquam tamen præjudicat manifeſtæ veritati. 2 Inſt. 654. 4 Rep. 18.
Frequentia actus multum operatur. 4 Rep. 78.
Obtemperandum eſt conſuetudini rationabili, tanquam legi. 4 Rep. 38.
Conſuetudo ex cauſa rationabili uſitata privat communem legem. Lit. 37.
Conſuetudo vincit legem. 4 Rep. 21.
Conſuetudo tollit communem legem. 1 Inſt. 33. b.

Rules

† Rules *concerning* Statutes *or* Acts *of Parliament.*

To an Act of Parliament [a] every Man in Judgment of Law is Party.

Acts of Parliament relate to the [b] firſt Day of the Seſſion of Parliament in which they were made, if it is not otherwiſe provided by the Act.

The Judges ought to take Notice of Statutes which concern the [c] King and Queen.

The Judges will take Notice of general or [d] *publick* Acts, tho' they are not pleaded; but not of particular or *private* [e]Acts, without Pleading.

The Expoſition of Acts of Parliament belongs to the Judges of the Common Law, tho' they concern Things of a Spiritual Nature.

The [f] Title of the Act is no Part of the Act.

The [g] Preamble or Rehearſal of a Statute is to be taken for Truth; therefore good Arguments and Proofs may be drawn from the Preamble or Rehearſal.

The Words of an Act of Parliament muſt be taken in a [h] lawful Senſe.

A Deſcription [i] ſpecifying Perſons and Things of an inferior Rank, ought not to be extended by ſubſequent *general Words* to thoſe that are ſuperior; as in theſe general Words, (*viz.*) *And no other Perſon or Act whatſoever*, ſhall not be included *Perſons* or *Things* ſuperior to thoſe that are before particularly expreſſed. Provided there are any of inferior Rank to ſatisfy the general Words*.

Statutes muſt be interpreted by reaſonable Conſtruction, according to the [k] Meaning of the Legiſlature.

It is natural to conſtrue [l] one Part of a Statute by another.

They may be conſtrued according to [m] Equity; eſpecially where they give Remedy for Wrong; or are for Expedition of Juſtice, or to prevent Delays; for Law-makers cannot comprehend all Caſes.

Things for Neceſſity-Sake, or to prevent a Failure of Juſtice, are excepted out of a Statute.

General Words of an Act ſhall not take away neceſſary Incidents.

A [n] Penal Statute regularly ought to be conſtrued ſtrictly. But it *may* be conſtrued beneficially; for what is out of the Miſchief, is out of the

† Black. Com.
Introd Sect.
3. 87. to 91.
and 1 Burn.
Edit. 11th.
1770. Introd.
24 to 32.
[a] 1 Rep. 47.
4 Rep. 76.
1 Inſt. 95. b.
333. a.
[b] 4 Inſt. 25. 27.
Hob. 111.
[c] 4 Rep. 13, 77.
Finch. 86.
[d] 4 Rep. 76.
8 Rep. 28.
1 Inſt. 98. b.
2 Inſt 618.
2 Rol. Abr.
465.
[e] Dr. and
Stud. Dial. 2.
cap. 55.
6 Rep. 13.
2 Inſt. 611,
614, 618.
3 Inſt 43.
[f] 11 Rep. 33.
4 Inſt. 330.
[g] 1 Inſt. 11. b.
19. b. 79. a.
4 Inſt 330.
[h] 1 Inſt 381. b.
[i] 2 Rep. 46.
2 Inſt. 16,
166, 457.
3 Inſt. 72.
* 2 Inſt. 137,
627.
[k] Noy's Max.
18.
11 Rep. 34.
4 Inſt. 330.
[l] 1 Inſt. 11. b.
381. a. & b.
2 Inſt. 186.
[m] 1 Inſt. 24. b.
54. b. 76. a.
77. b. 224. b.
365. b. 381. b.
2 Inſt. 106,
107, 112, 127,
152, 168, 242,
251, 258, 393,
501.
[n] 1 Inſt. 54. b.
268. b. 290 b.
365. b.
2 Inſt. 107.
199, 649.
3 Rep. 7.
11 Rep 34.
1 Strange 253.
3 Cro. 71.
See Tit. Action on the Caſe
poſt. B. 4. Ch. 4.

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[k] *Contemporanea expoſitio in lege eſt fortiſſima.* 2 Inſt. 10, 11, 136, 139. 181. 4 Inſt. 138.
Ex antecedentibus et conſequentibus fit optima interpretatio. 2 Inſt. 317. 2 Rep. 71.
Relatio fit ad proximum antecedens, niſi impediatur ſententia. 2 Rep. 71.
Verba poſteriora propter certitudinem addita, ad priora quæ certitudine indigent ſunt referenda. 8 Rep. 119.

[m] *Generale dictum generaliter eſt intelligendum.* 2 Inſt. 81.
Qui omne dicit, nihil excludit. Ibid.
Generalis clauſula non porrigitur ad ea quæ ſpecialiter ſunt comprehenſa aut expreſſa. 8 Rep. 118.
Ubi lex eſt ſpecialis et ratio ejus generalis, generaliter eſt accipienda. 2 Inſt. 43, 83. 10 Rep. 101.
Quanquam lex generaliter loquitur, ceſſante ratione poteſt reſtringi. 4 Inſt. 330.
Caſus omiſſus diſpoſitioni juris communis relinquitur. 5 Rep. 37.

[n] *Qui hæret in litera, hæret in cortice.* 1 Inſt. 54. b. 365. b.
Apices juris non ſunt jura. 4 Rep. 46. 1 Inſt. 356. a. 8 Rep. 56.
Nimia ſubtilitas in jure reprobatur. 4 Rep. 7.
Sammum jus eſt ſumma injuria. 2 Inſt. 495.

Meaning of a Law, tho' it is within the Letter. And on the contrary, what is within the ſame Miſchief, ſhall be within the ſame Remedy, tho' it be out of the Letter of the Law.

The Conſtruction of a Statute muſt be in [a] Suppreſſion of the Miſchief and in Advancement of the Remedy.

It muſt be ſo conſtrued as that no innocent Man may by a literal Conſtruction receive Damage.

Statutes made to prevent and ſuppreſs [b] Fraud ought to have a favourable Interpretation.

Acts of Parliament that are againſt *common* Juſtice and [c] Reaſon, or impoſſible to be performed, ſhall be judged void.

The ſureſt Conſtruction is by the Reaſon of the [d] Common Law.

The Reaſon of the Law is the [e] Life of the Law.

[f] General Words will not always be allowed to transfer a Right.

[g] Cuſtom or Uſage is a good Interpreter of a Law.

Common Law muſt [h] give Place to a Statute where they thwart. And * Old Statutes muſt give Place to new where they are contrary: But an Affirmative Act ſhall not repeal a precedent Affirmative Act, or the Common Law.

Acts of Parliament [i] againſt the Power of ſubſequent Parliaments bind not.

A [k] Saving, which is repugnant to the Body of the Act, is void.

When an Act makes any Thing good as againſt a Perſon in certain, [l] it ſhall not take away the Right of another, tho' there is no Saving.

By repealing of a repealing Statute, the firſt is revived.

By reviving an Act repealed, the Act of Repeal is of no Force.

[m] An Act of Parliament cannot be antiquated by *Non-uſer.*

For the true Interpretation of Statutes [n] *Four* Things are to be obſerved and conſidered: 1. What the Common Law was before the making of the Statute. 2. What was the Miſchief or Defect not provided for by the Common Law. 3. What Remedy the Statute has appointed to cure the Miſchief or Defect. 4. The true Reaſon of the Remedy.

Theſe are the Foundations and *Six* Grounds of the Laws of *England.* For tho' they are uſually divided into three Parts only, (*viz.*) [o] Into *Common* Law, *Particular Cuſtoms*, and Statutes or Acts of Parliament; yet under the Words *Common* Law, the Law of Nature or Reaſon, the revealed Law of God, the General Cuſtoms of the Kingdom, and the Principles and *Maxims* of the Law are included. This Diviſion is moſt in Uſe, and moſt conciſe, but it is obſcure. There is [p] another Diviſion of our Laws more large than either; as into the Prerogative or *Crown Law*; the Law and Cuſtom of *Parliament*; the Law of *Nature*; the *Common* Law; the *Statute* Law; reaſonable *Cuſtoms*; the Law of *Arms*,

[a] 1 Inſt. 11. b. 42. a. 360. a. 381. b. 3 Rep. 7. 11 Rep. 71. b.

[b] 3 Rep. 82. 5 Rep. 60.

[c] 8 Rep. 118, 128, 129. 2 Inſt. 587. 588.

[d] 1 Inſt. 272. b. 2 Inſt. 148, 301.

[e] 1 Inſt. 183. b. 191. a.

[f] 3 Rep 4, 5.

[g] 1 Inſt. 81. b. 2 Inſt. 18. a. 228.

[h] 11 Rep. 62, 63. 2 Inſt. 200.

[i] 4 Inſt. 43. 1 Inſt. 81. a.

[k] 1 Rep. 47,

[l] 1 Rep. 138.

[m] 1 Inſt. 81. b. 113. a. 115. a.

[n] 3 Rep. 7,

[o] 1 Inſt. 110. b. 115. b. 344. a

[p] 1 Inſt. 11. b.

Æquitas in paribus rationibus paria jura deſiderat. 1 Inſt. 24. b.

Æquitas eſt quaſi æqualitas; et eſt perfecta quædam ratio, quæ jus ſcriptum interpretatur et emendat. Ibid.

Ratio legis eſt anima legis. 1 Inſt. 183. b. 191. a. 2 Inſt. 689.

Ubi eadem ratio, idem jus. 1 Inſt. 10. a. 191. a. 2 Inſt. 619. 7 Rep. 18.

Diſſimilium diſſimilis eſt ratio. 1 Inſt. 191. a. 7 Rep. 18.

Ceſſante ratione legis, ceſſat et ipſa lex. 1 Inſt. 70. b. 2 Inſt. 11. 3 Inſt. 330.

* *Legis poſteriores priores abrogant.* 8 Rep. 137. 11 Rep. 62, 63.

War and Chivalry; Eccleſiaſtical or *Canon* Law in certain Courts and Caſes; Civil Law in certain Courts and Caſes; *Foreſt* Law; the Law of *Marque* or *Repriſal*; the Law of *Merchants*[a]. The Laws and Cuſtoms of the Iſles of *Jerſey*, *Guernſey*, and *Man*; the Law and Privilege of the *Stannaries*. But this large Diviſion too may be reduced to the † common Diviſion; into *Common Law*, *Particular Cuſtoms* and Statutes. All is founded on the Law of Nature or Reaſon, and the revealed Law of God; as all other Laws ought to be founded.

See Mag. Chart. Ch 30. and 2 Inſt, 57.

Upon theſe Laws, there are many *Caſes* ſolemnly *Adjudged* in the higheſt Courts of Juſtice which are collected in the Books of *Reports*,* and have great Weight with the Judges in their Debates upon like Caſes. Many of theſe *Reports* are as highly valued as the *Reſponſa Prudentum* amongſt the *Romans* to be found in the *Digeſt*, which were *Authoritative*.

The *Objects* of theſe Laws are, 1. The *Perſons* of which *England* is compoſed. 2. Their *Eſtates*. 3. The Crimes and *Miſdemeanors* that may be committed by them, called *Pleas of the Crown*. 4. The *Courts* of Juſtice, or Juriſdiction of Courts, and the Manner of the *Proceedings* therein.

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† The Law of England, at this Day, is properly divided into the unwritten Law, and written Law. The unwritten Law conſiſts of the General Cuſtoms of the Realm and is called the Common Law, and of the particular Cuſtoms of particular Places, which is often called, in our Books, the *Lex loci*. The written Law conſiſts of Acts of Parliament made from Time to Time by the Legiſlature; But the Common Law, and the Statute Law flow originally from the ſame Fountain, namely, the Legiſlature; The Statute Law being the Will of the Legiſlature remaining upon Record in Writing; The Common Law, nothing elſe but Statutes antiently written, which have been worn out by Time; all our Law began by Conſent of the Legiſlature, and whether it be now Law by Cuſtom, Uſage or Writing, it is the ſame Thing. *Per* the great and able Lord Ch. Juſtice *Wilmot*, in the Caſe of *Collins v. Blantern*. *Wilſon*'s Rep. 2 part 348, 351.

* *Periculoſum eſt quod bonorum virorum non comprobatur exemplo.* 1 Inſt. 81. b.
Non eſt recedendum a communi obſervantiâ. 2 Rep. 74. 1 Inſt. 186. a. 229. a.
Minimè mutanda ſunt, quæ certam interpretationem habuerunt. Ibid.

[*The Objects of theſe Laws.*] According to the very learned Judge *Blackſtone*, *Lib.* 1. 122. the Objects of theſe Law, are, 1. The *Rights of Perſons*, with the Means whereby ſuch Rights may be acquired or loſt. 2. The *Rights of Things*, with the Means alſo of acquiring and loſing them. 3. *Private Wrongs*, or Civil Injuries, with the Means of redreſſing them by Law. 4. *Public Wrongs*, or Crimes and Miſdemeanors, with the Means of Prevention and Puniſhment. Under theſe four large Heads, the learned Judge has with the greateſt Perſpicuity arranged his moſt elegant Commentaries on the Laws of *England*, which will be read, not only by Lawyers, but Engliſhmen of every Degree, Rank or Profeſſion, who have any Regard for the Preſervation of the Laws and Conſtitution of the Britiſh Empire, with infinite Pleaſure and Delight, ſo long as thoſe Laws and Conſtitution endure. *Faxit DEUS in Secula Seculorum*!

BOOK I.

OF PERSONS.

CHAP. I.

See 1. Black. Com. cap. 1. per totum.

Of Perſons *in their* Natural *Capacities: And therein of their* Life, Sex, Age, Health, Liberty, Reputation.

Of Perſons in their Natural Capacities.

I Have ſaid, that the *Objects* of the Laws of *England* are, 1. *Perſons.* 2. *Eſtates.* 3. *Crimes* and *Miſdemeanors*, or *Pleas* of the *Crown.* 4. The *Courts* of Juſtice.

Perſons are to be conſidered in their *Natural*, and in their *Relative* or *Civil* Capacities.

1 Black. Com. 129, 134 to 138. Life.

A Perſon in its natural Capacity is every Man or Woman: In which Capacity the Law takes Notice of its *Life*, *Sex*, *Health*, *Liberty*, Good Name or *Reputation*.

[a] 3 Inſt. 50. 51.

[b] H. P. C. Ch. 33. ſect. 2 Contra.

[c] 1Inſt. 123.b. 2 Cro. 541.

[d] 2 Cro. 541. 1 Roll. Ab. 356. Godb. 281. See of Baſtards poſt. Ch. 6.

I. *Life* begins when an Infant ſtirreth in the Womb; [a] for if a Woman is quick with Child, and killeth it in her Womb, and ſhe is delivered of a dead Child, it is a great Miſdemeanor, though not Murder: But if the Child be born alive, and dieth of the Potion, this is Murder [b]. The [c]Birth is uſually at the End of nine ſolar Months after Conception, reckoning thirty Days to the Month: Therefore if born within nine Months, or rather within forty Weeks after the Death of her Huſband, it is held to be legitimate: But there is no exact certain Time fixed by Law, beyond which if the Child were born the Law determines it to be illegitimate; but it ſhall be found by the Jury on the Examination of proper Phyſicians, *&c.* for by Defect of Nouriſhment, perhaps an Infant may be born [d] after forty Weeks, and by Accident at the End of ſeven Months.

[Not Murder] But if one beat a Woman, or gave her Poiſon, whereby the Child died in her Body, although this was not Murder, yet it was anciently Homicide or Manſlaughter according to *Bracton l. 1. cap. 21. Si aliquis Mulierem percuſſerit vel ei venenum dederit, per quod fecerit abortivam; ſi puerperium jam formatum fuerit, et maximè ſi fuerit animatum, facit Homicidium.*

An Infant *in ventre ſa mere* (in the Mother's Womb) may be ſuppoſed to be born to many Purpoſes. A Surrender of a Copyhold Eſtate to an Infant in the Womb is good; ſo is a Deviſe; ſo is an Appointment of Guardianſhip of ſuch an Infant by his Father, under 12 *Car.* 2. *ch.* 24. And

[By 10 & 11 *W.* 3. *ch.* 16. *Poſthumous Children are enabled to take Eſtates, as if born in their Father's Life-time; though there be no Eſtate limited to Truſtees after the Deceaſe of the Father to preſerve the contingent Remainder.*]

As the *Life* of every Man is under the Protection of the Law and all Wrongs againſt it are puniſhed: So the *Members* of every Subject are under the Protection of the King, that he may ſerve him and his Country: [e] Therefore, a Rogue for cauſing his Companion to ſtrike off his left Hand, thereby to have a Pretence to beg, was indicted and fined, with his Companion.

[e] 1 Inſt, 127. a. & b.

There is a *Civil* Death as well as a *Natural* Death: [a] If a Leaſe is made *during Life*, it may be determined by a Civil Death, as by entring into Religion, &c. But if the Leaſe is to have and to hold for the Term of one's Natural Life, it is not determined by a Civil Death.

[a] 2 Rep. 48. 1 Black. Com. 132.

The Sex.

II. The *Sex* is Male or Female, or an Hermaphrodite, *i. e.* both Male and Female. An [b] Hermaphrodite, ought to be Baptized according to that Sex which is moſt apparent, and doth moſt prevail. [c] *Homo* includes both Man and Woman: and a [d] Virgin is included under the Name of *Mulier*.

[b] 1 Inſt. 8. a. 29. b.
[c] 2 Inſt. 45. 3 Inſt. 4.
[d] 1 Inſt. 243. b.

[See the *Statutes* concerning *Women*, which will be cited again in a proper Place, 3 *H.* 7. *ch.* 2. 4 & 5 *Ph.* & *Mar. ch.* 8. 18 *El. ch.* 7. 39 *El. ch.* 9. 21 *Jac.* 1. *ch.* 6. 3 & 4 *W* & *M. ch.* 9. and 24.]

Age.

III. [e] *Full Age* of Male or Female is at Twenty-one Years. It is not material at what Hour of the Day one is born, for there muſt be no Fractions in a Day. Therefore if a Man were born the firſt Day of *February;* and lived to the laſt Day of *January* Twenty one Years, and on this laſt Day makes his Will [of his real Eſtate] and dies by ſix at Night; that Will is good, and the Deviſor was of Age [f]. [g] Odd Hours in a Legal Computation are rejected. [h] A Man hath divers Ages to ſeveral Purpoſes; at Twelve he ought to take the Oath of Allegiance; at Fourteen he may conſent to Marriage, chooſe his Guardian, is ſuppoſed to be at Years of Diſcretion, and if ſo in Fact, may make a Will of his perſonal Eſtate; at [i] Seventeen may act as Executor, and at Twenty-one he may alien his Lands, Goods and Chattels, but not before. A *Woman* had formerly *Seven* Ages [k] for ſeveral Purpoſes; but now the Law is altered. At nine Years of Age ſhe may have Dower; at Twelve ſhe may conſent to Marriage; at Fourteen ſhe is ſuppoſed to be at Years of Diſcretion, and may chooſe a Guardian; and (if of ſufficient Diſcretion) may make a Will of her perſonal Eſtate [l], (tho' ſome ſay ſhe may at Twelve) at Seventeen may act as Executrix, and at One and Twenty ſhe may alienate her Lands, &c.

[e] Lit. 104.
[f] 1 Ld. Raym. 480. 2 Ld. Raym. 1096.
[g] 1 Inſt. 135. b.
[h] 1 Inſt. 78. b.
[i] Gilb. Rep. 74.
[k] 1 Inſt. 78. b. Stat. 26 Geo. 2. c. 33.
[l] Gilb. Rep. 74. 1 Vezey, 303. 304, 305, 461.

[An Infant in *Ventre ſa Mere*] May have an Eſtate limited to it's Uſe, and take afterwards by ſuch Limitation, as if it were then actually born, and in this Point the Civil Law agrees with ours, *Qui in Utero ſunt, in Jure civili intelliguntur in rerum Natura eſſe, cum de eorum Commodo agatur. Ff.* 1, 5, 26. 2 *Atkyns*,. 117.

[Entring into Religion] This was alſo a Rule in the Feodal-Law. *Deſiit eſſe miles ſeculi, qui factus eſt miles Chriſti; nec Beneficium pertinet ad eum qui non debet gerere officium.*

2 Burn tit. *Infant* per tot. 3 Atkyns. 712. 713, 715. 3 Atkins, 711. [m] 1 Inſt. 171 b. 172. a. 380. b. 2 Inſt. 483, 673. 1 Cro. 569, 853.

Before the Age of Twenty-one, a Man or Woman is call'd an *Infant* or *Minor*; and before ſuch Age, any [m] Deed, or other Writing, may be avoided: Matters in *Fact*, either within Age or at full Age; but Matters of *Record*, as Statutes, Fines, only during Minority.

But if an Infant appears by Attorney, and a Recovery is had againſt him, he may avoid it by a Writ of Error after his full Age; for it ſhall be tried by the Country, whether he was within Age when he made the Warrant of Attorney? ‡

An Infant is not bound by his Conſent not to bring a Writ of Error. Caſes *B. R. temp.* Lord *Hardwicke.* 104. *Edit.* 1770. Nor can an Infant exerciſe an Office in a Corporation. Same Book. 4.

[n] 1 Inſt. 172 a. [o] 1 Sid. 112. 1 Str. 168. [p] 1 Rol. Abr. 729. 1 Cro. 920. 1 Lev. 87. 2 Str. 939. [q] 1 Salk. 279, 387. 2 Vezey. 23. 212, 374, 484. 3 Atkyns. 625. 626, 627, 115, 117, 130, 423, 610, 612, 613. 617. [a] 1 Wms. 558. [b] Dyer 104. 2 Str. 1217. [c] 2 Wms. 298. 1 Str. 768. S. C. reheard. 1 Str. 694. 2 Str. 932. What Acts of an Infant are good, void or voidable. 1 Atk. 489. 490. [d] 1 Inſt. 233. b. 246 b. 380. b. [e] 1 Inſt. 2. b. 172. a. 2 Str. 939.

Though an Infant cannot alienate any Lands, Goods or Chattels, yet he may bind himſelf to pay for [n] *Neceſſaries*, as Meat, Drink, Apparel, Phyſick, Inſtruction for Himſelf, Wife, Children and Family [o]. But if he bind himſelf in a Bond or other Writing, with a *Penalty*, for the Payment of any of theſe Neceſſaries, the Bond ſhall not bind him [p]. And if he borrows Money to buy or pay a Debt for Neceſſaries, and applies it accordingly, he is not liable at law, becauſe he might have waſted it [q]. But he is liable in Equity, and the Lender of the Money ſtands in the Place of the Creditor for Neceſſaries; or if after coming of Age he deviſe Lands in Truſt for Payment of his Debts, ſuch Debt, though contracted during Infancy, is within the Truſt [a]. An Infant Defendant is liable to Coſts [b], but not an Infant Plaintiff [c], for any one may commence a Suit in his Name as next Friend, but he does it at the Peril of Coſts. [d] An Infant is bound by all Conditions, Charges and Penalties in an Original Conveyance, whether he comes to the Eſtate by Grant or Deſcent; except that of doubling the Rent for Non-payment. [See the Statute of *Merton*, *ch.* 5.] He ſhall be alſo puniſhed for doing or ſuffering Waſte, when Tenant for Life or Years. Nay the Law gives him a Capacity to [e] *purchaſe* or *contract* without Conſent of any other, for it is intended for his Benefit, and the other Party is abſolutely bound: Yet he at his full Age may either agree to it and perfect it, or without any Cauſe alledged waive or diſagree to the ſame; and ſo may his Heirs after him, if he agrees not to it after his full Age. If he is an Executor, he may give an Acquittance on Payment; not without Payment. He may appoint a Guardian to his Children by Deed or Will, purſuant to 12 *Char.* 2. *Ch.* 24. *

By 5 Eliz. ch. 4. *An Apprentice ſhall be bound by his Indenture, notwithſtanding his Nonage. And by* 2 & 3 Ann. ch. 6. *Juſtices are empowered to put out poor Boys of ten Years of Age Apprentices to the Sea-Service.*

By 7 Ann. ch. 19. *Infants ſeiſed or poſſeſſed of Eſtates in Fee, in Truſt or in Mortgage, are enabled and compellable to make Conveyances of ſuch Eſtates, by the Directions of the Courts of Chancery or Exchequer.*

[f] Lit. 402. 1 Inſt. 246. a. 380. a. &. b. 1 Wms. 718. 3 Wms. 368.

As to an Infant's *Right* to an Eſtate [f], *Nonclaim* ſhall not bind him; nor any Laches or Lack of Diligence, or Negligence, be imputed to him, during his Infancy, except in ſome particular Caſes. Courts are ſo tender of the Intereſts of Infants, that where an Infant Heir by Anſwer in Chancery inſiſted, that being an Infant, the Parol ought to Demur, It was ordered accordingly, although the Infant's Counſel offered to Waive the Objection, as Prejudicial to the Infant[g]. And where a Legacy being given to a Child, the Executor payed it to the Father; this was held to be a Miſpayment, although the Teſtator had by Parol, on his Death-bed directed it ſo[h].

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‡ If he did not appear by an Attorney, but in his own proper Perſon at the Bar, either as Tenant to the Precipe or Vouchee, it ſeems he cannot avoid the Recovery.

[f] *Negligentia ſemper habet infortunium comitem.* 1 Inſt. 246. b.

* A Schoolboy contracts a Debt of 59 *l.* for Burgundy, Champain, Claret, *&c.* with a Victualler, who prevails on him a few Days after he became of Age to give a Note for the 59 *l.* without producing any Account or delivering him a Bill; the Court decreed the Note to be delivered up to be cancelled. 2 *Atkyns* 25, 34.

But where an Infant takes up Goods before, and gives a Note for them after he becomes of Age, if there is no Fraud, it is good at Law. 2 *Atk.* 35, 245.

Laches ſhall prejudice an Infant if he preſents not to a Church within ſix Months: For Lapſe ſhall incur. So in Caſe of a Fine, where the Time begins in the Life of the Anceſtor. In Caſe of an Appeal of Death of his Anceſtor, where he brings not his Appeal within a Year and a Day, as ſhall be obſerved under thoſe Heads.

An Infant or Minor, ſhall *Sue*[i] by *Prochein Amy* (his next Friend) or Guardian; [See *Weſtm.* 1. *Ch.* 48. *Weſtm.* 2. *Ch.* 15.] but always *Defend* by Guardian. The Courſe hath been to allow One of the Officers of the Court to be *Prochein Amy*, or Guardian, if a Guardian hath not been particularly appointed by the Father, purſuant to 12 *Char.* 2. *ch.* 24. [See 21 *Ja.* 1. *ch.* 13.] But if an Infant joins with others of full Age, and ſues *in auter Droit* (or in another's Right as Executor,) [a] or to an Information in the Crown-Office for a Riot, *&c.* he may appear by Attorney.

If Huſband and Wife are ſued, the Wife being under Age, ſhe muſt appear by Guardian[b].

[c] In *Criminal* Caſes, the Act of an Infant ſhall not be imputed to him; no not in Caſe of High Treaſon, till he is of the Age of Fourteen; which (as hath been ſaid) is accounted the Age of Diſcretion: But in ſome Caſes of extraordinary Malice, an Infant under 14, comes within the Cenſure of the Law[d].

IV. *Health* is deſtroyed either by the Diſeaſes of the *Body* or *Mind*.

The Law regards Health, or the Diſeaſes of the *Body*, when it allows of *Eſſoins* (or *Exonnies*, Excuſes) upon the Account of Sickneſs and Danger of Travelling for not anſwering in real Actions, or for not coming to perform Suit in a Court-Baron, or when a Writ is granted [e] *De Leproſo amovendo* to a Pariſh, [See 1 *Jac.* 1. *ch.* 31. *An Act for Ordering Perſons infected with the Plague, and the* 26 Geo. 2. ch. 6. 29 Geo. 2. ch. 8. *For the Performance of Quarentine.* 4 Black. Com. 161.]

But it is of more Uſe to conſider the Diſeaſes of the *Mind*.

He that is *Non compos mentis* is diſeaſed in Mind. *Non compos mentis* (for that is the moſt ſure and legal Word) is of[f] four Sorts.

1. An *Idiot*, or Natural Fool, or one of unſound Mind and Memory from his Nativity. If he hath ſo much Knowledge that he can read, or meaſure an Ell of Cloth, or name the Days of the Week, whereby it may appear that he hath ſome Light of Reaſon, then ſuch a one is no Natural Fool.

2. A *Madman*, or he that by *Sickneſs*, *Grief*, or other *Accident*, wholly loſeth his Memory, or Underſtanding.

3. A *Lunatick*, that hath ſometimes lucid Intervals: He is *Non compos mentis* ſo long as he hath not his Underſtanding.

4. Laſtly, he that by his own *vicious* Act depriveth himſelf of his Memory and Underſtanding for a Time; as he that is drunk. This kind of *Non compos mentis* ſhall give no Privilege or Benefit: But what hurt he doth his Drunkenneſs ſhall aggravate, tho' it is too often made Matter of Excuſe.

[g] Caſ. temp. Ld. Talbot 198.

[h] 1 Wms. 285. 3 Atkyns 710.

[i] F. N. B. 27. 1 Inſt. 135 b. 2 Inſt. 261, 290. 1 Ventr. 107, 185. 2 Cro. 640, 641. 2 Str. 1076. 1 Str. 305.

[a] 2 Ld. Raym. 1284.

[b] 1 Roll. Abr. 288. 1 Vent. 185. 2 Burn, 459.

[c] Dr. & Stud. Dial. 2. ch. 46. 1 Inſt. 247. b. 3 Inſt. 4, 6.

[d] H. P. C. ch. 3. 3 Black. Com. 122. See B. 3. ch. 1. poſt. Health.

[e] F. N. B. 234. 1 Inſt. 135. b. 2 Inſt 54, 447. 3 Burn tit. plague.

[f] 1 Inſt. 246. b. 247. a. 4 Rep. 124. 3 Burn tit. Lunatic 2 Atk. 327. 52. 412. 553.

2 Vezey 381, 401, 405, 673, 674.

[g] Lit. 405, 406.
1 Inſt. 247. a.
4 Rep. 123.
contr.
F. N. B 202.
Coymns 45.
[h] 1 Inſt. 247 b.
3 Inſt. 4, 6.
4 Rep. 124.
[i] 1 Inſt. 247. a & b.
[k] 4 Rep. 124.
5 Rep. 119.
8 Rep. 42, 43.
1 Inſt. 247. a.
2 Inſt. 483.
[a] 1 Ld. Raym. 313.
Show. P. C. 150.
1 Eq. Ab. 278, 279.
[c] 1 Eq. Ab. 279.
2 Str. 1104.
[d] Inſt. 2. b.

Now every Deed, Grant, or Gift, which is made by one who is *Non compos mentis* is [g] voidable, or may be made void. And yet it ſhall never be avoided by himſelf, becauſe when he recovereth his Memory he cannot know what he did when he was *Non compos*; and becauſe no Man of full Age ſhall be received in any Plea to ſtultify or diſable himſelf, *i. e.* in Civil Caſes: [h] For in Criminal Caſes, as Petit Treaſon, Felony, his Acts ſhall not be imputed to him. But the [i] King after Office found may avoid a Deed, or Grant, for the Benefit of the *Non compos*. [k] All Acts which he doth concerning his Lands, or his Goods in a Court of Record, ſhall bind himſelf and all others claiming under him for ever; by reaſon of the Inconveniencies that might otherwiſe follow. But Acts done out of Court ſhall bind only during his Life, his Heir having Liberty to avoid them, and as to third Perſons they are abſolutely void [a]. But Relief may be had in a Court of *Equity*, againſt the Act of a *Non compos*, either by himſelf and his Committee during his Inſanity, or by himſelf after he has recovered his Underſtanding [b]. [And according to later Determinations, even in a Court of Law, he may avoid his own Acts by pleading *Non eſt factum*, and giving Lunacy in Evidence. So that the Notion that a Man of full Age cannot ſtultify or diſable himſelf, ſeems to be over-ruled [c]] A *Non compos mentis* may [d] purchaſe Lands without Conſent of any other, and he himſelf cannot waive it; but his Heirs may. And [*By* 4 Geo. 2. ch. 10. *Idiots and Lunaticks and their Committees are enabled to convey Truſt and mortgaged Eſtates by Direction of the Chancery.*]

3 Atk. 185, 625.

The King is General Guardian of *Idiots, Madmen* and *Lunaticks.*

By the Statute De Prerogativa Regis, *or* 17 Ed. 2. ch. 9. *The King ſhall have the Cuſtody of the Lands of an Idiot, or Natural Fool; taking the Profits thereof during his Life, without Waſte, and finding him Neceſſaries: And after the Death of ſuch Idiots ſhall render the Lands to the Right Heir.*

This Statute does not refer to an Idiot by Accident, or ſubſequent Infirmity. The King ſhall have the Cuſtody of the Lands of an Idiot during his Life, becauſe there is no Hopes of his Recovery: And therefore he may let them to Farm rendering a Rent.

[e] 4 Rep. 127.
Coke's Compleat Copyh. Sect. 55.

Though the Statute gives only the Cuſtody of the *Lands* of an Idiot from his Nativity, the King ſhall have the Cuſtody of the *Body*, and of the *Goods* and *Chattels*, as well as of the Lands; except the Lands of an Idiot holden by Copy of Court-Roll: [e] For it would be prejudicial to the Lord of the Manor, if the King ſhould have the Cuſtody of Lands holden by Copy.

By 17 Ed. 2. ch. 10. *The King ſhall provide that the Lands of* Lunaticks *be ſafely kept without Waſte, and they and their Families maintained by the Profits: And the Reſidue ſhall be kept for their Uſe, and be delivered unto them when they come to their Right Mind.*

This Statute (which was but a Declaration of the Common Law) ſays, **Alſo the King ſhall provide**, &c. which ſhews he hath not the Cuſtody of the *Lands* or *Body* of a *Lunatick*, as he hath of an Idiot: For they may recover their Memories, which an Idiot is not preſumed to do. So that the King is Guardian of Idiots Lands *without Account*, and of Lunaticks *with Account*. [f] For if the King provideth one to have the Care and Charge of him that is *Lunatick*; or if one of his own Head taketh upon himſelf the Guardianſhip of one that is a Lunatick, he ſhall be accountable to him as Bailiff, or to his Executors or Adminiſtrators.

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[g] *Nemo contra factum ſuum venire poteſt.* 2 Inſt. 66.

[h] *Actus non facit reum, niſi mens ſit rea.* 1 Inſt. 247. b.

Furioſus ſolo furore punitur. Ibid.

[*Waſte.*] A Committee of a Lunatick's real Eſtate may cut down Timber for Repairs. 2 Atkyns, 407, 414.

3 Wms. 510.
[f] 4 Rep. 127.

[g] When an Idiot doth *Sue* or *Defend*, the Suit muſt be in his Name; but it ſhall be followed by others for his Benefit. So a *Madman* or *Lunatick* muſt ſue in his own Name. If an Heir is an *Idiot*, of what Age ſoever, [h] any Man may make a Tender for him, the Law in this Caſe being grounded upon Charity.

[g] 1 Inſt 135 b.
4 Rep. 124.
[h] 1 Inſt. 206. b.

But the Crown doth now grant, under the Royal Sign Manual, the Care and Commitment of the Cuſtody of *Idiots* and *Lunaticks*, and of their Perſons and Eſtates, to the Lord Chancellor or Lord Keeper who upon Petition iſſues a Commiſſion in the Nature of the Writ *De Lunatico inquirendo*, and, the Party being found *Idiot* or *Lunatick*, grants the Cuſtody of his Perſon and Eſtate to ſome Relations or Friends, who are called Committees [a]. And whether he be *Idiot* or *Lunatick*, the Committee of the Eſtate hath it only for the Benefit of the *Idiot* or *Lunatick*; and the Lord Chancellor directs a proper Part of it to be applied for his Maintenance and Support.

[a] 3 Wms. 107, 108, &c. See Harriſon's Practice in Chancery.

By 17 Geo. 2. c. 5. *Lunaticks, or Madmen, may be apprehended by the Warrant of two Juſtices, and during their Madneſs locked up and chained where apprehended, if their Settlement is in the ſame County, or otherwiſe be ſent to their laſt legal Settlement, to be there by Warrant of two Juſtices of that County locked up and chain'd: And the Charges of Removal, Maintenance, &c. ſhall be paid out of the Madman's Eſtate, if he hath any; if none, by the Pariſh.*

V. *Liberty*, conſiſts in a Power to do as one thinks fit, unleſs reſtrained by Force, or the Law. [b] Impriſonment is a Reſtraint of a Man's Liberty under the Cuſtody of another. One may be *lawfully* impriſoned by the King's Writ, or *unlawfully*. [c] An *unlawful* Impriſonment is not only an unjuſt Impriſonment at the firſt, but when one is detained longer than he ought, though he was at firſt lawfully impriſoned. For if a Sheriff, or Gaoler detains a Priſoner in Gaol after his Acquittal (unleſs it be for his Fees, not for Meat, Drink, or Lodging) this is an unlawful Impriſonment. An Action of falſe Impriſonment doth lie againſt a Bailiff for Arreſting One after the Return of the Writ is paſt, it being now without Writ. [d] He that is put into the Stocks, or is under an Arreſt, is ſaid to be in Priſon. Unlawful Impriſonment is ſometimes called *Dureſs of Impriſonment* (from *Durities*) [e] as where one is wrongfully impriſoned or detained, till he ſeals a Bond. But not where a Man is lawfully impriſoned for another Cauſe, and for his Delivery ſeals a Bond; nor where being arreſted at the Suit of another, and in Priſon on ſuch an Arreſt, he willingly ſeals a Bond to a Stranger. [f] A Son ſhall avoid the Action by Reaſon of the unlawful Impriſonment of his Father; a Huſband by Reaſon of the unlawful Impriſonment of the Wife. So if one's Beaſts are unlawfully impriſoned till he Seals a Deed, he may avoid the Action. So if one is under a juſt [g] *Fear* of being impriſoned, killed,

Liberty.
1 Black. Com. 125, 134.
3 Black. Com. 127.
[b] 1 Inſt. 253 b.
2 Inſt. 590.
[c] 2 Inſt. 52. 482.
[d] 2 Inſt. 482. 589.
2 Roll. Abr. 74.
[e] 2 Inſt. 482, 483.
3 Inſt. 91.
4 Inſt. 97.
[f] 1 Roll. Abr. 687.
[g] 1 Inſt. 162. a. 253. b.
2 Inſt. 483. a.

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[g] *Nemo tenetur exponere ſe infortuniis et periculis.* 1 Inſt. 162. a. 253. b.
Qui non cadunt in conſtantem virum, vani timores ſunt. 2 Inſt. 483. 7 Rep. 27.

killed, or maimed, and he ſeals a Bond to him that *menaces* him, it is *Dureſs per Minas*, and in both Caſes he may plead the *Dureſs*, and avoid the Action. If it be only a *Threatning* of a Battery, which may be light, or to take away my Goods, or to burn my Houſe, this will not make the Deed made upon that Occaſion to be by *Dureſs*; for there one may have Satisfaction by Recovery of Damages. There muſt be ſome Threatning of Life, or Member, or of Impriſonment, and to the End of obtaining the Deed, and thereupon the Deed muſt be made. To threaten another to kill or maim, or impriſon him, if he will not ſeal a Deed to a third Perſon, and thereupon he do it, this is as voidable as if it were made to the Party himſelf.

Even *lawful* Impriſonment is ſo far pitied, that by ſeveral Statutes, as well as by Common Law, Defaults are ſaved on that Account.

[a] 1 Inſt. 124 b. 2 Inſt. 42. 115. 9 Rep. 56.
[b] 2 Inſt. 55. 4 Inſt. 182.
[c] See Catalogue of Writs B. 4. ch. 4. poſt.
[d] See of Bail poſt. B. 4. ch. 4, & 5.
[e] 2 Inſt. 47, 48. 2 Roll. Abr. 166.
[f] 7 Rep. 7, 8.
1 Black. Com. 128.
3 Black. Com. 135.
4 Black. Com. 431.

The Law [a] favours Liberty, and the Freedom of a Man from Impriſonment; and therefore kind Interpretations ſhall be made on its Behalf. If a Man is unlawfully impriſoned, he may have an Action of Treſpaſs for falſe Impriſonment, and recover Damages: [b] Or he may have the Writ of *Habeas Corpus*, [c] and upon Return of this Writ by the Gaoler, ſetting forth by whom he was committed, and for what Cauſe, he ought to be diſcharged if it appears to be againſt Law. But if the Caſe be doubtful, he may be bailed. If the Impriſonment appears to be juſt, he ſhall be remanded to the Priſon, or bailed [d]. [See *Magna Charta, ch.* 29. *and the Petition of Right,* 3 *Car.* 1. *ch.* 1.]

The King cannot ſend any Subject of *England* [e] againſt his Will to ſerve him out of the Kingdom; for that would be Baniſhment: No, he cannot ſend one into *Ireland*, againſt his Will, to ſerve as his Deputy there [f].

By 31 Car. 2. ch. 2. [*called the* Habeas Corpus *Act, and entitled*, An Act for the better ſecuring the Liberty of the Subject, and for Prevention of Impriſonment beyond Seas.] *A Priſoner may have an* Habeas Corpus *from any* Judge *in the Vacation, returnable immediately (unleſs committed for* Treaſon *or* Felony, *plainly and ſpecially expreſſed in the Warrant, or for other Offences not bailable) and upon his being brought up, ſuch Judge ſhall diſcharge him upon Bail, to appear in the King's Bench the next Term, or at the next Aſſizes or Seſſions, or General Gaol-Delivery, or in any other Court where the Offence is cognizable.*

And Perſons committed for Treaſon *or* Felony, *plainly and ſpecially expreſſed in the Warrant, who ſhall petition in* open Court *the firſt Week of the Term, or firſt Day of the* Seſſions *of* Oyer *and* Terminer, *or* Gaol-Delivery, *after ſuch Commitment, to be brought to Trial, and who ſhall not be indicted ſometime in ſuch Term or Seſſions, ſhall upon Motion the laſt Day of the Term, or Seſſions, be let out upon Bail; unleſs it appear upon Oath that the King's Witneſſes could not be produced that Term, or Seſſions: And if ſuch Perſons, upon ſuch Prayer, ſhall not be indicted, and tried the ſecond Term, or Seſſions, after Commitment, they ſhall be diſcharged.*

A Subject committed for any Crime, ſhall not be removed into the Cuſtody of any other Officer, unleſs by Writ.

This Act ſhall not extend to diſcharge any Perſon charged in any Civil *Cauſe, as to ſuch* Civil *Suit.*

[*Dureſs per Minas*] Is either for Fear of loſs of Life, or elſe for Fear of *Mayhem*, or loſs of Limb. And this Fear muſt be upon ſufficient Reaſon; " *Non*, as *Bracton* expreſſes it, " *Suſpicio cujuſlibet vani et meticuloſi hominis, ſed talis qui poſſit cadere in virum conſtantem*; " *talis enim debet eſſe metus, qui in ſe contineat vitæ periculum, aut Corporis Cruciatum.*"

IV. The

VI. The *Reputation* alſo of a Perſon is under the Protection of the Law: For Perſons in their Natural Capacity, abſolutely and ſimply conſidered, have an Intereſt in their Good Name: Scandal and Defamation are injurious to it. But defamatory Words are not actionable, otherwiſe than as they are ſuppoſed to be a Damage to the Perſon injured: The mere Contumely is of little Conſideration. A Contumely, or Scandal againſt the King, a Peer of the Realm, or a Magiſtrate, is eſteemed to be of a heinous Nature [g].

Reputation.
3 Black. Com. 123 to 127.

[g] See of Nobility poſt. ch 4. Of Libels B. 3. ch. 3. Actions on the Caſe B. 4. ch. 4.

CHAP. II.

Of Perſons *in their Relative or* Civil *Capacities: And therein of the* King *and* Queen.

A *Perſon* in its Relative or *Civil* Capacity, is either the *King*, or a *Subject*: A *Subject* is either of the *Clergy*, or *Laity*, *Nobility* or *Commonalty*; and ſome amongſt the Nobility and Commonalty, are of the *Military* State. And more particularly, a Perſon in a Civil Capacity is a *Maſter* of a *Family*, *Husband* or *Wife*, *Parent* or *Child*, *Anceſtor* or *Heir*, *Landlord* or *Tenant*, *Guardian* or *Minor*. Afterwards a Perſon may be further conſidered in ſome Publick *Office*, as *Sheriff*, &c. And laſtly, a *Corporation*, or Body Politick, is eſteemed a *Perſon* in Law.

Of Perſons in their Civil Capacities.

This Account of a Perſon in a *Civil* Capacity, ſhall be given in ſeveral Chapters to the End of this firſt Book. And as a Perſon is to be conſidered as *King* or *Subject*. It will be proper to ſpeak firſt of the *King*, and his Conſort the *Queen*.

I. The *King* is the Head of the Common-wealth, immediately under God, and the only [a] Supreme Governor. [See 24 *H*. 8. *ch*. 12. 25 *H*. 8. *ch*. 21. 1 *El*. *ch*. 1. 1 *Ja*. 1. *ch*. 1.] By his taking the Imperial Crown upon himſelf, all [b] Attainder of his Perſon is purged *ipſo facto*, without any Reverſal. He cannot be a Minor, or [c] under Age. In him there is no [d] Imperfection, Negligence, Laches or Folly.

It is his Prerogative to make War or Peace. He is the [e] Fountain of all Honour; has the ſole Power of conferring Honourable Titles, and has the Choice and Nomination of all Counſellors and Officers of State. [f] He may create Biſhopricks, Deans and Chapters, Univerſities, Colleges, Counties and Counties-Palatine, Cities, Boroughs, Fairs, Markets, Foreſts, Denizens. He can put a Value to the Coin; [g] for it is either coined by his immediate Authority, or Foreign Coin is made Current here by his Proclamation. To make Money, the Law gives the King all Mines of Gold and Silver; or where the Gold and Silver in the Mine is of the greater Value, [See 1 *W*. & *M*. *ch*. 30. 5 *W*. & *M*. *ch*. 6] and Liberty to dig

The King
[a] 4 Inſt. 342, 343.
Bract. lib. 2. cap. 16.
[b] 1 Inſt. 16. a.
[c] Plowd. 212.
1 Inſt. 43. a. & b.
7 Rep. 10, 12.
[d] Finch 82.
1 Inſt. 41. b. 57. b. 90. b.
[e] 1 Inſt. 165. a.
[f] Finch 84.
4 Inſt. 204.
[g] Plowd. 314, &c.
1 Inſt. 207. a. & b.
2 Inſt. 576, 578.
4 Inſt. 236.
5 Rep. 114.
11 Rep. 82.
2 Rol. Abr. 169.

[*The King*.] See 1 Black. Com. cap. 3. wherein the learned Judge purpoſes to treat of the royal Rights and Authority, and to conſider the King under ſix diſtinct Views; 1. With regard to his Title. 2. His Royal Family. 3. His Councils. 4. His Duties. 5. His Prerogative. 6. His Revenue. And in this 3d Cap. per totum he treats of the King and his Title only.

in the Out-Houſes of another, but not in his Dwelling-Houſe. He is the General Guardian of all Idiots and Lunaticks. He is a [h] Corporation, or Body Politick; and when the Royal Body Politick of the King doth meet with his Natural Capacity, it is drowned in the moſt Worthy. He never [i] dieth, for in Law it is ſaid, the *Demiſe* of the King. The Judges will take Notice, *ex Officio*, of the Day of the King's Demiſe [k].

[h] 1 Inſt. 43. a. & b.
2 Inſt. 186.
7 Rep. 12.
[i] 1 Inſt. 9. b.
[k] 2 Ld. Raym. 811.

But more particularly, he hath a *Prerogative* with reſpect to *Church* Affairs, with relation to the *Parliament*, to *Property* and *Suits* in Court, *Grants*, *Eſcheats*, and *Forfeitures*. [l] His *Prerogative* ſignifies the Powers, Preheminences and Privileges which the Law giveth the Crown: It is Part of the Laws of *England*.

1 Inſt. 90.b.

1. The King's Power in *Church* Affairs does appear, in that he is the [a] Supreme Head of the Church, and Supreme Ordinary, to whom the laſt Appeal is made. [See 24 *H.* 8. *ch.* 12. 25 *H.* 8. *ch.* 19, 20, 21. 26 *H.* 8. *ch.* 1. 35 *H.* 8. *ch.* 3. 1 *El. ch.* 1. and ſee the *Ordination of Prieſts and Deacons.*] His Proclamations and Injunctions for Reformation, Order and Correction in Matters of Religion, are to be obeyed. He has Power to call a National or Provincial Council; and by his Licence and Royal Aſſent, Canons made in Convocation [b] concerning Eccleſiaſtical Affairs, obtain the Force of Laws, ſo as to bind the Clergy, but not the Laity unleſs confirmed by Parliament [c]. He can create Biſhopricks, Deans and Chapters, as before has been ſaid; and hath the ſupreme Right of Patronage all over *England* [d]. He is the Founder and Patron of all the Biſhopricks; none can be choſen Biſhop but at his Nomination. [e] The Cuſtody of the Temporalties of every Archbiſhop or Biſhop, belongs to the King during the Vacancy of the See; [f] and he may preſent to a void Advowſon, when the Temporalties are in his Hands. [g] When he founds a Church, Hoſpital, or Free Chapel Donative, it is of Courſe exempted from the Ordinary, though no particular Exemption is mentioned; and the Lord Chancellor viſits the ſame. He may alſo exempt any [h] Eccleſiaſtical Perſon from the Juriſdiction of the Ordinary, as he has the Archdeacon of *Richmond*. He may by Charter [i] licenſe any Subject to found a Church or Chapel, and that it ſhall be Donative, and viſited by the Founder, and not by the Ordinary. A Church is not full againſt the King 'till [k] Induction, though Inſtitution is a good [l] Plenarty againſt a common Perſon. He ſhall have the Tithes of Foreſts and Places Extraparochial; and becauſe he has the ſupreme Eccleſiaſtical Juriſdiction, he provides a ſufficient Paſtor for the Place which is not within any Pariſh; and he may grant theſe Tithes by Letters Patent. [See 2 & 3 *Ed.* 6. *ch.* 13.]

[a] Davis 73.
4 Inſt. 325, 326.
Godb 163.
2 Salk. 412.
[b] See of Convocation B. 4. ch. 1. poſt.
[c] 1 Ld. Ray. 7, 449.
2 Str. 1056.
2 Salk. 673.
[d] See of Advowſons poſt. B. 2. ch. 2.
[e] F. N. B. 32, 34.
2 Inſt. 15.
1 Inſt. 90. a. 388. a.
[g] 1 Inſt. 134. a.
2 Rol. Abr. 230.
[h] 5 Rep. 32. b.
2 Ld. Raym. 1205.
[i] 1 Inſt. 344 a.
[k] 1 Inſt. 119 b. 344. a.
[l] 2 Rep. 44. a.
5 Rep. 15.
2 Inſt. 647, 651.

The King's [m] Palaces, where his royal Perſon reſides, are exempt from all Eccleſiaſtical Juriſdiction.

2. It is the King's Prerogative [n] to call, continue, prorogue and diſſolve the *Parliament:* And [o] tho' an Act paſſeth both Houſes of Parliament, yet it is not a Law before the Royal Aſſent is obtained. [p] At *Common*

[m] 3 Inſt. 141.
[n] 1 Inſt. 110. a.
4 Inſt. 4, 6, 7.
[o] 1 Inſt. 90. b.
[p] Finch 234.
7 Rep. 14, 36, 37.
11 Rep. 88.
3 Inſt. 154, 236.
4 Inſt. 135.
2 Roll. Abr. 179.

[*The King's Prerogative.*] See 1 Black. Com. Cap. 7. wherein the learned Judge treats of the King's Prerogative *per totum*.

The Courts are cautious of extending the Prerogative of the Crown further than the Law will allow. Per Lord *Hardwicke*. 3 *Atkyns* 171.

[p] *Diſpenſatio eſt mali prohibiti provida relaxatio, utlitate ſeu neceſſitate penſata.* 1 Inſt. 99. a.

Law it was formerly held, that he might diſpenſe with a Penal Statute, in reſpect of Time, Place and Perſon, wherein all his Subjects had not an Intereſt, [q] and make a new Grant with a *Non-obſtante*, when any Thing was prohibited *ſub modo*, as upon a Penalty given to the King, not when it was an abſolute and direct Law. And that he might licenſe [r] Things prohibited by Statute, that were only *Mala prohibita*, and not *Mala in ſe.* [But *by the* 1 W. & M. *ſeſſ.* 2. ch. 2. *intituled, An Act declaring the Rights and Liberties of the Subject, it is expreſly declared, that the pretended Power of ſuſpending Laws or the Execution of them by regal Authority without Conſent of Parliament, and of diſpenſing with Laws or the Execution of them by regal Authority, as it had been then late aſſumed and exerciſed, was illegal; and that all Grants and Promiſes of Fines and Forfeitures of particular Perſons before Conviction were illegal and void. And it was alſo declared and enacted, That no Diſpenſation by* Non obſtante *of or to any Statute or any Part thereof ſhould be allowed; but that the ſame ſhould be void, except a Diſpenſation be allowed of in ſuch Statute; and ſee* 21 *Ja.* 1. *ch.* 3.]

[q] 1 Inſt 99. a. 120 a. 234. a. 2 Rol. Abr. 179. 3 Inſt. 154.
[r] Finch 234, 235.

[a] Acts of Parliament do not bind the King unleſs he is ſpecially named; or unleſs they concern the Common-wealth, [b] ſuppreſs Wrong, take away Fraud, or prevent the Decay of Religion, &c. The Common Words *No Perſon or Perſons, Bodies Politick or Corporate* do not bind him; though the Statute is in the Negative: * But he may take Benefit of any Act, tho' he is not named.

[a] Finch 234. 7 Rep. 32. 11 Rep. 68. 2 Inſt. 359. 1 Str. 516.
[b] 5 Rep. 14. 11 Rep. 71, 72. 2 Inſt. 681.
* 7 Rep. 32. 11 Rep. 71, 72, 74, 75.

The King's [c] *Proclamations*, in ſome Inſtances, are to be taken for Laws, as in calling or diſſolving the Parliament, declaring War and Peace. But he cannot by his Proclamation introduce new Laws contrary to thoſe eſtabliſhed by Common or Statute Law. When neceſſary Statutes have been for a Time diſcontinued, the King uſually gives Notice by Proclamation, that ſuch Statutes for the Time to come ſhall be put in due Execution. [d] None may make any Proclamation without the King's Authority, except Mayors or ſuch like Governors of Towns, by Cuſtom or Privilege.

[c] 3 Inſt. 162. 2 Inſt. 743. Keilw. 116.
[d] Crom. Jur. 41. b.

3. Concerning the King's Advantages in reſpect of *Property* and *Suits* in his Courts, he is ſuppoſed to be [e] preſent in all his Courts, and on this Account the King cannot be nonſuit. [f] No Action lies againſt him, for who ſhall command the King? A *Petition*, inſtead of an Action, muſt be made to him in *Chancery* or perſonally [g]; but Proceſs ſhall go out againſt the King's Grantee to maintain his Title. Againſt the King there can be no

[e] 1 Inſt. 139. b. 2 Inſt. 431.
[f] 2 Inſt. 187.
[g] Ld Somers's Argument 18, 127, &c.

[*The King's Suits in his Courts.*] Per Lord Chancellor *Hardwicke*, an Account between the King and Subject cannot be taken in any Caſe in the Court of Chancery, but in the *Exhcquer* only. 2 *Atkyns* 56.

F. ſeiſed of an Eſtate in Fee deviſed it to his Wife for Life, and after her Death to one *H.* to ſell, and in the firſt place to pay Debts and Legacies, and the Reſidue to the Plaintiffs. *H.* who had a bare Power died before any Sale, and for want of Heirs to *F.* the Eſtate eſcheated to the Crown. The Bill was brought by the reſiduary Legatees under the Will againſt the Attorney General, who was made Defendant on behalf of the Crown, to have the Will eſtabliſhed and proved, and to have the Eſtate ſold. Per Lord Chancellor *Hardwicke*, the Court of *Exchequer* might do this, as it is a Court of Revenue, but the Court of *Chancery* cannot, and he diſmiſſed the Bill. 2 *Atkyns* 223.

The Father of *L.* had a Mortgage in Fee on Sir *W. P.*'s Eſtate who was attainted; the Son of *L.* brought his Bill in the Exchequer to forecloſe, and made the Attorney General a Party, the Court would not decree a Forcloſure againſt the Crown, but directed the Mortgagee ſhould hold and enjoy, till the Crown thought proper to redeem the Eſtate. 2 *Atkyns* 223.

[h] Preſcription or Occupancy. General Acts of [i] Limitation do not bind him: He cannot be a [k] Jointenant with any one; for no one can be equal with him. He cannot be Tenant in Common of an entire Chattel Perſonal, but ſhall have the Whole. There is no Tenant at [l] Sufferance againſt the King, for it is Intruſion. Where the [m] Title of the King and a common Perſon concur, the Title of the King ſhall be preferred. The King [n] is to be preferred before any Subject, tho' his Debt is laſt. And no Protection ſhall be [o] allowed againſt the King. [See 25 *Ed.* 3. *St.* 5. *ch.* 19. 1 *R.* 2. *ch.* 8. 13 *R.* 1. *St.* 1. *ch.* 16. 33 *H.* 8. *ch.* 39] [p] The King may reſerve Rent to a Stranger, ſue in what Court he pleaſes, and is not bound to make a Demand or Tender, where a Leaſe is made reſerving Rent with a Clauſe of Re-entry. A *Choſe* in *Action* (or a Thing recoverable by Action) may be aſſigned by and to the King. [See 7 *Ja.* 1. *ch.* 15.] No Diſtreſs can be made upon the King's Poſſeſſion, [q] but he may diſtrain out of his Fee in other Lands of the ſame Perſon for his Rent-charge, if the Lands are in actual Poſſeſſion and Manurance of the ſame Tenant, not if they are in the Hands of an Under-tenant; and by 22 *Car.* 2 *ch.* 6. the Grantee of the King under that Statute hath the ſame Privilege[r]. He may alſo take Diſtreſſes in the Highway or common Street. [s] An Heir ſhall pay the King's Debt tho' not named in the Bond. The King is not bound by the Sale of Goods in [t] open Market. [u] If one gives Land to the King by Deed inrolled, A Fee-ſimple doth paſs without the Words Heirs or Succeſſors. Goods and Chattels may go in [a] Succeſſion to the King; not to any other ſole Corporation. Judgment is never [b] Final againſt him, but is with a *Salvo jure Regis*[c].

When any of the King's *Goods* come into the Hands of Subjects ſo as they are Accountant for them, their *Land* is chargeable for the ſame, and ſubject to the King's Seizure to whomſoever it comes, whether by Deſcent or Purchaſe. If one becomes Debtor to the King, being ſeiſed of Land in Fee-ſimple or Fee-Tail, and then aliens the Land, yet the Land is ſubject to Execution, tho' the Alienation was before an Action commenced; for it ſhall relate to the Time that he was in Debt to the King. [d] But the Sale of a Leaſe for Years, or other Goods and Chattels, by ſuch Debtor, is good at any Time after Judgment, and before Execution awarded. [See 29 *Car.* 2. *ch.* 3. See alſo 33 *H.* 8. *ch.* 39. 34 & 35 *H.* 8. *ch.* 2. 13 *El. ch.* 4. 14 *El. ch.* 7. 27 *El. ch.* 3. 9 *El. ch.* 7. 7 *Ja.* 1. *ch.* 15. and the reſt of the *Statutes* concerning Accountants, Receivers and Collectors.]

4. Concerning the King's *Grants.*

The King cannot [e] *Grant* or *Take* any Lands, Tenements or Hereditaments, but by Matter of Record; as he cannot command but by Matter of Record. Otherwiſe it is when the Law caſts a Freehold upon him; as in a Gift in Tail, Remainder to the King. To Perſonal and Tranſitory Things, the King may be intitled without Office, or other Matter of Record. [f] Every Grant made by the King upon Surmiſe or Suit of the Party, ſhall be taken moſt beneficially for the King, and againſt the Party. But otherwiſe if the Grant is *Ex certâ ſcientiâ, ex ſpeciali Gratiâ* and *ex mero Motu.* Yet there too, if the King is

[h] Lit. 178.
1 Inſt. 41. b.
90. b. 118. a.
[i] 11 Rep. 74.
[k] Finch 83.
[l] 1 Inſt. 57. b.
[m] 1 Inſt 30. b.
131. b.
[n] 1 Inſt 130.
a & b.
131. b.
[o] 1 Inſt. 131 a.
[p] 1 Inſt. 143. b.
Finch 84.
1 Wms. 252.
[q] 2 Inſt. 131, 132.
4 Inſt. 118, 119.
5 Rep. 56.
[r] 1 Wms. 307.
[s] 1 Inſt. 386. a.
[t] 2 Inſt. 713.
[u] 1 Inſt. 9. b.
[a] Inſt. 90. a.
[b] Finch 460.
2 Inſt. 282, 495.
[c] See Quo Warranto poſt. B. ch. 4.
[d] 8 Rep. 171.
2 Black. Com. 346 to 348.
[e] Dr. & Stud. Dial. 1. ch. 8.
4 Rep. 54.
2 Inſt. 186, 187.
4 Inſt. 115.
Finch 82, 83, 232.
2 Roll. Abr. 204, 205.
[f] Finch 100. 101, 232.
2 Inſt. 497.

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[m] *Jura publica ſunt anteferendo privatis.* 1 Inſt. 130. a.

[z] *Præſumitur Rex habere omnia jura in ſcrinio pectoris ſui.* 1 Inſt. 99. a.

[g] deceived, or if the Intent or Purpoſe of his Grant cannot by the Law take Effect, it ſhall not give the Patentee an Advantage. When the King is here deceived, it is to be underſtood of a Matter of Law, not of Fact, altho' it ſhall never be intended or preſumed that he is miſconuſant of the Law. [h] But when it appeareth within the Body of the Grant, that the King is deceived as to Matter of Law, the Grant is not good, tho' with the Clauſe *Ex certâ Scientiâ, &c.* His Grant ſhall not be taken to [i] two Intents, that is, it ſhall not enure to any other Intent than that which is preciſely expreſſed in the Grant. But then it may enure to two or three Intents, if they are expreſſed. The King's Grant ſhall be void if expreſs Mention is not made of the true Value of the Lands, in the Petition of thoſe that ſue for them. [See 1 *H.* 4. *ch.* 6.] [k] Nonage or Minority does not avoid his Grant. The King may grant over a [l] Condition, and may grant an Eſtate in Fee upon Condition not to alien, becauſe he may reſerve the Tenure to himſelf. [*Qu.*] [See 34 & 35 *H.* 8. *ch.* 21. 1 *Ed.* 6. *ch.* 8. 7 *Ed.* 6. *ch.* 3. 4 & 5 *Ph.* & *Mar. ch.* 1. 18 *El. ch.* 2. 35 *El. ch.* 3. For Confirmation of Letters Patent.] [m] A Gift to the King goeth to his Succeſſors; [n] his Succeſſors being included under the Name of King. [*See* 1 Ann. ſt. 1. ch. 7. ſ. 5, 6, *&c. which limits the Grant of Crown Lands to a certain Number of Years, or Lives, &c.*

5 Rep. 56.
6 Rep. 6. 55.
8 Rep. 56.
[g] 10 Rep. 67.
11 Rep. 11.
10 Rep. 112, 113.
5 Rep. 94.
1 Rep. 51, 52, 53.
1 Inſt. 99.
[h] Finch 10.
4 Rep 35.
10 Rep. 28.
11 Rep. 90.
1 Inſt 27. a.
2 Inſt. 512.
2 Roll. Abr. 196, 197.
[i] 1 Rep. 52.
11 Rep. 11.
[k] 1 Inſt. 43. a.
[l] 1 Inſt 223 a.
5 Rep. 56.
[m] See of Pardons poſt B. 4. ch. 5.
[n] 1 Inſt. 9. b. 90. a.
3 Inſt. 6.
6 Rep. 27.

5. As to *Eſcheats* and *Forfeitures.*

[a] All Lands are holden either mediately or immediately of the King; for all Lands were originally derived from the Crown. [b] All Franchiſes [c] alſo are derived from the Crown; and therefore *Eſcheats* [d] and *Forfeitures* [e] of all Lands and Franchiſes belong to him, unleſs granted away. [f] So are all Deodands, Treaſure-Trove of Gold and Silver, Eſtrays, Wreck, Waifs, Goods and Chattels of Felons and Fugitives, and of thoſe put in *Exigent*, in Order to an Outlawry [and outlawed.] And if a Felon hath Freehold held of an inferior Lord, the King ſhall have his Year, Day and Waſte of it. [See 17 *Ed.* 2. *ch.* 16.] He ſhall have all Royal Fiſhes, as Whales and Sturgeons. He ſhall alſo have [g] white Swans, not marked, which have gained their natural Liberty. All Eſtates for want of Heirs (wherein no one can claim Property) belong to the King, or to thoſe that claim under his Grant.

[a] 1 Inſt. 65. a.
[b] Finch 132, 164.
2 Inſt. 47. 452.
[c] See B. 2. ch. 2. poſt.
[d] See B. 2. ch. 4. poſt.
[e] See B. 4. ch. 5. poſt.
[f] 3 Inſt. 57, 132, 133.
[g] 7 Rep. 16.

There are many more Prerogatives which ariſe wholly from the Reaſon of the Common Law, though they are generally againſt the Common Law. But ſtill the Common Law and the Crown Law are not two different Laws; [h] tho' almoſt in every Caſe the Law for the King is not Law for the Subject. The King hath a Prerogative in all Things that are not injurious to the Subject; [i] for the King can do no Wrong: His Prerogative can never extend ſo far. [See the Statute of the *Prerogative*, 17 *Ed.* 2. and the 27 *H.* 8. *ch.* 24.]

[h] Finch 85.
[i] 1 Inſt. 19. b.
2 Inſt. 186, 187, 681.
1 Rep. 44.

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[i] *Nihil aliud poteſt Rex, quam quod jure poteſt.* 9 Rep. 123. 11 Rep. 74. 2 Inſt. 63, 187.
Poteſtas regia eſt facere juſtitiam. 2 Inſt. 374.
Nihil tam proprium eſt imperii quam legibus vivere. 2 Inſt. 63.

The Queen.

k 3 Inſt. 7.

II. The *Queen* is either ſhe that holdeth the Crown by Right of Blood, or elſe ſhe is married to the King: This laſt is called the Queen Conſort. She that holdeth by [k] Blood is in Conſtruction of Law, and by the Statute, the ſame with the King, and hath the like Power in all Reſpects. [See 1 *Mar. St.* 2. *ch.* 1.] But the Queen Conſort is Inferior to the King, and is his Subject: Yet becauſe ſhe partaketh of ſeveral Prerogatives above other Women, I mention her in this Place.

l 1 Inſt. 31. b.
m 1 Inſt. 3. a. 133. a. & b. 4 Rep. 23. b.
n Finch 86. 1 Roll. Abr. 912.

The King may take an [l] Alien to Wife, and ſhe ſhall be endowed notwithſtanding ſhe is an Alien. [m] By the Common Law the Wife of the King, or Queen Conſort, is a Publick Perſon, exempt from the King, and is capable of a Gift of *Lands* from the King, and may ſue and be ſued alone (by *Præcipe*, not by Petition) and may purchaſe, grant, and make Leaſes without the King. She may alſo have in herſelf the Poſſeſſion of [n] *Perſonal* Things during her Life; for ſhe may have an Action in her own Name for them. But both real and perſonal Eſtate go to the King after her Deceaſe, if ſhe does not in her Life-time diſpoſe of them, or bequeath them away by Will.

o 1 Inſt. 133. a.

[o] The Queen, and the King's Son, are not reſtrained by the 1 *H.* 4. *ch.* 6. *Concerning* the *Grants by the King*.

p 1 Inſt. 133. b.
a 2 Inſt. 361. contra.

The Queen ſhall pay no [p] Toll. And if a Tenant of the Queen aliens a Part of his Tenancy to one, and another Part to another, the Queen may diſtrain in any one Part for the Whole, as the King may do. Nor is the Queen bound by the Statute of *Marlebridge*, for driving a Diſtreſs into another County. And in a *Quare Impedit* brought by her, ſome ſay that Plenarty is no Plea [a], no more than in the Caſe of the King.

b 2 Inſt. 18, 50.

No Man may marry the Queen Dowager without the [b] Licence of the King, upon Pain to loſe his Lands and Goods. And if ſhe marry any of the Nobility, or under that Degree, yet ſhe doth not loſe her Dignity; but by the Name of Queen may maintain an Action. Nay, a Foreign Queen marrying a Subject in *England* ſhall bring an Action by the Name of Queen.

c Finch 86. 8 Rep. 28. See of High Treaſon poſt. B. 3. ch. 1. and of Trials B. 4. ch. 5.

[c] Acts of Parliament concerning her need not be pleaded; for the Court muſt take Notice of them, becauſe ſhe is a publick Perſon.

CHAP. III.

Of Subjects. *And therein of the* Clergy *and* Laity. *Of the* Clergy, *as Archbiſhops, Biſhops, Dean and Chapter, Archdeacons, Parſons, Vicars, Curates.*

[*Of the Clergy*] 1 Black. Com. cap. 11. treats of the Clergy only, per totum. 1 Burn. tit. Clergy 324 to 327.

Of Subjects.

A Perſon may likewiſe be conſidered in his Relative or *Civil* Capacity as a *Subject*.

The *Subjects* are the Members of the Commonwealth under the King their Head.

[*The Queen*] See 1 Black. Com. cap. 4. where the learned Judge treats of the King's Royal Family, and (among the reſt) therein of the Queen Conſort 219 to 224. Of the Queen Dowager 224. Of the Prince of *Wales*, and the younger Sons and Daughters of the King, 225.

Aliens living in *England,* are Subjects. [d] An Alien is he that is born out of the *Legiance* of the King. [e] *Legiance* is the true and faithful Obedience of a Subject to his Sovereign. It is either *Perpetual* or *Temporary*. *Perpetual,* where one is born a Subject or hath the Right of a Subject by *Denization,* or *Naturalization.* If one is *Born* in any of the Dominions belonging to the Crown of *Great Britain* in any Part of the World, he is a Subject born. *Denization* (from *Donaiſon, Donatio*) is a Right to be a Subject by Letters Patent of the King. This may be either *General,* as to be accounted in all things as a Subject; or *Particular,* enabling one to ſue only. If it is the former, and he had Iſſue within the Realm before his Denization, that Iſſue is not at Common Law inheritable to his Father. But after Denization he may purchaſe Lands, and the Iſſue born afterwards ſhall inherit. *Naturalization* is a Right of being a Subject, given by Act of Parliament, whereby one is a Subject to all Intents and Purpoſes, as much as if he was born ſo. His Iſſue before the Naturalization ſhall inherit at Common Law, if born within the Realm; ſo if the Iſſue of an *Engliſhman* is born beyond Sea, and that Iſſue is naturalized, he ſhall inherit his Father's Lands.

1 Black. Com. cap. 10. treats of the People, whether *Aliens, Denizens* or *Natives,* per totum.
Foſter 185.
2 Burn. 478.
[d] Lit. 198.
1 Inſt. 129. b.
7 Rep 16. 17.
Kelynge 38.
[e] 1 Inſt. 2. b. 8. a 129. a. and b.
2 Inſt. 741.
7 Rep 4, 5.
2 Cro 539.
Vaugh. 297.

By 11 & 12 W. 3. ch. 6. *All Perſons, being the King's natural born Subjects, may inherit as Heirs to their Anceſtors, though their Anceſtors were born out of the King's Allegiance, and out of his Dominions, as fully as if ſuch Anceſtors had been natural born Subjects.*

But by 25 Geo. 2. ch. 39. *It ſhall not give any Perſon Right to inherit by enabling him to claim or derive his Pedigree through any Alien Anceſtor, unleſs ſuch Perſon ſo claiming was in Being and capable to take as Heir at the Death of the Perſon who laſt died ſeiſed, and to whom he ſhall claim to be Heir; provided that in Caſe the Perſon who ſhall be in Being and capable to take at the Death of the Anceſtor ſo dying ſeiſed, and upon whom the Deſcent ſhall be caſt by Virtue of this and of the laſt Act, ſhall be a Daughter or Daughters of an Alien, and that the Alien Father or Mother through whom ſuch Deſcent ſhall be derived by ſuch Daughter or Daughters ſhall afterwards have a Son born within the King's Dominions, the Deſcent ſo caſt upon ſuch Daughter or Daughters ſhall be diveſted in Favour of the Son, and ſuch Son ſhall inherit in like Manner as by the Common Law in caſe of the Birth of a nearer Heir; or in Caſe ſuch Father or Mother ſhall have no Son, but ſhall have one or more Daughter or Daughters afterwards born within the King's Dominions, the Daughter or Daughters ſo born afterwards ſhall inherit and take in Coparcenary with the Daughter or Daughters upon whom the Deſcent ſhall be caſt at the Death of the Anceſtor laſt ſeiſed.*

By 7 Ann. ch. 5 *and* 4 Geo. 2. ch. 21. *Children of all natural born Subjects, except of Parents at the Time of ſuch Childrens Birth attainted of Treaſon, or in the actual Service of a Foreign Prince in Enmity with the Crown, tho' born out of the Allegiance of the King, ſhall be deemed natural born Subjects.*

By 5 Geo. 1 ch. 27. *Artificers going beyond Sea to work in our Manufactures, or to teach Trades to Foreigners, are to be deemed* Aliens *and to be out of the King's Protection.*

By the 12 *and* 13 W. 3. ch. 2. 1 Geo. 1. ſt. 2. ch. 4. *No* Aliens, *tho' naturalized or made Denizens ſince K.* George *the Firſt's Acceſſion to the Crown, except ſuch as are born of* Engliſh *Parents, ſhall be capable to be of the Privy-Council, or a Member of either Houſe of Parliament, or to enjoy any Office of Truſt, either Civil or Military, or to have any Grant of Lands, Tenements or Hereditaments from the Crown.*

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[e] *Legiantia naturalis nullis clauſtris coercetur.* 7 Rep. 10.

1 Black. Com. 372.

Temporary Legiance is an Allegiance due by Reaſon of Reſidence in the King's Dominions, or becauſe one is made a Denizen only for Life. If one is naturalized for a Day, it is good for Ever.

[a] 5 Rep. 52. 7 Rep. 17, 18. 1 Inſt 2 b. 8. a. 129 b. 261. a. 2 Inſt. 741. 1 Ventr 417, 418, &c 3 Cro 9. 2 Str. 1082. [b] 1 Salk. 46 1 Ld. Raym. 282. Foſter 185, 186.

[a] An Alien can hold no Lands by Deſcent, Deviſe or Purchaſe, nor can an Alien be Tenant by the Curteſy, or in Dower. Neither can he take by Deſcent, but he may by Deviſe or Purchaſe, and the King on Office found ſhall have the Lands; and ſo if he purchaſe Lands and die, the King ſhall have them. There is an Alien *Enemy*, and an Alien *Friend:* An Alien *Enemy* could not formerly ſo much as bring an Action; but now an Alien *Enemy*, who is Reſident here, may maintain Perſonal Actions [b]. An Alien *Friend* may maintain an Action *in auter droit*, as Adminiſtrator, and Perſonal Actions. And ſuch an Alien may purchaſe a *Houſe* for Years, for Habitation during his Reſidency, as neceſſary for Commerce and Trade; but not Lands. This muſt be underſtood of an Alien Merchant; for if the Alien is no Merchant, the King ſhall have the Leaſe for Years, tho' it were for his Habitation. *Sed Qu.* If this is Law at this Day? If an Alien Friend being a Merchant leaves the Realm, the King ſhall have the Leaſe; and if he dies here poſſeſſed thereof, his Executors or Adminiſtrators ſhall not have it, but the King. For he had it only for Habitation, as neceſſary for his Trade and Traffick. [See 32 *H.* 8. *ch.* 16.] [a] Whether his Sovereign be in League with our King, in a Plea of Alien born, ſhall be tried by the Record of the Chancery; for every League is of Record.

[a] 9 Rep 31.

[b] 7 Rep. 24, 25. 3 Inſt. 11. [c] 1 Raym. 1. Show. P. C. 186. S. C.

A Subject cannot be an [b] *Enemy*, though in open War againſt the King; for he is to be uſed as a Traitor. So on the other Hand an Alien *Enemy* cannot be indicted of Treaſon, but an Alien Friend may [c].

See the 25 *Ed.* 3. *St.* 2. 43 *Ed.* 3. *ch.* 10.

Subjects may be *divided* into *Clergy* and *Laity*, *Nobility* and *Commonalty*; and among the Nobility and Commonalty, we ſhall conſider thoſe of the *Military* State.

This is the General Diviſion of Subjects; we ſhall be more particular hereafter.

Of the Clergy, 1 Black. Com. cap. 11. 376.

I. The *Clergy* (from Κλῆρος *Sors*) are thoſe who are choſen to be the Lot and Inheritance of God, and are ſeparate from the Noiſe and Buſtle of the World, that they may have Leiſure to ſpend their Time in Heavenly Meditation and Prayer. The Clergy are called [d] Clerks, and are either *Regular* or *Secular*.

[d] 2 Inſt. 121.

[e] 1 Inſt. 93 b. 94 a. 97. a. 2 Inſt. 151.

Thoſe are [e] *Regular* which live under certain Rules and are of ſome Religious Order, and are called Men of *Religion*, or the *Religious*. Such are all Abots, Priors, &c. There were 118 Monaſteries in *England*, whereof 27 Abbots, and two Priors, were Lords of Parliament.

But *By* 27 *H.* 8. ch. 28. 31 H. 8. ch 13. 32 H. 8. ch. 24. 37 H. 8. ch. 4. 1 Ed. 6. ch. 14. *All Abbeys, Priories, Monaſteries and other Religious Houſes, and alſo all Free Chapels and Chauntries perpetual, were diſſolved, and their Poſſeſſions given to the Crown.*

[Alien] 2 Vezey. 538. Quære whether an Alien may not take by Deviſe, and if he may; for whoſe Benefit, and if he may for the Crown? 2 Vezey. 362. An Alien may take by Purchaſe for the Benefit of the Crown. 2 Atk. 398. There is no Inſtance where it hath been held that a Perſon marrying an Alien Woman is ſeiſed of the Eſtate purchaſed by her, *ib.*

The

[f] The *Secular* are thoſe who live not under any certain Rules of the Religious Orders, as Archbiſhops, Biſhops, Deans, Archdeacons, Parſons, Vicars, Curates.

[f] 1 Inſt, 93. b. 94. a.

The Church ought to have all the Privileges of one [g] under Age. And the Clergy had greater Privileges at Common Law than the Laity, which are confirmed by *Magna Charta*, and other ancient Statutes. But theſe Privileges are loſt, the Clergy being included under general Words in later Statutes. So that Clergymen are liable to all publick Charges impoſed by Act of Parliament, where they are not particularly excepted. Indeed they are not forced to undergo [h] Temporal Offices, by Reaſon of their Lands; to ſerve on Juries, [i] nor to appear at Turns and Leets, or preſſed to ſerve in the Wars in Perſon, (tho' they are always obliged by Statutes to contribute to the Charge of a War, and to Muſters of the *Militia*) or perhaps their Bodies are not to be taken upon Statutes Merchant or Staple, or a Recognizance in the Nature of a Statute Staple (for the Writ to take the Body of the Conuſor is *Si laicus ſit.* See *Weſt.* 2. *ch.* 18.) or perhaps he that beats a Clergyman may ſtill be obliged to do [a] Penance in the Spiritual Court; [See 13 *Ed.* 1. *ſt.* 4.] or a Clergyman may not be arreſted in the Church, or Church-Yard, while he is attending on Divine Service. [See 50 *Ed.* 3. *ch.* 5. 1 *R.* 2. *ch.* 15.] But theſe are all the Privileges remaining on *Civil* Accounts. They are uſed like other Men in *Criminal* Caſes, [b] except as to Burning in the Hand for Felony; from which, upon producing their Orders, or the Ordinary's Certificate, they ought to be freed. And though they have had the Privilege of the Clergy for a Felony, yet they may again have their Clergy, and ſo cannot a Layman. [See the 4 *H.* 7. *ch.* 13. 32 *H.* 8. *ch.* 3. 34 & 35 *H.* 8. *ch.* 14. 1 *Ed.* 6. *ch.* 12. 5 *Ann. ch.* 6.]

[g] 2 Inſt. 3.

[h] F. N. B. 175. 1 Inſt. 96. a. 2 Inſt. 3, 4. 625, 1 Vent, 105.

[i] 2 Inſt. 4.

[a] 2 Inſt. 492, 608, 620.

[b] 2 Inſt. 636. Hob. 288, 294. H. P. C. ch. 51.

In the Clergy there are *Archbiſhops*, *Biſhops*, *Deans and Chapters*, *Archdeacons*, *Parſons*, *Vicars*, *Curates*, and antiently there were *Pariſh Clerks*.

1. An *Archbiſhop* is the Chief of the Clergy in one Province only; and is that Spiritual Secular Perſon, who hath Supreme Power under the King, within his Province, in all Eccleſiaſtical Cauſes. [For the *Manner of his Creation* ſee 25 *H.* 8. *ch.* 20.] The Archbiſhop of *Canterbury* is ſtiled [c] *Metropolitanus & Primas totius Angliæ*; and the Archbiſhop of *York* is ſtiled *Primas & Metropolitanus Angliæ*. They are called *Archbiſhops* in reſpect of the Biſhops under them; and *Metropolitans*, becauſe they were conſecrated at firſt in the *Metropolis* of the Province. *Primate* is a Degree betwixt an Archbiſhop and a Patriarch. The Archbiſhop of *Canterbury* hath the Precedency, before all the Nobility, and next to thoſe of the Royal Blood; then the Lord Chancellor, and then the Archbiſhop of *York*. [See 31 *H.* 8. *ch.* 10 *For placing of the Lords.*]

Archbiſhop. 1 Black. Com. 377 to 382, 155.

[c] 1 Inſt. 94. a.

[d] Both the Archbiſhops have diſtinct Provinces, and each hath within his Province Suffragan Biſhops of ſeveral Dioceſſes with Juriſdiction under them: But each Archbiſhop hath alſo a Dioceſs within his Province.

[d] See P. Ante

It is the Right of an Archbiſhop to call the Biſhops and Clergy of his Province to Convocation [e], upon the King's Writ. Each Archbiſhop is the *Ordinary* of the whole Province, to Viſit it, and to receive Appeals from inferior Juriſdictions within his Province: For regularly an Archbiſhop has no Juriſdiction over the Subjects of the Suffragans, un-

[e] See B 4. ch. 1. poſt.

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[g] *Eccleſia eſt infra ætatem, et in cuſtodia Domini Regis.* 2 Inſt. 3.

leſs in his *Viſitation*, or upon *Appeals.* [But ſee 23 *H.* 8. *ch.* 9.] An [f] *Ordinary* (a Name taken from the Canoniſts) is he that has Juriſdiction in his own Right, and not by Deputation: And this Name is only applied to a Biſhop, or any other that hath an Original Juriſdiction in Cauſes Eccleſiaſtical. But in ſome late Statutes, Chancellors, Comiſſaries, Archdeacons, are ſtiled Ordinaries.

An Archbiſhop hath Juriſdiction over his Suffragans; he *Confirms* the Election of Biſhops within his Province, and afterwards *Conſecrates* them; and hath the *Option* of a Dignity or Benefice in the Gift of every Biſhop conſecrated by him, which the Biſhop then Aſſigns to him by Deed, to diſpoſe of it at the next Vacancy: He may appoint *Co-adjutors* to a Biſhop that is grown infirm, or diſabled to manage his Charge: He may cenſure and excommunicate, ſuſpend or [g] depoſe them for Cauſe.

During the Vacancy of any See within his Province he is [a] *Guardian* of the *Spiritualties* by Preſcription or Compoſition, whereby all Epiſcopal Eccleſiaſtical Rights of the Dioceſs belong to him for that Time, and all Eccleſiaſtical Juriſdiction. But when an Archiepiſcopal See is vacant, the Dean and Chapter of his Dioceſs are Guardians of the Spiritualties; that is the Spiritual Juriſdiction of his Province and Dioceſs is committed to them [b].

By 21 H. 8. ch. 13 *Each Archbiſhop may retain eight Chaplains.*

By 25 H. 8. ch 21. *The Archbiſhop of* Canterbury *has Power of* diſpenſing *in any Caſe, wherein Diſpenſations (not contrary to the Law of God) were formerly granted by the See of* Rome; *and may grant ſuch Diſpenſations to the King as well as to his Subjects; but if the Caſe is new, the King and his Council are to be conſulted; ſuch Diſpenſations,* &c. *not to be granted out of the Realm, nor in any other Manner.*

During the Vacancy of the See of Canterbury, *the Guardian of the Spiritualties ſhall grant Diſpenſations.*

Notwithſtanding the [c] negative Clauſe in the Act, the King's Authority remains as before at Common Law; the Archbiſhop is only enabled by the Statute to have a concurrent Power with the King. Therefore if the Diſpenſation is to be in Matters extraordinary, it is Prudence to have it confirmed under the Great Seal.

The Archbiſhop of *Canterbury* grants theſe Diſpenſations [d], not only within his own Province, but in the Province of *York,* by Virtue of this Statute; the Statute allowing only to the Archbiſhop of *York* and other Biſhops, to diſpenſe as they were wont to do by the Common Law and Cuſtom of the Realm.

By Virtue of this Statute, the Right of Conferring *Degrees* of all kinds, is veſted in the Archbiſhop of *Canterbury.*

If an Archbiſhop *reſigns*, it muſt be to the King as ſupreme Ordinary.

As to the Cuſtody of the [e] *Temporalties* of an Archbiſhop during the Vacancy of the See, it belongs to the King, as in the Caſe of a Vacancy of a Biſhoprick, to be mentioned hereafter.

Biſhop.

2. A [f] *Biſhop* ſimply ſo called, (for the Pope, a Patriarch, a Primate and an Archbiſhop is a Biſhop) is the Archbiſhop's Suffragan, or Aſſiſtant under him; for *Suffragari* ſignifies to help or aſſiſt. [For the *Manner* and *Order* of his *Election*, *Confirmation*, and *Conſecration*, ſee 25 *H.* 8. *ch.* 20.]

He muſt be full [g] thirty Years of Age. [h] All the Biſhopricks in *England* are of the King's Foundation, and therefore the Power of chuſing them is lodged in the Crown; and this Power is recognized by 25 *H.* 8. before-mentioned. The Biſhopricks in *Wales* were founded by the Princes of *Wales*, and came to the Crown of *England* by Forfeiture; ſo that now the King is Patron of all. At this Day the Biſhopricks of [i] *Ireland* are donative, and not elective.

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[f] 1 Inſt. 96. a 344 a. 2 Inſt 398. 9 Rep. 41.

[g] Salk. 134. 1 Ld. Raym. 447. S C. 541. 3 Inſt 204 11 Rep 49.

[a] 2 Roll. Abr. 223.

[b] See of Eccleſiaſtical Courts poſt B. 4. ch. 1.

[c] 1 Cro. 542, 601.

[d] See Faculty Court poſt. B. 4. ch. 1. 1 Black. Com. 382.

[e] 2 Inſt. 15.

[f] 2 Inſt. 79. 1 Black Com. 155, 377, 401.

[g] Preface to the Ordination Service.

[h] 1 Inſt. 97. a. 134. a. 344. a.

[i] 2 Roll. Abr. 342.

Every Biſhop is an *Ordinary*; and [k] hath Juriſdiction in his Dioceſs at his *Confirmation*, and therefore the Guardian of the Spiritualties ceaſes to act from that Time.

[k] 8 Rep. 69.

Upon his [l] *Conſecration*, he has a Right to his Temporalties, in which he hath an abſolute Fee. He cannot ſue for them till his Conſecration is certified by the Archbiſhop; but the King may grant his Temporalties immediately after Election and Confirmation. [See *Godolphin's Repert. Canon.* for the Order of making a Biſhop.]

[l] 1 Roll. Abr. 880, 881, 882.
1 Inſt. 67. a.

He is Overſeer of the Manners of the People of his Dioceſs, and has great Authority in the Church: He hath his Conſiſtory Court [a] to hear Eccleſiaſtical Cauſes, and may viſit the Clergy and Laity within his Juriſdiction, and the [b] Hoſpitals therein if they are Spiritual; if Lay, the Patron ſhall viſit them. [But ſee 2 *H.* 5. *ch.* 1. 25 *H.* 8. *ch.* 20, 21. 31 *H.* 8. *ch.* 13. 39 *El. ch.* 5. 21 *Ja.* 1. *ch.* 1.] When he viſits the Clergy he hath a Fee called *Procurations*, in lieu of an Entertainment that was to be procured. He may conſecrate Churches and Altars, ordain Prieſts and Deacons, admit and inſtitute Prieſts into Benefices, confirm after Baptiſm, ſuſpend and depoſe the offending Clergy, impoſe Purgation and Penance, excommunicate both Clergy and Laity, diſpenſe by granting Licences and Faculties; [See 3 *H.* 8. *ch.* 11. For *Phyſicians* and *Surgeons.* 1 *J.* 1. *ch.* 4. 13 & 14 *Car.* 2. *ch.* 4. for *Schoolmaſters*] Grant Probate of Wills, and Letters of Adminiſtration of Inteſtates Eſtates.

[a] See B. 4. ch. 1. poſt.
[b] Lit. 136.
10 Rep. 31.
1 Inſt 96. a. 282. a 344. a.
2 Inſt 725.
2 Rol. Abr. 230.
See of Corporations poſt, ch. 8.

He is regularly the immediate [c] Officer to the higheſt Courts of Record in Cauſes Eccleſiaſtical: None but the King, *i. e.* his Courts of Record, can write to the Biſhop, to certify Excommunication, General Baſtardy, [See 9 *H.* 6. *ch.* 11.] Mulierty (*i. e.*) Legitimation, Loyalty or Lawfulneſs of Matrimony, *&c.*

[c] 1 Inſt. 134. a.
2 Inſt, 97, 99, 325.
3 Black Com. 335.
Co. Lit. 74 a.

Every Biſhop hath his Chancellor (*i. e.* the Principal Official) and his Vicar General, commiſſioned by him to aſſiſt in all Matters and Cauſes Eccleſiaſtical, within his Dioceſs. [d] The Offices of the Principal Official, and Vicar General, are two diſtinct Offices, tho' they are uſually united. His Commiſſary is he that is limited by the Biſhop to ſome certain Place of the Dioceſs, to aſſiſt him; and in moſt Caſes hath the Authority of a Principal Official and Vicar general within his Limits.

[d] Lyndewood De Sequeſt. poſſ. & Fruct. cap. Frequens, verb. Vicarios Generales.

If the See of a Biſhop is vacant, the Archbiſhop of the Province is Guardian of the *Spiritualties* by Preſcription in *England*, as before obſerved; tho' by the Canon Law, the Dean and Chapter was to take Care of the Spiritual and Temporal Juriſdiction belonging to the Biſhoprick. The Guardians of the Spiritualties have all Manner of Juriſdiction of the Courts; as the Power of granting Licences and Diſpenſations, Probate of Wills, Adminiſtrations, during ſuch Vacancy; and of admitting and inſtituting Clerks preſented to them; but they cannot (as ſuch) conſecrate or ordain, or preſent to vacant Benefices.

The Cuſtody of the [e] Temporalties of every Biſhop (as well as of an Archbiſhop) after the Sees are vacant, belongs to the King as Founder, during the Vacancy; ſo that no Subject can claim the Temporalties of an Archbiſhop or Biſhop, by Grant or Preſcription: [f] During the Vacancy;

[e] F. N. B. 32. 34
2 Inſt. 15.
[f] 1 Roll. Abr. 821.

cancy, The Freehold of the Temporalties is in the King. The Temporalties are all ſuch Things as a Biſhop hath by Livery from the King; as Caſtles, Manors, Lands and Tenements, Advowſons, Tithes. Theſe the King may commit during the Vacancy. [See *Magna Charta*, *ch.* 5. and the 14 *Ed.* 3. *ſt.* 4. *ch.* 4 & 5.]

[g] 1 Inſt. 67. a. 341. b. 1 Roll. Abr. 821.

[g] When an Archbiſhop or Biſhop hath done Homage to the King, and received his Temporalties of him, he hath in them a Fee-ſimple abſolute, and may maintain a writ of Right.

1 Black. Com. 382.

A Biſhop muſt *reſign* to the Archbiſhop, not to the Dean and Chapter.

By 21 H. 8. ch. 13. *Each Biſhop may qualify ſix Chaplains.*

By 25 H. 8. ch 21. *A Biſhop may diſpenſe in Caſes accuſtomed.*

By 26 H. 8. ch. 14. *There may be Biſhops Suffragans in ſeveral Towns.* [See the 31 H. 8. ch. 10. *For placing the Lords.*]

By 6 Ann. ch. 27. ſ. 5. *Four Years are allowed to Archbiſhops and Biſhops to pay their Firſt-Fruits, paying one Fourth of the whole Sum yearly.*

[What Leaſes made by Biſhops may be good, See of *Leaſes* and *Confirmation*, *B.* 2. ch. 3. and *Stat.* 5. *Geo.* 3. ch. 17. *as to Leaſes of Tithes*, *&c.*]

Dean and Chapter. 1 Black. Com. 382, 383. [a] 1 Inſt 94. a. [b] 1 Inſt. 301. a. [c] 1 Inſt. 95. a.

3. [a] Every Archbiſhop and Biſhop hath a *Dean* and *Chapter*, and a Biſhop may have [b] two Chapters.

The [c] *Dean* (*Decanus à* δέκα ten, for at firſt he was over ten Canons and Prebendaries) is an Eccleſiaſtical Secular Governor next under the Biſhop, and is Head of the Chapter. The antient Deans, as the Dean of *York*, St. *Paul*'s, &c. are choſen by the Chapter, by a *Conge d'elire*, (or Licence to proceed to Election) from the King, as Biſhops are: And (the King afterwards giving his Royal Aſſent) they are confirmed by the Biſhop, who gives his Mandate to have them inſtalled. But the new Deans (which are either newly tranſlated or founded) are *Donative*, and are inſtalled by the King's Letters Patent, without Election or Confirmation, [d] and are viſitable only by the Lord Chancellor, or by ſpecial Commiſſion from the King. But the Letters Patent are preſented to the Biſhop for Inſtitution, and a Mandate for Inſtalment goes forth.

[d] Davis 46, 47.

[e] 1 Inſt 325. b. 341. b.

A Dean that is ſolely ſeiſed of a diſtinct Poſſeſſion hath an [e] abſolute Fee in him, as well as a Biſhop.

[f] 1 Inſt. 95. a.

[f] A *Chapter* (*Capitulum*) is a Congregation of Clergymen under one Dean in a Cathedral Church. They make a Spiritual Corporation. The Chapter in a Collegiate Church is more properly called a College, as at *Weſtminſter*, and *Windſor*, where there is no Epiſcopal See. And where there are Chapters without a Dean, as at *Southwell*, thoſe are not properly Chapters. Chapters as well as Deans are antient and new, and were either tranſlated or founded by *H.* 8.

[g] Dyer 233. Dav. 47, 48.

Whenever a Dean and Chapter do confirm Grants, *&c.* [g] the Dean muſt join with the Chapter. A Deputy Dean cannot make a Grant or Confirmation, unleſs the Statutes of the Church expreſly give the Deputy Dean that Power, in the Abſence of the Dean: And then Confirmations and Grants made by the major Part of the Corporation are good. But the Dean, or any other, hath not a negative Voice. [See 33 *H.* 8. *ch.* 27.] There muſt be the Conſent of the major Part, and their Conſent muſt be expreſſed by fixing of their Seal to the Deed in one Place and at one Time; either in the Chapter-Houſe, or ſome other certain Place: For when they meet in any Place, that is the Chapter-Houſe.

It was thought neceſſary, That every Biſhop ſhould be aſſiſted with a Council, (*viz.*) a *Dean* and *Chapter*, to aſſiſt him in Affairs of Religion and in his Temporal Concerns; 1. To conſult with him in deciding difficult Controverſies in [h] Religion; to which Purpoſe every Biſhop hath his *Cathedra* in the Chapter. 2. To conſent to every Grant which the [i] Biſhop ſhall make to bind his Succeſſors: For the Law did not judge it reaſonable, to repoſe Confidence in the Biſhop alone as to the Diſpoſal of the Inheritance of the Church. But the Dean and Chapter hath nothing to do with that which the Biſhop does as [a] Ordinary. [b] In other Things they remain a Dean and Chapter to aſſiſt him, though they ſurrender all their Poſſeſſions to the King; for they were a Chapter before they had Poſſeſſions.

The Biſhop and Chapter are but one Body, yet their Poſſeſſions (for the moſt Part) are divided: The Biſhop hath his Part, the Dean hath a Part alone in Right of his Deanery, and each particular Prebendary a certain Part in Right of his Prebend; and each is incorporate by himſelf: The Dean and Chapter have the Reſidue in Common: The Dependance on the Biſhop by Degrees grew leſs and leſs, tho' they were at firſt maintained out of his Eſtate; and tho' now they have diſtinct Parcels of the Biſhop's Eſtate aſſigned for their Maintenance, the Biſhop hath little more left him than a Power of [c] Viſiting the Dean and Chapter, and is ſcarce allowed to nominate Half of thoſe to their Prebends, who were originally of his Family: But of Common Right he is their Patron.

A Chapter of itſelf is not capable to take by Gift or Purchaſe [d], without the Dean.

Deans and Chapters have ſometimes an Eccleſiaſtical Juriſdiction in ſeveral Pariſhes, beſides that Authority which they have within their own Body: This Eccleſiaſtical Juriſdiction is executed by their *Officials*. And they have alſo Temporal Juriſdictions in ſeveral Manors belonging to them, as well as Biſhops, where their Stewards keep Courts.

[e] The *Reſignation* of a Deanery may be made to the King, as well as to a Biſhop.

By 25 H. 8. ch. 20. *The Dean and Chapter muſt elect the Perſon to be Biſhop whom the King Names.*

The Dean and Chapter of Canterbury, *and the Dean and Chapter of* York, *are Guardians of the Spiritualties of their reſpective Archbiſhopricks, during a Vacancy.*

See 31 *El. ch.* 6. againſt Abuſes in Elections of Scholars, *&c.* 6 *Ann. ch.* 21. Concerning the Statutes of Cathedral Churches founded by King *H.* 8. and the 6 *Ann. ch.* 27. How Deans and other Dignitaries ſhall compound for the Firſt-Fruits.

How the Grants or Leaſes of a Dean, Prebendary, *&c.* muſt be confirmed, See of *Confirmation*, *B.* 2. *ch.* 3.

There are ſome Deans in *England* without any Juriſdiction, as the Dean of the Chapel Royal, the Dean of the Chapel of St. *George* at *Windſor*. And ſome Deans there are without any Chapter, and yet they do enjoy ſome Juriſdiction, as the Dean of *Croydon*, the Dean of *Battel*, *Bockin*, &c.

The Power of *Rural* Deans is almoſt extinguiſhed.

4. An *Archdeacon* (heretofore the firſt and chief of the Deacons) is ſuch a one that hath obtained an Eccleſiaſtical Dignity in a Cathedral Church,

[h] 3 Rep. 75.

1 Inſt. 103. a.

[a] 1 Inſt. 300 b.

[b] 3 Rep. 75.

[c] 2 Roll. Abr. 229.

[d] See poſt. B. 2 ch. 2.

[e] Plowd. 498. 5 Rep. in Cawdrie's Caſe. 4 Black. Com. 115.

Church, and a Juriſdiction over the Clergy and Laity, next after the Biſhop throughout the Dioceſs, or in ſome Part of it only: But he cannot regularly exerciſe any Juriſdiction within the Cathedral Church. And indeed he hath no original Juriſdiction, but what he hath got is from the Biſhop, either by *Preſcription* or *Compoſition*, and (as the Dean and Chapter) he derives his Juriſdiction from him; and yet he is allowed to be an [a] *Ordinary*, becauſe now he hath a Branch of Epiſcopal Power in his own Right.

[a] 2 Cro. 556. 1 Lev. 193.

An Archdeacon therefore may viſit his Juriſdiction once every Year; ſome viſit twice every Year, by Preſcription: He is intitled to Procurations [b]. He hath a Court where he may enjoin Penance, ſuſpend, excommunicate, prove Wills, grant Adminiſtrations of Inteſtates Eſtates, and hear Cauſes, of Eccleſiaſtical Cognizance. In many Places Archdeacons grant Licences and Faculties.

[b] See ante.

It is one Part of the Archdeacon's Office to examine the Candidates for Holy Orders, and to *Induct* or put into Poſſeſſion all Clerks into their Benefices within his Juriſdiction, upon Receipt of the Biſhop's Mandate. [c] But by Preſcription, the Dean and Chapter of St. *Paul*'s and *Litchfield*, do induct: And the Grantee of the King, of a free Chapel, is put into Poſſeſſion by the Sheriff of the County; ſo the Dean of *Battel* is ſaid to be inducted by the Patron. And in ſome Places a Prebendary ſhall have preſent Poſſeſſion where the King collates by Letters Patent, as at *Weſtminſter*. Uſage generally takes Place.

[c] 2 Rol. Abr. 356, 357, 379. Watſon 275, 276.

He hath an *Official* [d] (or Church Lawyer) to aſſiſt him; from whom, as well as from the Archdeacon, an Appeal lies to the Biſhop of the Dioceſs. [See 24 *H.* 8. *ch.* 12. And ſee 6 *Ann. ch.* 27. How Archdeacons ſhall compound for their Firſt-Fruits.]

[d] See of the Archdeacon's Court B. 4. ch. 1 poſt.

Parſon 1 Black. Com. 384.

5. A [e] *Parſon* is a Rector of a Church Parochial, and is called *Perſona Eccleſiæ*, becauſe he taketh upon him the Perſon of the Church, and is ſeiſed in Right of his Church, that in his Perſon the Church might ſue for and defend her Right, and alſo be ſued by any that have an Elder Right. The Word [f] *Eccleſia* is always applied to a Parſonage, as *Vicaria* is to a Vicarage: But the Word [g] *Parſon*, in a large Senſe, includes alſo Vicars, Prebendaries, *&c.*

[e] 1 Inſt. 300. a. & b.

[f] F. N. B. 32.

[g] 2 Inſt. 407.

* A *Church*, in a ſtrict Senſe, ſignifies the Building only; [h] and if it hath Adminiſtration of the Sacraments and Sepulture, it is in Law adjudged a Church: Theſe Divine Adminiſtrations make it a Church. [i] Any good Chriſtian may build a Church without Licence; but the Law takes no Notice of it as a Church till it is conſecrated by the Biſhop: And this is the Reaſon why Church or no Church, Chapel or no Chapel, ſhall be tried and certified by the Biſhop.

[h] 2 Inſt. 363.

[i] 3 Inſt. 202, 203.

A *Parſonage*, or a Rectory, is a Pariſh-Church endowed with a Houſe, Glebe, and Tithes, and ſuch originally were all Pariſh-Churches. Glebe is the Church Lands excluſive of the Tithes.

[k] A Chapel of *Eaſe* is that which is built for the Eaſe of thoſe Pariſhioners who dwell far from the Parochial or Mother Church: It is for

[k] 2 Roll. Abr. 340, 341.

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* [*Church*] Is from the Anglo-*Saxon* Word *Cyrcea* or *Cyrce*, the Alamanni *Kiricha* or *Chirih*, the Cimbrick *Kirkia* or *Kurk* Daniſh *Kircke*; probably from the Greek Word κυριακὸν belonging to the Lord, or from κυρὶο οἶκος the Houſe of the Lord: In the North of *England* and *Scotland* it is ſtill called *Kirk*; Names of Towns in the North are taken from the Situation of the Churches, as *Kirkby Kendal*, i. e. the Church by the River *Kent* in the Dale or Valley. *Kirkby Lonſdale*, the Kirk by the River *Lon* in the Dale or Valley.

their Eaſe in Prayer and Preaching only; for the Sacraments and Burials ought to be performed in the Parochial Church. Here, generally, the Curate is removeable at the Pleaſure of the Rector or Vicar. But a Chapel of Eaſe may be Parochial too, and have a Right to Sacraments and Burials and to a diſtinct Miniſter by Cuſtom, though ſubject in ſome Reſpects to the Mother Church.

A *Free* Chapel is that which is perpetually maintained and provided with a Miniſter, without Charge to the Rector or Pariſh; or that which is Free and exempt from all ordinary Juriſdiction[a]. [See the 1 *Ed.* 6. *ch.* 14.]

The Parochial Church and Church-yard are the Freehold of the Parſon, and he may let a [b] Leaſe of the Church-yard. [See 15 *R.* 2. *ch.* 5.] But the beneficial Uſe of the Body of the Church and Church-yard, and the Maintenance, or [c] Repairs thereof belong to the Pariſhioners by the Cuſtom of *England*. So that a Pariſhioner may preſcribe in Right of his Meſſuage to repair and ſit in a particular Pew or Iſle[d], or for a particular Iſle, Vault or Place in the Church or Church-yard to bury in; but the Direction of the Seats, the building Galleries or new Pews, or erecting Monuments, which is not a Right conſequent upon that of Burial, and all other Directions neceſſary for the Service and Maintenance of the Church, and the Celebration of publick Worſhip, are in the Ordinary who grants Faculties for thoſe Purpoſes. [e] The *Freehold* of the Church, Church-yard and Glebe, after Induction, are in the Parſon; but not the Fee-*ſimple*; for that is not in any one, but always in Abeyance (from the *French* Word *Bayer*, to expect) or Remembrance of the Law: So if the Parſon dies, during the Voidance the Freehold of the Glebe is in Abeyance till another is made. And ſo it is of a Biſhop, Dean, Archdeacon, Prebendary, Vicar. Though a Parſon, for the Benefit of his Church, in ſome Caſes hath a Fee-ſimple qualified[f]; yet in other Reſpects he hath in effect but an Eſtate for Life. [g] But an Archbiſhop, or Biſhop, or Dean ſolely poſſeſſed, hath a Fee-ſimple abſolute, as hath been ſaid.

[h] A Parſon may have an Action for any Treſpaſs committed in the Church or Church-yard. [i] For defacing a Monument, they that build the ſame ſhall have an Action during their Lives; afterwards the Heir of the deceaſed; for theſe Monuments ſerve for Proof of Deſcents and Pedigrees. The Carcaſs that is buried belongs to no one; but is ſubject to Eccleſiaſtical Cognizance, if abuſed or removed. Neither the Ordinary, nor the Churchwardens, can grant Licence to bury in the Church, but the Parſon only. *Sed Qu.* and ſee the Caſes above referred to.

By 35 Ed. 1. ſt. 2. *The Parſon cannot cut down Trees growing in the Church-yard, unleſs for the Repair of the Chancel, or* (*in Charity*) *of the Body of the Church.*

[See 10 *Ann. ch.* 11. For building Fifty New Churches in and about *London* and *Weſtminſter*, and the Suburbs thereof.]

We will now enquire, 1. How one may be *made* a Parſon of a Church.
2. How one may *ceaſe* to be a Parſon.

1. The Things requiſite to *make* a Parſon of a Church, are, *Holy Orders*, *Preſentation*, *Inſtitution*, and *Induction* into a Rectory.

As to *Holy Orders*, [k] None is to be ordained Prieſt or Deacon without a *Title*. A *Title*, is ſome certain Place where one may exerciſe his

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[a] See of the Court of Peculiars poſt. B. 4. ch. 1.

[b] 2 Roll. Abr. 337. 2 Str. 1126.

[c] 2 Inſt. 653. 1 Wilſon 326.

[d] Corven's Caſe 12 Rep. 2 Cro. 605. 3 Lev. 73. 2 Mod. 8. Cart and Marſh K. B. Mich. 11. G. 2. Pawſon and Scot K. B. Hil. 28. G. 2.

[e] Lit. Sect. 644, 645, 646, 647, 648. 1 Inſt. 341. a. 342. b.

[f] See of Fee-ſimple, B. 2. ch. 1.

[g] 1 Inſt. 67 a.

[h] 1 Inſt. 341. a. & b.

[i] 1 Inſt. 18. b. 2 Cro. 366.

1 Black. Com. 388. See 2 Burn. Eccl. law 103.

[k] Can. 33.

Function. For a wandering Clergyman will be a Scandal to Religion: But though one has a Title, the Biſhop may refuſe to ordain him Prieſt or Deacon, without giving a Reaſon. When he is to be ordained, he is to be ordained by a Biſhop, according to the Book of Common Prayer. [See 5 & 6 *Ed.* 6. *ch.* 1. and the 13 & 14 *Car.* 2. *ch.* 4.]

By 13 El. ch. 12. *One cannot be ordained Prieſt, or admitted to preach or adminiſter the Sacraments, under twenty-four Years of Age, nor unleſs he bring to the Biſhop a Teſtimonial of his honeſt Life, and of his profeſſing the Doctrine of the thirty-nine Articles of Religion, in the Year* 1562. *and unleſs he is able to render to the Ordinary an Account of his Faith, in* Latin, *according to the ſaid Articles, or have a ſpecial Gift to be a Preacher; nor ſhall be admitted to the Order of Decon, or the Miniſtry, unleſs he ſhall firſt ſubſcribe the ſaid Articles. All Diſpenſations to the Contrary to be void.*

Therefore if one is made Prieſt before the Age of twenty-four compleat, he can never be a Statutable Parſon. [*Qu.* if it is not uſual to grant Orders *currente anno?*]

[a] 4 Inſt. 324. 1 Cro. 252.

[b] 4 Inſt. 323.

To ſubſcribe the thirty-nine Articles with this Addition, (*viz.*) [a] *So far forth as the ſame are agreeable to the Word of God*, is not a Subſcription according to this Statute; becauſe the Statute requires an abſolute Subſcription, and without Reſerve. [b] *Note*, That this Act confirms and eſtabliſhes the thirty-nine Articles.

[c] Preface to the Ordination Service, § 7.

[c] None ſhall be ordained *Deacon*, except he be twenty-three Years of Age, unleſs he have a Faculty or Diſpenſation; which gives a Latitude to the Archbiſhop to diſpenſe with one to be made Deacon at what Age he pleaſes. But he cannot diſpenſe with the Age of one that is to be made Prieſt, becauſe that Age is fixed by Statute.

He that is to be ordained Prieſt or Deacon muſt take the Oaths appointed inſtead of the Oaths of Allegiance and Supremacy. [See 1 *El. ch.* 1. 1 *W. & M. Seſſ.* 1. *ch.* 8. and 6 *A. ch.* 7.

By 31 El. ch. 6. *If any Perſon ſhall receive directly or indirectly, any Reward or Aſſurance thereof (all ordinary Fees excepted) for or to procure the* Ordaining *of any Miniſter, or giving Orders, or Licence to preach, he ſhall forfeit forty Pounds, and the Party ſo corruptly ordained,* &c. *ten Pounds: And if at any Time within ſeven Years next after ſuch corrupt entring into the Miniſtry, he ſhall take any Benefice, or Eccleſiaſtical Promotion, it ſhall be void immediately after Induction.*

1 Black. Com. 389.
1 Burn. Eccl. Law 103.
[d] See of Advowſon, poſt. B. 2. c. 2.
[e] 1 Inſt. 119. b. 120. a.
6 Rep. 49.
[f] 5 Rep. 58.
2 Roll. Abr. 355, 632.
[g] 2 Inſt. 631, 632.
4 Inſt 338,
5 Rep. 57, 58.

As to *Preſentation*. When one is ordained he may be *Preſented* to a Parſonage [d] or Vicarage, by the Patron: That is, the Patron may [e] offer his Clerk to the Biſhop of the Dioceſs, to be inſtituted to his Church. But the Clerk may be refuſed if the [f] Patron is excommunicate, or if the Clerk himſelf is not *Perſona Idonea*; which includes [g] Ability in Learning, and Honeſty in Converſation. If the Perſon is outlawed, excommunicate, a Layman, under Age, a Man of ill Life and Converſation, a Heretick, Schiſmatick, an Alien, [See 3 *Ric.* 2. *ch.* 3. 7 *Ric.* 2. *ch.* 12.] unlearned, the Biſhop upon Examination may refuſe the Perſonpreſented. [See 9 *Ed.* 2. *ch.* 13.] But in a *Quare Impedit* brought againſt the Biſhop for Refuſal of the Clerk, he muſt ſhew the Cauſe of his Refuſal ſpecially and directly. Becauſe the Clerk is of ill Life and Converſation, or a Schiſmatick in general, is not ſufficient, without ſhewing what Crimes, or ſort of Schiſm he has been guilty of. The Temporal Court then will judge whether the Cauſe be juſt or not: And if the Party denies the ſame, the Court may write to the Metropolitan to examine the

Matter, andcertify it: And tho' the Matter be of a Spiritual Nature, it ſhall be tried by a Jury. For whether the Cauſe be Temporal or Spiritual, the Examination of the Biſhop concludes not the Clerk; for tho' the Biſhop is Judge of the Ability, he is not the ultimate Judge. But in Caſe of Refuſal for Inſufficiency in Learning, it hath been adjudged, [a] That the Ordinary is not accountable to any Temporal Judge; and that *in Literaturâ minus ſufficiens* is a good Plea, without ſetting forth the *kind* of Learning, or the *degrees* of it. [b] That the Preſentee has a Benefice already is no good Cauſe of Refuſal. For Crimes that are [c] *Mala in ſe*, as Incontinency, Drunkenneſs, Perjury, he may be refuſed; but not for Crimes that are *Mala prohibita*, as haunting Taverns.

[d] If a Biſhop once refuſes a Clerk for Inſufficiency, he cannot accept of Him afterwards, if a new Clerk is preſented.

As for *Inſtitution*, [e] When the Ordinary upon Examination finds the Clerk qualified in all Reſpects, he *Admits* him, or approves of him; and thereon actually *inſtitutes* him in theſe Words, from a Written Inſtrument under his Seal, (*viz.*) *Inſtituo te Rectorem Eccleſiæ parochialis de A. cum Curâ Animarum, & accipe Curam tuam & meam.* The Biſhop (or Vicar General ſometimes, if his Patent impowers him) may inſtitute as well out of the Dioceſs as within it, for his Power is not local. If the Inſtitution is ſuſpected to be void, for want of Title in the Patron, a [f] *Superinſtitution* hath been ſometimes granted to another, to try the Title of the preſent Incumbent by Ejectment.

By 31 El. ch. 6. *A taking a Reward for* Inſtitution *is Forfeiture of the double Value of one Year's Profit, and makes the Living void.*

By 13 El. ch. 12. *Thoſe that are to be admitted to any Benefice with Cure, muſt ſubſcribe to the thirty-nine* Articles, *in the Preſence of the Ordinary.* See the 36 *Canon* of King *James*, and the 13 & 14 *Car.* 2. *ch.* 4. An Act for Uniformity, *&c.* 1 *W. & M. ch.* 18. in Relation to the 39 Articles; and 23 *Geo.* 2. *ch.* 28. for explaining Part of 13 & 14 *Car.* 2. and 13 *El.*

When the Biſhop has given Inſtitution, he iſſues out his *Mandate* to the Archdeacon to *Induct* the Clerk; and thereupon iſſues out a Commiſſion to ſome neighbouring Clergymen and others (if he himſelf cannot be perſonally preſent) to act for him.

The *Induction* is performed by Delivery of the Ring of the Church-Door, or a Bell-Rope, to the newly inſtituted Clerk, that he may toll the Bell, *&c.* and ſhew that he hath taken Corporal Poſſeſſion. If the Archdeacon [g] refuſes to induct, or to grant a Commiſſion to others to ſupply his Place, an Action on the Caſe lies againſt him; for Induction is a temporal Act; or he may be cited into the Biſhop's Conſiſtory-Court, to anſwer for his Contempt [h].

[i] By Preſcription or Compoſition, other Perſons, as well as Archdeacons, may make Inductions.

If after a *Caveat* entered againſt an Inſtitution, a Clerk is preſented, inſtituted, and inducted, the Inſtitution, *&c.* is not void; for it [k] is only a Breach of the Canon Law.

[a] By *Inſtitution* only the Clerk is compleat Parſon as to the Cure of Souls; but as to Temporalties, as the Glebe-Land, Tithes, *&c.* he hath no Freehold in him till Induction; nor can he grant, or let them, or ſue for them till Induction.

[a] Show. Caſes 88. 2 Inſt. 632. 3 Lev. 313.

[b] 2 Roll. Abr. 355.

[c] 5 Rep. 58.

[d] 1 Cro. 27. See of Corrupt Preſentations, poſt. B. 2. c. 2.

[e] 1 Inſt. 344 a. 3 Cro. 342. 1 Black. Com. 390. 2 Black. Com. 23. 4 Black. Com. 106.

[f] 2 Roll. Abr. 220.

1 Black. Com. 391. 2 Black. Com. 312. 4 Black. Com. 106.

[g] F. N. B. 47. 1 Roll. Ab. 108.

[h] See of the Writ De vi Laicâ Removenda, poſt. B. 4. c. 4.

1 Burn. Eccl. 207. 1 Roll. Rep. 191 1 Watſon's Clergyman's Law 275, 276, 8*vo.* Ed.

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[k] 2 Roll. Abr. 353. 2 Cro. 463. [a] Dyer 221, 2 Wilſon 181. 4 Rep. 79.

[b] 2 Inſt. 358.
[c] See of Uſurpation, B. 2. c. 2. poſt.

[b] By *Inſtitution*, the Church, as to all common Perſons, is *full*, but not againſt the King till *Induction*[c].

Inſtalment into Dignities, Prebends, *&c.* anſwereth to Induction in Parochial Cures.

Obſerve now by what has been ſaid, That by receiving *Holy Orders*, *Preſentation*, *Inſtitution*, and *Induction*, one may be *made* a Parſon of a Church. But by Reaſon of ſeveral Statutes there are yet great Difficulties in following a right Method to perform the Solemnities required to ſecure the Title; which may be learned (among other Books) from Sir *S. Degg's Parſon's Counſellor, ch.* 6. *Watſon's Clergyman's Law, ch.* 15. which give particular Directions, too long to be here inſerted. [See the 13 *El. ch.* 12. 13 & 14 *Car.* 2. *ch.* 4. 25 *Car.* 2. *ch.* 2. 1 *W.* & *M. Seſſ.* 1. *ch.* 8, 18. 13 *W.* 3. *ch.* 6. 9 *G.* 2. *ch.* 26. 23 *Geo.* 2. *ch.* 88.

There are other Ways by which one may gain a Title to an Eccleſiaſtical Benefice, as by *Collation*, *Donation*, *Union*, *Appropriation* and *Commendam*.

[d] See of Advowſon Collative poſt. B. 2. c. 2.
1 Black. Com. 391.
2 Black. Com. 23.

Collation[d] is the giving of a Benefice by a Biſhop, which ſupplies the Place of Preſentation and Inſtitution. But the Biſhop's Clerk is to be inducted, as any other Patron's Clerk is. If this Benefice was in any other it would be Preſentative.

[e] See of Advowſon Donative poſt, B. 2. C. 2.

Donation is when the King, or other Patron (though a Layman) does by Gift in Writing put the Clerk into Poſſeſſion without Preſentation, Inſtitution or Induction. Theſe Benefices are called *Donatives*[e]. A Clerk making Title to a Donative, muſt at or before his Admiſſion, ſubſcribe the Declaration before the Biſhop or Ordinary of the Dioceſs. And if the Donative be either Parſonage or Vicarage, he ought to have a Certificate under the Hand and Seal of the Perſon before whom he ſubſcribed, and to read the ſame in the Church belonging to his Donative: He ought alſo to take the new Oaths of Allegiance and Supremacy. And if the Donative be a Benefice with Cure, he muſt ſubſcribe the 39 Articles in the Preſence of the Ordinary of the Dioceſs; and it is the ſafeſt Way to read the ſaid Articles in his Church, within two Months after he hath Poſſeſſion; for the Caſe of ſuch Donative ſeems to be within the Reaſon and Equity of the 13 *El. ch.* 12.

Union is when a Church is united to a Church, of which one was before poſſeſs'd: It muſt be made by Aſſent of the Ordinary, or Ordinaries of the Dioceſs where ſuch Churches ſtand, and of the Incumbents of them, and of the Patrons, according to the Common Law, or according to the Statutes of 37 *H.* 8. *ch.* 21. and 17 *Car.* 2. *ch.* 3.

[f] Terms of the Law, v. Appropriation. Davis 80.
1 Black. Com. 384.
[g] Plowd. 496, &c.
11 Rep. 11.
1 Roll. Abr. 238, 239, 240.
[a] Hob. 149, 307.
[b] Plowd. 499.
11 Rep. 11.

[f] *Appropriation* (becauſe the Profits of a Benefice are held in *Propriety*) is an Annexing a Benefice to the proper and perpetual Uſe of a Spiritual Perſon or Corporation (being Patrons of the Advowſon in Fee) and their Succeſſors; as to a Biſhop, Dean, Dean and Chapter. [g] The Things requiſite to make it are, 1. The King's *Licence* to the Spiritual Perſon, or Body Spiritual; for the King at one Time or other may have an Intereſt in the Preſentation to the Benefice. 2. The Conſent of the Ordinary, the Perſon appropriating; becauſe he too may have an Intereſt by Lapſe. And 3. The Conſent of the Patron, the Spiritual Perſon having the abſolute Inheritance of the Advowſon, who is to be made a Parſon in direct Words, or by Words of the like Effect; for in Suits brought by or againſt him, he muſt be named *Parſon*. [b] This may be done during the Vacancy of the Benefice, to be exe-

cuted immediately, or by apt Words conſtituting the Patron Parſon *after the Church ſhall become void.* When this Appropriation is made and takes Effect, the Patron is perpetual Parſon, or hath (as it were) perpetual Inſtitution; for the Appropriation alone is a ſufficient Admiſſion.

[c] It is ſaid, That an Appropriation may be made by the King alone, as ſupreme Ordinary, where he himſelf is Patron; as when by his letters Patent he grants the Advowſon, which he is ſeiſed of in Right of his Crown, to a Dean and Chapter.

[c] Plowd. 499.

The Church becomes [d] *Diſappropriate* by the *Preſentation, Inſtitution* and *Induction* of a Clerk into the Parſonage, or of the Vicar to the Parſonage, if the Parſon is Patron of the Vicarage; for that is a Reunion of the Vicarage and Parſonage. It may alſo become diſappropriate by *Recovery* of the Advowſon by an elder Title, or by *Diſſolution* of the ſpiritual Corporation.

[d] 1 Inſt. 46.b.

By 15 R. 2. ch. 6. 4 H. 4. ch. 12. *Upon all Appropriations a Vicar muſt be ſufficiently endowed.*

1 Black. Com. 387.

You ſee that an Appropriation could not be properly made unleſs to a ſpiritual Perſon and his Succeſſor, or at moſt to a ſpiritual aggregate Corporation, that conſiſts of Prieſts. But now,

By 31 H. 8. ch. 13. *The King and his Patentees (though Laymen) are capable of having the Parſonages appropriate of diſſolved Monaſteries. But they are to be ſubject to the Viſitation of the King's Commiſſioners, or the Ordinary.*

Theſe are Vulgarly called *Impropriations,* and the Proprietors *Impropriators* [e].

[e] See of Mortmain, poſt. B. 2. ch. 4.

By *Commendam,* [f] which is holding a void Benefice, *commended* to the Care of a ſufficient Clerk till it may be conveniently ſupplied of a Paſtor; ſo that originally it was in the Nature of a *Depoſitum.* It is founded upon the Statute of the 25 *H.* 8. *ch.* 21. that Part which concerns the Power of Diſpenſation. A Sequeſtration of the Cure and Profits of a Living (according to 28 *H.* 8. *ch.* 11. till the Patron doth preſent his Clerk, or while the Church is Litigious) is not a *Commendam.* For by that Statute (the Supply of the Cure being firſt paid) the *Succeſſor* ſhall have the Profits during the Vacancy. Now a *Commendam* gives the Profits to the Commendatory; and may be *Temporary* or *Perpetual:* [g] *Temporary,* for ſix or twelve Months, two or three Years or more. The *Commenda Semeſtris* (neither more nor leſs than ſix Months) is not in uſe amongſt us. *Perpetual,* or for Life, (which is the compleateſt) is equivalent to a Preſentation; and by Virtue thereof, one is Parſon or Vicar to all Intents and Purpoſes, without Inſtitution or Induction.

1 Black. Com. 386.

[f] Terms of the Law, v. Commendam.

1 Black. Com. 393.

[g] 3 Lev. 381, 382. Show. Rep. 414.

When any ſpiritual Perſon is made a Biſhop, [h] all his ſpiritual Promotions (except Donatives) are void upon his Conſecration in caſe of Creation; and upon his Confirmation, in Caſe of Tranſlation; whether he takes a Biſhoprick in *England* or *Ireland,* or in the Iſle of *Man,* or whether the Benefices lie in *England* or *Ireland.* But he may prevent the Avoidance by Diſpenſation of *Retainer* of ſuch Benefices which he had, if obtained before his Conſecration or Confirmation of his Election: This is called a *Commendam Retinere,* and is uſually granted by the Archbiſhop of *Canterbury,* according to the 25 *H.* 8. *ch.* 21. upon the King's Mandate expreſſing his Conſent to it, as the true Patron of the Benefices for that Turn, by Virtue of the Promotion of the Clerk to a Biſhoprick. By this *Commendam Retinere,* the Incumbency is [a] continued: And this

[h] Dyer 228. 4 Inſt. 356, 357. Dav. 68, &c. 1 Cro. 527, 542, 601, 790. 3 Lev. 381, 382. Show. Rep. 414.

[a] Hob. 143.

Commendam hath been granted of *Headſhips* of Colleges and Hoſpitals, as well as of Dignities and Benefices.

1 Black. Com. 393.

But there is alſo a *Commendam Recipere* (or *Capere de novo*) to take a Promotion in the Biſhop's own Gift, or in the Gift of ſome other Patron, whoſe Conſent muſt be obtained, and expreſly recited in the Inſtrument of Diſpenſation. [b] This muſt be for Life, as other Parſons and Vicars enjoy their Benefices. [In the late Statutes for erecting new Pariſhes there is uſually a Clauſe, for preventing the Church being granted in *Commendam*.]

[b] Hob. 155, 156.

By theſe Methods one may be a complete Parſon, Parſon Imparſonee, or Rector in Poſſeſſion of a Church Parochial.

[c] 1 Inſt. 17. b. 18. a.

[c] There may be two ſeveral Parſons in one Church, one of one Moiety, and the other of the other Moiety; and a Part of the Church and Town allotted to each. And there may be two that make one Parſon in a Church, preſented by one Patron. Alſo two Prebendaries may be one Parſon of a Church.

Note, That before Inſtitution, and before Induction, *Firſt Fruits* are payable to the King, and to be agreed and compounded for.

[d] 4 Inſt. 120, 121.
2 Inſt. 627, 628.
1 Black. Com. 284.
4 Black. Com. 106.
F. N. B. 176. a.

[d] *Firſt-Fruits* are the Profits of the firſt Year of all ſpiritual Livings according to a Valuation thereof, made the 26 *H.* 8. Theſe are called *Annates*. The *Tenths* alſo, or a tenth Part of the yearly Value of all Church Livings, are to be paid according to the before-mentioned Valuation. [See 26 *H.* 8. *ch.* 3. 28 *H.* 8. *ch.* 11.] There was a Valuation of Eccleſiaſtical Livings, 20 *Ed.* 1.

By 26 H. 8. ch. 17. *Not the Farmers of ſpiritual Perſons, but the Leſſors themſelves ſhall be charged with the Firſt-Fruits and Tenths.*

By 27 H. 8. ch. 8. *No ſpiritual Perſon ſhall pay any Tenths the ſame Year that he pays his Firſt-Fruits; but it ſhall be deducted out of the Firſt-Fruits.*

Where a Succeſſor pays the Tenths for the Predeceſſor, he may diſtrain his Goods found on the Benefice, and retain them till Satiſfaction.

By 2 Ann. ch. 11. *He muſt give one Bond with Surety, to pay the Firſt-Fruits at four Payments.*

By 1 El. ch. 4. *Vicarages that are not above ten Pounds yearly, and Rectories not above ten Marks yearly, in the King's Books, are diſcharged from Payment of Firſt-Fruits; and Incumbents that die, or are removed before all the Payments are due, their Payments ſhall be made only according to their Continuance in the Benefice proportionably.*

By 5 Ann. ch. 24. *All Benefices, with Cure of Souls, not exceeding the clear yearly Value of* 50 l. *by the improved Valuation, are diſcharged from Firſt-Fruits and Tenths, and the Payment of all Arrears.* [See 2 & 3 *Ann. ch.* 11. 6 *Ann. ch.* 27. and 3 *Geo.* 1. *ch.* 10. For the better Collecting and Levying the Tenths of the Clergy. *Whereby the old Method is altered:* And *B.* 4. *ch.* 1. Of the *Court of Exchequer*.]

[a] 2 Inſt. 624, 625, 626, 627.

[a] A Parſon or Vicar, is called an *Incumbent*, and the Law doth intend and ſuppoſe him to be *Reſident* on his Benefice. And therefore,

1 Black. Com. 392, 390.

By 21 H. 8. ch. 13. *He that is* wilfully *abſent from his Benefice for one Month together, or two Months in the whole Year, though at different Times, forfeits Ten Pounds, the one Half to the King, the other Half to him that will ſue for it. But Chaplains to the King, or other great Perſons mentioned in the Statute, and in* 25 H. 8. ch. 16. *and in* 33 H. 8. ch. 28. *are excuſed from Reſidency, while they attend thoſe that retain them.*

* [b] The Parſon ought to *Abide* upon his Rectory, and in the Parſonage-Houſe, and not in any other Houſe within the Pariſh. For the Statute is intended not only for ſerving the Cure, and for Hoſpitality, but to maintain the Houſe in Repair, that his Succeſſors may keep Hoſpitality too. Lawful Impriſonment, Sickneſs, Want of a Parſonage-Houſe, are good Excuſes for Non-reſidency, and excepted out of the Act by Conſtruction of Law; for the Words of the Statute are, *That he that* wilfully *abſents himſelf*, &c.

[b] 6 Rep. 21. 1 Cro. 590.

[c] If a Duke, Earl, *&c.* retain a Chaplain, and die, or are attainted of Treaſon; or an Officer qualified to retain a Chaplain is removed from his Place, the Retainer upon the Statute is determined, and will not excuſe Him from *Reſidency*.

[c] 4 Rep. 118.

By 28 H. 8. ch. 13. *The Chancellor, Vicechancellor, Commiſſary, Rulers of Colleges and Halls, Doctors of the Chair, and Readers in Divinity, and Clergymen under forty Years of Age, reſiding in the Univerſity, and hearing Lectures, and doing exerciſe in Perſon, are exempt from the Penalties of the* 21 H. 8. [See 13 *El. ch.* 20. 14 *El. ch.* 11. 18 *El. ch.* 11. 43 *El. ch.* 9.]

By the above-mentioned Statute of 21 *H.* 8. *ch.* 13. *No Clergyman can hold* two *Benefices with Cure of Souls, if the firſt to which he was inſtituted, or collated and inducted, be worth* eight *Pounds in the King's Books of Record, without Diſpenſation from the Archbiſhop of* Canterbury, *confirmed under the Broad Seal. And he that without Diſpenſation takes a ſecond, makes void the firſt* ipſo facto.

[d] The Statute ſays, Inſtituted and *Inducted* to the Second; but Inſtitution is looked upon to be ſufficient, for otherwiſe the Act might be eluded by Deferring the Induction.

[d] 4 Rep. 79. 2 Wilſon 181.

But by this Act there muſt be certain Qualifications neceſſary to obtain ſuch Diſpenſation; as of Birth, Degree, to be Chaplain to the King, Queen, a Duke, *&c.* Archbiſhop or Biſhop, or to a Dutcheſs, Marchioneſs, Counteſs, Baroneſs, being Widows (or married to any Perſon under the Degree of a Baron, though noble only by their firſt Marriage) or to other great Perſons by Virtue of the ſaid Statute, and 25 *H.* 8. *ch.* 16. and 33 *H.* 8. *ch.* 28. By Reaſon of ſuch Qualifications one may purchaſe Diſpenſations to keep two Benefices.

See of Nobility, poſt, ch. 4.

If one hath his full Number of Chaplains allowed to be Qualified, and retains one more, who obtains a Diſpenſation before Others are advanced; [e] His Diſpenſation to hold a *Plurality* is not Good.

[e] 4 Rep. 89, 90.

[f] If a Duke, Earl, *&c.* retain a Chaplain and die, or is attainted of Treaſon before his Chaplain takes a *ſecond* Benefice, this Retainer too is determined: If he had taken a ſecond Benefice before his Death, *&c.* the original Retainer would have continued in Force, to qualify Him to enjoy the Benefices, which were once lawfully ſettled in him. And this Retainer is good during his Life. One cannot Diſcharge his Chaplain,

1 Cro. 723, 724, 839. [f] 4 Rep. 118, 119.

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* [*The Parſon*] The Duties of a Parſon or Vicar are principally of Eccleſiaſtical Cognizance, thoſe only excepted which are laid upon them by Statute, and thoſe are indeed ſo numerous that it is impracticable to recite them here with any tolerable Conciſeneſs or Accuracy; ſome of them are remarked, but for the reſt the Reader muſt look into thoſe Authors who have compiled Treatiſes expreſly upon this Subject; theſe are very numerous; but there are only two, which can be relied on with any Degree of Certainty; namey, Biſhop *Gibſon's Codex*, and Dr. *Burn's* Eccleſiaſtical Law.

if he purchaſes Diſpenſation, and is advanced by it, to qualiſy another in his Place.

Further, *By* 21 H. 8. ch. 13. *No ſpiritual Perſon ſhall take to* Farm *any Lands,* &c. *in pain to forfeit ten Pounds for every Month he ſo continues the ſame, to be divided betwixt the King and Proſecutor. And he ſhall not (by himſelf or any other) buy to ſell again for Profit, any Cattle, Victual, or* Merchandize *whatſoever, in pain to forfeit treble the Value thereof, and every ſuch Bargain ſhall be void.*

By 2 & 3 Ed. 6. ch. 1. *If a Miniſter is* diſturbed *in the Exerciſe of his Office in the Church; the Puniſhment upon Conviction is* 10 l. *and upon Non-payment, three Months Impriſonment without Bail.* [And by 1 *W. & M. ch.* 18. a Penalty of 20 Pounds is laid on the Diſturber of publick Worſhip in any Church or licenſed Meeting-houſe, *&c.*

[The Statutes concerning Leaſes by ſpiritual Perſons will be mentioned under the Title *Leaſes, Book* 2. *ch.* 3.]

By 13 El. ch. 10. *If fraudulent Gifts of their perſonal Eſtate are made by Eccleſiaſtical Perſons, on purpoſe to hinder their Succeſſors from recovering* Dilapidations *againſt their Executors or Adminiſtrators; the Succeſſors ſhall have like Remedy in the Eccleſiaſtical Court againſt the Grantee, as he might have had againſt the Executor or Adminiſtrator or his Predeceſſor.*

By 14 El. ch. 11. *All Money recovered for Dilapidations, ſhall be imployed within two Years, upon the Building, in pain to forfeit double the Sum received, and not ſo employed.* [See 7 *Ann. ch.* 14. concerning Pariſh *Libraries.*]

2. One may [a] *Ceaſe* to be a Parſon of a Church. 1. By *Death,* 2. By *Ceſſion,* which is by taking a ſecond Benefice with Cure of Souls, contrary to 21 *H.* 8. *ch.* 13. before-mentioned: [b] or contrary to the Canon Law, without Diſpenſation, when the firſt Benefice is under eight Pounds *per Annum*: This is properly called Ceſſion. Ceſſion is not made by taking a Deanery, Archdeaconry, Prebend, or Rectory with Vicarage endowed, becauſe they are not Benefices with Cure within the Statute, but particularly excepted. 3. By *Creation*; for when a Parſon is made a Biſhop, his Benefice is void upon his [c] Conſecration. 4. By *Reſignation* to the Biſhop, the immediate Ordinary, [d] in whoſe Diſcretion it is either to accept or refuſe the Reſignation [e] *Reſigno* is not ſo proper a Term in Law as *Renuncio, Cedo Demitto.* A Reſignation before a Notary, without the Biſhop's Acceptance, does not make the Church void. The Notary can only atteſt the Reſignation in order to its being preſented: It cannot be made upon Condition, becauſe it is a judicial Act. [f] A Donative muſt be reſigned into the Hands of the Patron. [See 31 *El. ch.* 6. concerning *Corrupt Reſignations.*] 5. By *Deprivation,* as upon *Simony,* [g] contrary to 31 *El. ch.* 6. 12 *Ann. ſt.* 2. *ch.* 12. By maintaining any *Foreign* Power, [See 1 *El. ch.* 1.] or any *Doctrine* contrary to the thirty-nine *Articles* of Religion, and perſiſting therein. [See 13 *El. ch.* 12.] Or by neglecting to make the *Declarations* in the Church, and to read and to aſſent to the thirty-nine *Articles* there. [See 13 *El. ch.* 12. 13 & 14 *Car.* 2. *ch.* 4. and 23 *G.* 2. *ch.* 28.] Or by neglecting to take the Oaths, *&c.* within ſix Months after one enters on a Benefice. [See the 13 *W.* 3. *ch.* 6. 1 *Geo.* 1. *ch.* 13. 2 *Geo.* 2. *ch.* 31. 9 *Geo.* 2. *ch.* 26.] By *Abſence* of *ſixty* Days in one Year from a Benefice belonging to a Papiſt, in the Preſentation of one of the Univerſities, or if the Clerk preſented had *Another* Benefice with Cure. [See 1 *W. & M. ch.* 26.] By uſing any *other Form* of *Prayer,* or *Adminiſtration*

[a] 1 Inſt. 120. a. 4 Rep. 75, 76, 77, 117. 1 Black. Com. 392, 393.

[b] 2 Roll. Abr. 360. 361. 1 Sid. 426.

[c] 1 Cro. 526, 527. 2 Roll. Abr. 360.

[d] 2 Cro. 63, 198.

[e] 2 Roll. Abr. 358.

[f] 1 Inſt. 344. a.

[g] See of Advowſons, poſt. B. 2. ch. 2.

1 W. & M. St. 1. ch. 8.

1 Black. Com. 393.

Adminiſtration of *Sacraments* than what is contained in the Common Prayer Book, or by *Refuſing* to uſe the ſaid Form, or by *Depraving* the Book of Common Prayer, or any Part of it, upon a ſecond Conviction. [See 1 *El. ch.* 2.] In all theſe Caſes the Parſon is *Deprived*, and the Benefice made void by *Statute* Law, [a] where there needs not any Sentence Declaratory in the Eccleſiaſtical Court. [b] There are alſo many Cauſes of Deprivation by the *Canon* Law, upon Sentence in the Spiritual Court, as for Adultery, Drunkenneſs, Dilapidations.

[a] 6 Rep. 29.
[b] 3 Inſt. 204.
2 Roll. Abr. 222.
6 Rep. 13 & 14.
11 Rep. 49, 98.
Hob. 243.

6. A *Vicar*, (*Vicarius, quaſi vice fungens Rectoris*) is the Prieſt of that Pariſh where the predial Tithes are appropriated: The Parſon or Rector has the predial Tithes to himſelf. At firſt a Vicar was a mere Curate to the Impropriator, temporary and removeable at Pleaſure; but by Degrees he got a ſettled Maintenance of Glebe, and ſome kind of Tithes, and now claims his Dues either by *Endowment* of the Impropriator or by *Preſcription*, or by Uſage, which is Evidence of an Endowment. The Ordinary hath Power to increaſe his Allowance. [See 15 *R.* 2. *ch.* 6. 4 *H.* 4. *ch.* 12.]

1 Black. Com. 387, 388.
Vicar.

The Freehold of the Church, Church-yard and Glebe is in him; and in ſome Caſes he is eſteemed to have a Fee-ſimple qualified. In ſome Places the Vicar has a *Penſion* from the Impropriator: But ſome Benefices that were formerly ſevered by Impropriation, have ſince been united, and all the Glebe and Tithes have been given to the Vicarage; and many Vicars have a good Part of the great Tithes, or a Leaſe of them upon reaſonable Terms from the Impropriators. [See 29 *Car.* 2. *ch.* 8.] For Confirming Augmentations made by Eccleſiaſtical Perſons, to ſmall Vicarages, *&c.* and ſee the 2 *&* 3 *Ann. ch.* 11 and 1 *G.* 1 *ſt.* 2. *ch.* 10. for the Augmentation of the Maintenance of the poor Clergy, *&c.* and 12 *Ann. S.* 1. *ch.* 4. concerning the Endowment of poor Vicarages in the Weſt-Riding of *Yorkſhire.*

The Method of taking *Holy Orders*, *Preſentation*, *Inſtitution* and *Induction* to a Vicarage, or the Way of obtaining a Title to a Vicarage, by *Collation*, *Union*, and *Commendam*, is the ſame by which a Parſon obtains a Rectory, and the ſame Methods are to be obſerved in performing the Solemnities of *Subſcriptions*, *Oaths*, &c. required to ſecure the Title of a Parſon. But a Vicar over and above is to take an Oath of perpetual Reſidency, which the Biſhop may diſpenſe with. The *Statutes* concerning *Reſidence*, *Pluralities*, *Farming* and *Merchandizing*, *Diſturbance* of Miniſters in Execution of their Office, and concerning *Dilapidations*, alſo relate to them, as well as to Parſons; and one may ceaſe to be a Vicar in the ſame Manner as a Parſon.

7. A *Curate* is he who repreſents the Incumbent (Parſon or Vicar) and officiates in his Stead; though every Clergyman that officiates in a Church (whether Incumbent or Subſtitute) is in our Liturgy, called a Curate. He ought to be licenſed by the Biſhop or Ordinary: However he may recover his Salary for ſerving the Cure, though he has no ſuch Licence. [See 28 *H.* 8. *ch.* 11. How the Curate is to be paid during the Vacancy of a Benefice upon a Sequeſtration. 1 *El. ch.* 2. 13 *&* 14 *Car.* 2. *ch.* 4. and ſee 13 *El. ch.* 20.]

Curate.
1 Black. Com. 393. 394.

There are *Perpetual* Curates as well as Temporary, where all the Tithes and Profits are impropriate, and no Vicarage endowed. The Impropriators are obliged to find them; and ſome of them have certain Portions of Tithes ſettled on them. [See the ſeveral Statutes abovementioned, under the Title *Vicars.*]

By 13 & 14 Car. 2. ch. 4. *Curates muſt* Subſcribe *and* Declare *before the Archbiſhop, or Biſhop,* &c. *as Lecturers, upon pain of loſing their Places, and of being impriſoned three Months without Bail.*

By 12 Ann. S. 2. ch. 12. *If any Rector, or Vicar, preſents any Curate to the Biſhop or Ordinary to be licenſed to ſerve the Cure in his Abſence; he ſhall appoint under his Hand and Seal (before he grants ſuch Licence) a Stipend not exceeding* 50 l. per Annum, *nor leſs than* 20 l. *to be paid at ſuch Times as he ſhall think fit. And upon Non-payment of the ſaid Stipend, he may ſequeſter the Profits of the Benefice until Payment ſhall be made.*

1 Black. Com. 395. Every Parſon, Vicar, or Curate, hath a *Pariſh-Clerk* under him; who was formerly a real Clerk in Orders, though now he is generally a Layman. He is the Aſſiſtant to the Parſon, Vicar, or Curate, in performing
a Can. 91. Divine Service: [a] He is choſen by the Miniſter for the Time being, unleſs there is a Cuſtom that the Pariſhioners or Church-wardens ſhould appoint him; becauſe the Cuſtom is Temporal, and cannot be altered by a Canon. He ought to be deprived by him that placed him in the
b 1 Ventr. 143, 153. 2 Roll. Abr. 234. Office; [b] but if he is unjuſtly deprived, a *Mandamus* will lie to the Church-wardens to reſtore him, as it will lie to the Biſhop or Archdeacon to ſwear him when he is elected. The Law looks upon him as an Officer for Life, and one that hath a Freehold in his Place, and not as a Servant; and therefore will not ſuffer the Eccleſiaſtical Court to deprive him, but only to correct him for any Miſdemeanor by Eccleſiaſtical Cenſures. The ſame Law is with Reſpect to a *Sexton* that has a fixed Salary.

Thus much of the *Clergy*; which is fit to be known by the Students of the Common Law; though many Caſes relating to them are triable in the Eccleſiaſtical Courts.

Of the Laity. II. The *Laity* (from Λαὸς the People) are the *People* eſpecially ſo called; as diſtinct from the Clergy.

CHAP IV.

Of the Nobility *and* Commonalty.

a 1 Inſt. 16. b. 156. b. A Perſon in his *Civil* Capacity is moreover either of the [a] *Nobility* or *Commonalty.*

Of the Nobility. 1 Black. Com. 397, 398, 399, 227, 228. b 1 Inſt. 156. b. c 2 Inſt. 5. I. [b] The *Nobility* or *Peers* of the Realm are divided into Barons, Viſcounts, Earls, Marquiſſes and Dukes. All the Nobility are Barons or Peers. They are called [c] *Barons* by Reaſon of a Barony or Lordſhip held by ſome Service in Chief of the King; not that every one that has a Barony is a Lord of Parliament; for he muſt moreover be called by a Writ to Parliament. Every Barony in ancient Time was held by *Grand Searjeanty.* They are called *Peers* (*Pares*) becauſe in all publick Affairs they are equal as to their Votes in Parliament; tho' there is a Difference of Degrees in reſpect of their Dignities.

a 1 Inſt. 16. a. & b. 110. a. [a] One may have a Title of Nobility and Dignity by *Creation, Deſcent,* or by *Preſcription.*

1. By *Creation* either by Writ, or Letters Patent. [b] By *Writ* is the moſt ancient Way, and gives a Fee-ſimple in the Barony without Words of Inheritance, (*viz.*) *To him and his Heirs.* Yet the King may limit the general State of Inheritance to Heirs male, or to the Heirs of the Body. [c] As ſoon as he ſits in Parliament by Virtue of this Writ, his Blood is ennobled, and he is a *Peer*. But if he dies before he ſits in Parliament, he is not ennobled. The Bare Direction and Delivery of the Writ hath no Effect. By Sitting in Parliament his Blood is ennobled to him and his Heirs Lineal [d]. But Creation by *Letters Patent* is the ſureſt Way, and ennobles his Blood though he never ſit in Parliament. Yet he muſt have the Inheritance in this Caſe limited by [e] apt Words, as to him and his *Heirs*, or the *Heirs* male of his *Body*, or the *Heirs* of his Body, otherwiſe he hath no Inheritance. [f] The King may create either Man or Woman Noble for Life only; but not for Years, becauſe then the Nobility might go to Executors or Adminiſtrators. Nobility alſo may accrue to one for Life by *Act* of *Law* only; as if a Duke takes a Wife, ſhe is a Dutcheſs in Law by the Intermarriage. So if a Marquis, Earl, *&c.*

2. By *Deſcent*, as when Nobility comes down from the Anceſtor, and is enjoyed by Right of Blood. [g] The Dignity of an Earl may deſcend to a Daughter, if there is no Son, and if there are many Daughters and no Son; the Poſſeſſions of the Earldom ſhall be divided amongſt the Daughters, but the King ſhall diſpoſe of the Dignity to which Daughter he pleaſes, by Reaſon of the Incertainty, and ſhe ſhall be a Counteſs.

[h] A Woman Noble by Deſcent, marrying one that is under the Degree of the Nobility, remaineth noble. But if ſhe was noble by Marriage only, ſhe loſeth it if ſhe marry one that is under the Degree of the Nobility; not if her ſecond Huſband is noble, and inferior in Dignity to her firſt Huſband.

By 25 H. 8. ch. 22. *The Dignity of the Crown is deſcendible to the eldeſt Daughter alone, and to her Poſterity.*

3. By *Preſcription*; as thoſe that have continued Barons beyond the Memory of Man.

A Duke, Earl, *&c.* of [i] another Kingdom are not ſued by thoſe Names here. Duke or [k] no Duke, Earl or no Earl, Baron or no Baron, if created by *Writ*, ſhall be tried by the King's Writ, or the Record of Parliament, and not by a Jury: But if created by *Letters Patent*, they may be pleaded and given in Evidence to a Jury [l]; and ſo Dutcheſs or no Dutcheſs, *&c.* by Marriage, ſhall, as a Matter of Fact, be tried by a Jury.

[m] But there are Barons by *Succeſſion*, and thoſe are the *Biſhops*, who by Virtue of ancient Baronies held of the King (into which the Poſſeſſions of their Biſhopricks have been converted) are called by Writ to Parliament, had always have Place in the upper Houſe, and are called [a] Lords Spiritual: but there are no Feudal Baronies, or Baronies by Tenure at this Day. The temporal Poſſeſſions of Biſhops are held by their Service to attend in Parliament, when called; and that is in the Nature of a Barony. The Biſhops of [b] *Wales* are Lords of Parliament as the Biſhops of *England*; and all the Biſhops together make one of the [c] three Eſtates in Parliament, and are ſo accounted in ſeveral Statutes [See 1 *El.* *ch.* 3. 8 *El. ch.* 1.] But though the Biſhops are Barons and Lords of

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[b] 1 Inſt. 9. b. 16. a & b. 1 Black. Com. 400, 401.

[c] 1 Inſt. 16. b.

[d] 1 Inſt. 16. b. 2 Inſt. 48. 1 Ld. Ray. 11. &c.

[e] 1 Inſt. 9. b.

[f] 1 Inſt. 16. b. 9 Rep. 97, 98.

[g] 1 Inſt. 165. a.

[h] 1 Inſt. 16. b. 2 Inſt. 50. 6 Rep. 53. See of Trials of Criminals, poſt. B. 4. ch 5. 1 Black. Com. 402.

[i] 1 Inſt. 16. b. 2 Inſt. 48.

[k] 1 Inſt. 16. b. 6 Rep. 53. 7 Rep. 15. 9 Rep. 31.

[l] 1 Ld. Ray. 14.

[m] 1 Inſt. 70. b. 97. a. 110. a. 134. b. 2 Inſt. 5, 6, 7. 79. 3 Inſt. 30.

[a] Lit. 163. 1 Inſt. 109. a. 2 Inſt. 5, 6. 3 Lev. 401.

[b] 1 Inſt. 97. a.

[c] 4 Inſt. 1, 2. 1 Vent. 325.

Parliament, and are called by the King's Writ, and have a Vote there, [d] yet they ſhall not be tried by the Peers, becauſe they do not ſit in Parliament by Reaſon of their Nobility, but by Reaſon of their Baronies, which they hold in Right of the Church, as ſome Abbots did heretofore, and yet were not to be tried by the Peers; but they are to be tried by the Country, *i. e.* by a Jury, for that they are not of the Degree of the Nobility. And when one of the Nobility is to be tried by his Peers in Parliament for a capital Offence, the Spiritual Lords withdraw, [e] becauſe by the Canon Law they ought not to condemn any one to Death.

[d] 3 Inſt. 30. S. P. C. 153. 4 Black. Com. 261, 262.

3 Inſt. 30. 2 Inſt. 586, 587.

Let us now examine what the Law ſays particularly to the Caſe of Nobility.

A Peer ſhall not be [f] *arreſted* upon mean Proceſs, or upon Execution for Debt or Treſpaſs, becauſe he is preſumed to attend the King and the publick Affairs; and becauſe the Law does preſume that he hath ſufficient Lands in which he may be diſtrained: But he may be arreſted or apprehended in criminal Caſes. Neither is an *Exigent* awardable againſt a Peer in Civil Caſes. Before the 24 *Geo.* 2. *ch.* 18. If a Peer of the Realm was Plaintiff or Defendant (whether Lord Spiritual or Temporal) a [g] Knight was to be returned of the Jury. A Peer is not to be put on *Juries*. If he is Defendant in a Court of Equity, he is not ſworn to his Anſwer, but anſwers upon his Honour, as upon the Trial of a Peer. But his Affidavit, his Examination upon Interrogatories, and Examination as a Witneſs muſt be upon Oath [h]. So at Common Law when he is a [i] Witneſs upon a Trial, he ought to be ſworn. [How a Peer ought to be tried in High Treaſon, Petit Treaſon, Felony, *&c.* ſee *B.* 4. *ch.* 1 and 5 *poſt.*]

[f] 6 Rep. 52, 53. 9 Rep. 49. 2 Ld. Ray. 1247. S. C. Salk. 512.

[g] 1 Inſt. 156. b.

[h] 1 Wms. 146.

[i] 9 Rep. 49. 3 Inſt. 29.

By Weſt. 1. ch. 34. *None ſhall report any falſe or* ſlanderous *News or Tales whereby Diſcord may ariſe betwixt the King and his People, or the Great Men of the Realm, on Pain of Impriſonment, till he produce the Author.*

2 Inſt. 225. &c.

By 2 R. 2. ſt. 1. ch. 5. *None ſhall deviſe or tell any falſe News, Lies,* &c. *of Prelates, or Lords, or of the Chancellor, Treaſurer, Privy Seal, Steward of the King's Houſe, Judges,* &c. *whereby any Diſcord or Slander may ariſe, or Miſchief come to the Realm, on Pain of Puniſhment, as is ordained by* Weſt. 1.

1 Black. Com. 402.

Since the Union, Peers of *Scotland* may maintain the Action of *Scandalum Magnatum* upon this Statute [k].

[k] Com. 459.

By 12 R. 2. ch. 11. *When one hath told falſe News, Lies,* &c. *contrary to* 2 R. 2. ch. 5. *and cannot produce the the Author, and is thereupon impriſoned, he ſhall afterwards be puniſhed by the King's Council, notwithſtanding the Act of* Weſt. 1.

The Statute of *Scandalum Magnatum* is a [a] General Law, of which the Court is to take Notice.

[a] 4 Rep. 13.

If the Slander is publiſhed in a Libel, the Party may be [b] indicted, fined and impriſoned. But the Action of *Scandalum Magnatum* is uſually brought upon 2 *R.* 2. *ch.* 5. *tam pro Domino Rege quam pro ſeipſo*, in the Name of the King and the Party; the King being concerned in the Credit of Great Men, who act by his Authority; ſo that the Plaintiff recovers Damages upon this Statute for the Wrong, and the Defendant is impriſoned on the Statute of *Weſt.* upon the King's Account. The Words in ſuch Caſes ſhall be taken in the worſt Senſe [c] to preſerve the Honour of Great Perſons. Yet a Defendant may [d] *juſtify* in a *Scandalum Magnatum*, ſetting forth the ſpecial Matter.

[b] 5 Rep. 125.

[c] 1 Vent. 60. 1 Lev. 277.

[d] 4 Rep. 13, 14.

Theſe Statutes extend only to [e] extrajudicial Slanders; and ſo it is at Common Law. For tho' the Charge be falſe which is alledged in a *Court*, no Action *de Scandalo Magnatum* lieth.

[e] 2 Inſt. 228. 4 Rep. 14, 15. 1 Roll. Abr. 34.

By 21 H. 8. *ch.* 13. *A Duke may have ſix Chaplains, a Marquis and an Earl five, a Viſcount four, a Baron three; every Dutcheſs, Marchioneſs, Counteſs and Baroneſs,* (*being Widows,* &c.) *two.* [f]

By 31 *H.* 8. *ch.* 10. The Precedency of the Nobility, Lords of Parliament, and of the great Officers is ſettled and determined.

[f] 4 Rep. 89, 90, 117, &c.

II. The *Commonalty* are divided into ſeveral Degrees, as *Knights*, *Eſquires*, *Gentlemen*, and *Yeomen*. And as every one of the Nobles is a Peer to the other, though there are ſeveral Degrees; ſo it is of the Commons.

Of the Commonalty. 1 Black. Com. 403. 404.

1. [g] A *Knight* is of five Kinds (*viz.*) Knight of the *Garter*, Knight *Baronet*, Knight *Banneret*, Knight of the *Bath*, and Knight *Bachelor*. All theſe muſt have their Honours by Creation, except Baronets, who may be by Deſcent. One who was a Baronet by deſcent, levied a Fine of his Honour to another, who enjoyed it, and took Place in Seniority from the Date of the Patent, as if it had been granted to his Anceſtors [h] The Title *Baronet* is uſed in old Acts of Parliament [i]: Baronets, as ſuch, as are not Knights. A Knight Bachelor is termed in Law *Miles*, for [k] *Eques Auratus* is not uſed; [l] therefore in Writs and Indictments he ought to be ſo named. [See 16 *Car.* 1. *ch.* 20.]

[g] 1 Inſt 74. b. 2 Inſt. 594. 595.

[h] 32 Char. 2.

[i] 16 R. 2. ch. 6.

[k] 4 Inſt. 5.

[l] 2 Inſt. 593, 594. 2 Ld. Ray. 859. 1 Ld. Ray. 304, 305. 1 Black. Com. 405.

2. [m] *Eſquire* (*Armiger*) is a Name that is frequently uſed in divers Acts of Parliament to denote an Eſtate and Degree. All Dukes, Marquiſſes, Earls, Viſcounts, and Barons of other Nations, or which are not Lords of Parliament, are to be named *Eſquires*. If *Knights*, they are to be termed *Milites*. The Sons of all the Peers and Lords of Parliament are in Law Eſquires in the Life of their Fathers. And the [n] eldeſt Son of a Knight is an Eſquire.

[m] 2 Inſt. 667. 7 Rep. 15. 1 Inſt. 16. b.

[n] 2 Inſt. 596, 667.

A Foreign King being in *England*, muſt ſue and be ſued by the Name of *King*.

3. [o] A *Gentleman* is he that beareth a Coat of Arms. There is but a ſmall Difference betwixt an Eſquire and a Gentleman. There may be Gentlemen by *Office* and *Reputation*. And if one is ſo *reputed*, he may be called ſo in legal Proceedings. [p] But if he is named *Yeoman*, he cannot abate the Writ, as a real Gentleman may. If a Gentlewoman is named *Spinſter* inſtead of *Generoſa* in any Original Writ, Appeal, or Indictments, ſhe may abate and quaſh the ſame. In other Caſes, Widow or ſingle Woman, are good Additions.

[o] 2 Inſt. 595, 667, 668. 1 Black. Com. 405, 406. 2 Ld. Raym. 1541. 2 Str. 816.

[p] 1 Ld. Raym. 849.

He that hath taken a Degree in our Univerſities, may be named by that Degree. And if he hath taken Holy Orders, he may have the Addition of *Clerk*.

4. [a] *Yeoman* in Legal Underſtanding is properly a Freeholder that may ſpend forty Shillings *per Annum*. This Degree is applied only to Men, not to Women, [b] but it comprehends all under the Degree of Gentlemen, as Citizens, [c] Burgeſſes (*i. e.* Men of Trade) Day-Labourers, Beggars [*Yeoman* is generally reckoned a diſtinct Addition from *Labourer*, and of higher Degree.] [d] *Citizen* and *Burgeſs* are no ſufficient Additions in Writs, [e] &c. becauſe they are too general. A Man may be named either with the Addition of his Degree or Myſtery [f]: And a Peer muſt be named by his worthieſt name of Dignity. [See the Statute of *Additions*, 1 *H.* 5. *ch.* 5.]

[a] 2 Inſt. 668. 1 Black. Com. 406.

[b] 2 Ld. Ray. 1179.

[c] 1 Inſt. 80. a. 1 Str. 556.

[d] 2 Inſt. 668.

[e] See of Writs, poſt. B. 4 ch. 4. 2 Inſt. 665. &c.

[f] 2 Ld. Raym. 1541. 1 Str. 556.

CHAP. V.

Of thoſe that are amongſt the Nobility and Commonalty in the Military State.

1 Black. Com. c. 13. 407, &c. 4 Burn. tit. Soldier. Of the Military State. [g] 1 Inſt. 249, a. & b. 3 Burn. tit. Militia. & Appendix to 4 Burn tit. Militia.

[g] WHEN the Courts of Juſtice are open to diſtribute Juſtice to all, it is ſaid to be a Time of Peace. But when by Invaſion, Rebellion, *&c.* the peaceable Courſe of Juſtice is ſtopt, then it is ſaid to be a Time of War. This ſhall not be tried by a Jury, but by the Records and Judges, whether Juſtice at ſuch a Time had her equal Courſe of Proceeding or no? For Time of War doth not only give Privilege to them that are in the War, but to all others within the Kingdom.

The *Military* State includes the Soldiery by *Land* and *Sea*. But it muſt be obſerved, that in Time of War particular Orders are always made for the due Order and Diſcipline of Officers and Soldiers, and for the Regulation of the *Army* and *Navy*; which we muſt conſult upon all Emergencies, and not expect many ſtanding or perpetual Laws on that Account.

[h] 3 Inſt. 52.

But it appears in our Books, [h] that if any one in Commiſſion in Time of Peace put to Death any Man by Colour of Martial Law, it is Murder, and againſt *Magna Charta, ch.* 29. But now an Act of Parliament for puniſhing Mutiny and Deſertion is paſſed yearly, empowering the King to appoint Courts Martial though in Time of Peace.

The chief *Statutes* relating to the *Army* and *Navy*, are as follow:

[i] 6 Rep. 27. 3 Cro. 71.

By 7 H. 7. ch. 1. *and* 3 H. 8. ch. 5. It is enacted, *That if a Captain ſhall not have the whole Number of his Soldiers, or not pay them their due Wages within ſix Days after he hath received them, he ſhall forfeit all his Goods and Chattels and ſuffer Impriſonment.* And it is made [i] *Felony without Clergy for a Soldier, (not being a Captain) retained in Wages, or taking any Preſt to ſerve the King upon the Sea, or upon the Land beyond-ſea, to depart from his Captain without Licence.* [See 11 *H.* 7. *ch.* 18.]

See B. 3. ch. 1. poſt. [a] 6 Rep. 27. 3 Inſt. 86.

By 2 & 3 Ed. 6. ch. 2. *It is Felony without Benefit of Clergy for a Soldier retained, to depart without Licence of his Commander.* [a] But this Part of the Act doth extend only to a Soldier that departeth after he hath ſerved the King in his Wars.

The Officer that receives more Wages for Soldiers than he ought, and doth not every Month (by a Note in Writing) acquaint the Treaſurer of the Army with every Soldier's Entry, Death, or Departure, ſhall forfeit five Pounds to the King, ſuffer one Month's Impriſonment and loſe his Place. [See more in this Act concerning Commiſſioners and Captains, Licences of Soldiers to depart, and concerning the Puniſhment of a Soldier that makes away with his Horſe or Arms.]

By 4 & 5 Ph. & M. ch. 3. *If any Perſon being commanded to muſter, doth abſent himſelf (having no lawful Excuſe) he ſhall ſuffer ten Days Impriſonment, unleſs he will agree to pay forty Shillings for a Fine. And if any Perſon authorized to levy or Muſter Soldiers ſhall take any Reward to diſcharge or ſpare any from the ſaid Service, he ſhall forfeit ten Times as*

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[g] *In republicâ maximè conſervanda ſunt jura belli.* 2 Inſt. 58.

much as he ſhall ſo take. And a Captain or other Officer which doth not pay the Soldier his Wages, ſhall forfeit ten Times as much as he ſhall take, and to the Soldier three Times as much as he ſhould have paid to him.

Offences committed during the Time of Service ſhall be heard and determined by the chief Commander.

[See 31 *El. ch.* 4. 9 & 10. *W.* 3 *ch.* 41. 1 *Geo.* 1. *Seſſ.* 2. *ch.* 25. 9 *G.* 1 *ch.* 8. As to Embezilment of Armour, Stores, *&c.*]

By 43 El. ch. 3. *The moſt Part of the Juſtices of the Peace yearly in Seſſions have Power to charge every Pariſh towards a weekly Relief for maimed Soldiers and Mariners.*

A Soldier or Mariner that begs, or counterfeits a Certificate of his chief Commander, ſhall ſuffer Puniſhment as a common Rogue. [See 17 G. 2. ch. 5.]

By 3 Ja. 1. ch 4. *If any one goeth beyond Sea, to ſerve foreign Princes, not having taken the Oath of Allegiance before he goes, it is Felony.* [b] *If he is a Gentleman or Officer that is going to ſerve a Foreign Prince; he muſt be bound with two Sureties in twenty Pounds, not to be reconciled to the Pope, or to conſent to any Conſpiracy againſt the King; or elſe it is Felony.* [See 1 G. 1 *ſt.* 2 ch. 47. *for the Puniſhment of thoſe who perſuade Soldiers to deſert, and of Soldiers of the popiſh Religion.*]

[b] See of Felony, poſt. B 3. ch. 1.

By 31 Car. 2 ch. 1. *No Soldier ſhall be quartered upon any Perſon or Inhabitant without his Conſent. And every ſuch Inhabitant may refuſe to quarter any Soldiers notwithſtanding any Order whatſoever.* [See the Petition of Right, 3 *Car.* 1. *ch.* 1.]

But by the Mutiny Acts which are now paſſed annually, and have only Continuance for one Year, the Conſtables, *&c.* are to quarter Officers and Soldiers in Inns, [c] not in private Houſes: But thoſe Acts do not exempt Officers or Soldiers from the ordinary Proceſs of Law, (though they are not to be arreſted for Debts under ten Pound) [d] nor extend to the Militia, except when embodyed and in actual Service, purſuant to 30 *G.* 2. *c.* 25. by which Act all the former Laws relating to the Militia are repealed, and ſeveral Regulations made relating hereto, too long to be here inſerted. [See therefore that Act, and alſo 31 *G.* 2. *ch.* 26 & 30. 32 *G.* 2. *c.* 20. 33 *G.* 2. *c.* 22 & 24. 4 *G.* 3. *c.* 17. 5 *G.* 3. *c.* 34 & 36. 6 *G.* 3. *c.* 30. 7 *G.* 3. *c.* 15. 8 *G.* 3. *c.* 20. 9 *G.* 3. *c.* 40 & 42. 10 G. 3. *c.* 9. 11 *G.* 3. *c.* 32. And ſee 1 *Burn* title Militia, wherein the old and new Militia are largely treated of, the 11 Edition in Octavo, *anno* 1770. And ſee 4 *Burn* in the Appendix, *tit.* Militia. As to the Militia and their pay, *&c.*

1 Black. Com. 414.
[c] 1 Ld. Raym. 479.
[d] 2 Ld. Ray. 1246. 1 Wilſon 216. A Serjeant in the Guards cannot be arreſted under 10 *l.* a Common Soldier cannot be deemed a Vagrant within the Stat. 17 Geo. 2.

See for the Increaſe and encouragement of Seamen, 7 & 8 *W.* 3. *c.* 21 and 8 & 9 *W.* 3. *c.* 23. 2 *&* 3 *Ann. c.* 6. 13 *G.* 2. *c.* 17. and 17 *G.* 2. *c.* 34. and 29 *G.* 2. *c.* 24. and 32 *G.* 2. *c.* 25 and 33 *G.* 2. *c.* 19. Concerning *Apprentices* to Seamen. And 9 *&* 10 *W.* 3. *c.* 41. 1 *G.* 1. *ſt.* 2. *c.* 25. 1 *G.* 2. *ſt.* 2. *c.* 9. 14. 14 *G.* 2. *c.* 38. and 31 *G.* 2. *c.* 10. Concerning Seamen's Wages, *&c.* And Diſturbances by Seamen on Paydays, *&c.* and 30 *G.* 2. *c.* 18. As to bringing and landing Prize Goods taken from the Enemy.

By 1 Ann. *c.* 9 and 4 G. 1. *c.* 12. *Captains and Mariners belonging to Ships, deſtroying the ſame to the Prejudice of the Owners, Merchants, or Inſurers, ſhall ſuffer Death as Felons.* See 12 *Ann. S.* 2. *c.* 18.

See of Felony Poſt B. 3. ch 1.

[*See* 2 Geo. 2. c. 36. *for regulating Seamen in Merchants Service*; And 3 *Geo.* 1. *c.* 13. 7 *G.* 1. *ſt.* 1. *c.* 21. 5 *G.* 2. *c.* 20. For the better Regulating of Pilots for Conducting Ships from *Dover*, *Deal*, and the Iſle of *Thanet* up the Rivers of *Thames*, and *Medway*.].

See alſo 7 *G.* 2. *c.* 15 which diſcharges the Owners of Ships from being liable farther than the Value of the Ship and her Appurtenances, and Freight, for Loſs or Imbezilment, by Maſter, or Mariners. And 10 *G.* 2. *c.* 14. For collecting Money at *Leghorn* for Relief of diſtreſſed Seamen. See 22 *G.* 2. *c.* 33. For amending, explaining and reducing into one Act, the Laws relating to the Government of his Majeſty's Ships and Forces by Sea. And alſo 29 *G.* 2. *c.* 27. and ſee *B.* 4. *c.* 1. *poſt.* of the Admiralty Court and Courts of Commiſſion for the Trial of Piracies and other Crimes committed at Sea: See alſo the Acts which are annually paſt for the Regulation of the Marine Forces while on Shore.

See alſo 3 *G.* 3. *c.* 3. for Regulation of the Marine Forces, while on Shore, and 2. *G.* 3. *c.* 12. the like.

See alſo 3 *G.* 3. *c.* 8. for enabling ſuch Officers, Mariners and Soldiers, as have at any Time been in the Land or Sea Service, or in the Marines, ſince the 29th Day of *November*, 1748. and have not ſince deſerted; and alſo the Wives and Children of ſuch, to exerciſe Trades within any Part of *Great Britain* or *Ireland*, without Lett, Suit or Moleſtation.

See alſo 4 *G.* 3. *c.* 8. 5 *G.* 3. *c.* 6. 6. *G.* 3. *c.* 10. 7. *G.* 3. *c.* 13. 8 *G.* 3. *c.* 12. 9 *G.* 3. *c.* 7. 11 *G.* 3. *c.* 3. as to Marines and Seamen. See alſo 4 *Burn. tit.* Seamen, and 4 *Burn.* in the Appendix *tit.* Seamen.

No Perſon liſted according to 29 *G.* 2. *c.* 4. *ſ.* 14. ſhall be taken out of his Majeſty's Service by any Proceſs other than for ſome criminal Matter. 1 *Burr.* 339, 340. But he may be ſurrendered by his Bail in their own Diſcharge, *ibid.* 1ſt. An impreſſed Man in Cuſtody at the *Savoy* may be brought into Court by his Bail by *Habeas Corpus*, and when ſurrendered, is to be firſt committed to the Marſhal, and inſtanter delivered to his Military Keeper, who brought him up. *ibid.*

2dly, A Soldier at large (not in Cuſtody at all) is to be firſt committed to the Marſhal, but inſtantly ſet at large; *per* Lord *Mansfield*. *ibid.*

A Volunteer under 30 *G.* 2. *c.* 8. is not privileged from Arreſts; but perſons compelled againſt their Wills, are privileged by *ſ.* 20. of that Act. 1. *Burr.* 466.

CHAP. VI.

Of a Perſon, as Maſter *of a* Family, Huſband, *or* Wife, Parent *or* Child, Anceſtor *or* Heir, Landlord *or* Tenant, Guardian *or* Minor.

See 1 Black. Com. ch. 14. Of Maſter and Servant. ch. 15 Of Huſband and Wife ch. 16. Of Parent and Child. ch. 17.

HAVING ſhewn a general Diviſion of Perſons in reſpect of their *Civil* Capacities, as the *King* and *Subject*; and of *Subjects*, as they are either of the *Clergy* or *Laity*, *Nobility* or *Commonalty*, or of the *Military* State; I proceed to give an Account more particularly of Perſons that are in *Civil* or Relative Capacities; as a *Maſter* of a *Family*, *Huſband*, or *Wife*, *Parent* or *Child*, *Anceſtor* or *Heir*, *Landlord or Tenant*, *Guardian* or *Minor*. And then in the next Chapters of this Book, I ſhall give an Account of ſome *Publick Officers*, and of *Corporations*, which are Particular Perſons in the Eye of the Law, and ſo conclude my Obſervations upon the *firſt* Object of our Laws, (*viz.*) The *Perſons* in our Commonwealth.

Of Guardian & Ward. 4 Burn tit. Servant.

A Perſon therefore in a *Civil* Capacity may be further conſidered,

I. As a Maſter of a *Family*; where I ſhall underſtand the Word *Family* in a large Signification, including not only the *Kindred*, but *Apprentices* and *Servants*, under the Maſter of it.

Of a Maſter of a Family.

1. As for the *Kindred*. The *Maſter* of a *Family* may be conſidered, as his *Kindred* are related to him, tho' not of the ſame Houſe: *Kindred* are a certain Body of Perſons of Kin to each other. [a] The Kindred is diſtinguiſhed by *Lines* either *Aſcending*, *Deſcending*, or *Collateral*, with reſpect to him. The *aſcending* Line is from Son to Father, and ſo directly upwards. The *deſcending* Line is from Father to Son, and ſo directly downwards. The *collateral* Line is between Brothers and Siſters, and the reſt of the Kindred upwards and downwards, a-croſs and amongſt themſelves. Now to know the Degrees of Kindred, there are four Rules; 1. *A Perſon added to a Perſon in the Line of Conſanguinity maketh a Degree.* As in the *aſcending* Line, take the Son and add the Father, and it is one Degree aſcending; then add the Grandfather, and it is a ſecond Degree aſcending. 2. *If there are many Perſons, take away one, and you have the Number of Degrees.* For if there are four Perſons, it is the third Degree, if five, four Degrees. As in the deſcending Line, take the Father and add the Son, and it is one Degree; then take the Son and add the Grandchild, and it is the ſecond Degree, wherein obſerve that the Father, Son and Grandchild, tho' three Perſons, yet make but two Degrees. 3. *In every Line the Perſon muſt be reckoned from whom the Computation is made.* For Example, If the Queſtion is in what Degree the Sons of two Brothers ſtand, we muſt begin from the Grandfather and deſcend to one Brother, which is one Degree; then deſcend to his Son, which is a ſecond Degree; then deſcend again from the Grandfather to the other Brother, which is one Degree, then deſcend to his Son, which is the ſecond Degree. Thus reckoning the Perſon from whom the Computation is made, it appears there are two Degrees, and that the Sons of two Brothers are diſtant from each other two Degrees. For in what Degree either of them is diſtant from the common Stock, (the Perſon from whom the Computation is made,) they are Diſtant betwixt themſelves in the ſame Degree. This is the Way when the Kindred are equally diſtant from the common Stock. But if they are not equally diſtant, then, 4. *In what Degree the moſt remote is diſtant from the common Stock, in the ſame Degree they are diſtant betwixt themſelves*; and ſo the moſt remote maketh the Degree: Thus I and the Grandchild of my Uncle are diſtant in the third Degree; for the Grandchild of my Uncle is diſtant three Degrees from my Grandfather, the neareſt common Stock.

The Common Law agrees in its Computation with the *Civil* and *Canon Law* as to the right Line; and only with the *Canon* Law as to the collateral Line. [See my *New Inſtitute of the Civil Law with Notes*, &c. *B.* 1. *ch.* 2.]

2. *Apprentices* and *Servants* may be under the Government of the *Maſter* of the *Family*.

1 Burn. Juſt. title Apprentices.

1. *Apprentices* (from *Apprendre*, to *learn*) ſignify thoſe that are bound by Indenture (with their own Conſents, or by the Agreement of their Friends) to ſerve Men of Trade, &c. for certain Years upon Con-

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[a] 1 Inſt. 23. b.

dition that the Maſter ſhall in the mean Time inſtruct them in his Art or Myſtery.

By 5 El. ch. 4. §. 43. *Apprentices bound according to that Statute, ſhall be bound by their Indentures, notwithſtanding their Non-age.*

They ſhall be bound by their Indentures to ſerve their Maſters, ſo as to be puniſhed for Miſbehaviour, but not to entitle the Maſter to bring an Action againſt them for Breach of Covenant; [a] except in *London*, where the Apprentice is above fourteen Years of Age: But it hath been adjudged, [b] that there, notwithſtanding the Cuſtom, a collateral Covenant ſhall not bind an Infant. Some Friends are uſually bound for the Apprentice in the Country. [See 8 *Ann. ch.* 9. 18 *G*. 2. *ch.* 22. and 20 *G.* 2. *ch.* 45. Concerning Rates on Monies given with Apprentices [c].]

[a] 3 Cro. 179. Danvers Abr. Tit. Cuſtoms of London, 421.
[b] 1 Cro. 652.
[c] 2 Str. 1132.

Apprentices to *Trades* and *Huſbandry* ought to be regulated by the 5 *El. ch.* 4. which ſee at large, where it is ſet forth, *Who may take Apprentices, and who not; Who ſhall be compelled to ſerve in Trades: The Manner of Puniſhing and Diſcharging Apprentices; and how long they muſt ſerve.* [But by 5 *W. & M. c.* 9. the 32 *Sect.* in that Statute relating to Cloth-weavers is repealed.]

By 35 *Sect. of that Statute,* Four Juſtices in open Seſſions have Power to Diſcharge Apprentices upon Complaint of the Maſter, as well as of the Apprentice [d], (and upon Complaint originally made at Seſſions, though that was formerly queſtioned) if there be good Cauſe of Diſcharge in the Order, but Sickneſs is no Cauſe [e], nor the Uſing him unkindly [f], nor that the Maſter declared in open Court he would not take him again [g].

[d] 1 Saund. 314. 1 Ventr. 174. 1 Mod. 287. 1 Salk. 68. 1 Str. 69. 1 Str. 143, 663, 704. 1 Ld. Ray. 1410.
[e] 1 Str. 99.
[f] 2 Str. 1014.
[g] 1 Str. 704.

By 20 Geo. 2. ch. 19. *On Complaint of any Pariſh-Apprentice, or other Apprentice upon whoſe binding no more than* 5 l. *was paid, touching any Miſuſage, Refuſal of neceſſary Proviſion, Cruelty or other ill Treatment; any two Juſtices may Summon the Maſter or Miſtreſs to appear before them, and examine into the Matter of ſuch Complaint, and on Proof thereof upon Oath, (whether the Maſter or Miſtreſs be preſent or not, if the Service of the Summons be upon Oath proved) may diſcharge ſuch Apprentice by Warrant or Certificate under their Hands and Seals, for which Warrant or Certificate no Fee ſhall be taken. And ſuch Juſtices upon Complaint on Oath by any Maſter or Miſtreſs againſt any ſuch Apprentice, touching any Miſdemeanor, Miſcarriage, or ill Behaviour in ſuch Service, may hear and determine the ſame, and puniſh the Offender by Commitment to the Houſe of Correction, there to be kept to hard Labour at any Time not exceeding a Calendar Month, or by diſcharging ſuch Apprentice.*

By 6 Geo. 3. ch. 25. *On Complaint, Juſtices of Peace are impowered to oblige Apprentice, abſenting before the Expiration of his Apprenticeſhip, to Serve for ſuch Term as he ſhall, without Leave of his Maſter, abſent himſelf from his Service, or to make Satisfaction, and on Refuſal to commit him to the Houſe of Correction for any Time not exceeding three Months, except as to Apprentices paying* 10 l. *Fee, or where ſeven Years ſhall have elapſed. And Juſtices on Complaint are alſo thereby impowered to grant Warrants againſt any Artificer, Callicoe Printer, Handicraftſman, Miner, Collier, Keelman, Pitman, Glaſſman, Potter, Labourer or other Perſon, not fulfilling their Contract, or being guilty of any Miſdemeanor, and upon Conviction to commit the Offender to the Houſe of Correction for any Time not exceeding three Months, nor leſs than one Month. Perſons aggrieved may appeal to the Seſſions (except in Caſes of Commitment,) who are impowered to determine the Appeal and award Coſts.*—This Act does not extend to the Stannaries in *Devon* and *Cornwal*, nor to the Juriſdiction of the Chamberlain of *London*.

[h] At the Common Law any one might uſe what Trade he pleaſed: But to prevent Unſkilfulneſs in Trades, by 5 *El. ch.* 4. *ſſ.* 31. *It is enacted, That no Perſon ſhall exerciſe any Craft, Myſtery or Occupation, then uſed, except he had been brought up therein ſeven Years as an Apprentice; or ſet any Perſon on Work in ſuch Craft,* &c. *who had not been as an Apprentice as aforeſaid, upon the Forfeiture of forty Shillings a Month.* This Clauſe is not to be extended to the getting of a Livelihood by meer Labour, where there is no Craft or Myſtery, or any further than the Words expreſly direct. And therefore a Perſon ſerving *as* an Apprentice, though not bound, or having uſed or exerciſed the Trade as Maſter or Servant for ſeven Years, may exerciſe his Trade and ſet others to Work therein[i]: And the Clauſe extends only to Crafts and Myſteries *then* uſed, at the making of the Act, and not to new Arts and Myſteries ſince invented.

It muſt be expreſly proved, that the Party did publickly exerciſe the Trade, or ſet others to work, and make Gain by it: For the Act does not forbid any one to exerciſe a Trade [a] *privately* in his own Family; as to bake, brew, trim and ſhave, *&c.*

The Penalty in this Clauſe of the Act is to be recovered by Indictment or Information (but without Coſts) in the proper County where the Offence is committed, according to 31 *El. ch.* 5. 21 *Ja.* 1. *ch.* 4. [b] Or by Action of Debt, in any of the Courts at *Weſtminſter*.

[c] An Apprentice cannot be ſent out of *England*, unleſs the Nature of his Service doth imply it.

As an Apprentice cannot be made without Writing, ſo he cannot be [d] diſcharged by his Maſter without Writing under his Hand, and with the Allowance of one Juſtice. See 20 *Geo.* 2. *c.* 19.

If any Maſter dies, the Apprentice may go to the Executor or Adminiſtrator, to be maintained, if there be Aſſets[e]. But the Executor cannot bind him over to another Maſter for the remaining Part of his Time, unleſs by ſpecial Cuſtom, or with the Concurrence of the Apprentice; neither is the Apprentice bound to ſerve the Executor or Adminiſtrator of the Maſter[f]. [g] By the Cuſtom of the City of *London*, an Apprentice may be *turned over* from one to another; and he to whom ſuch Apprentice is turned over, may have an Action of Covenant on Breaches aſſigned; *Qu.* And in *London*, if a Maſter ſhall refuſe to make his Apprentice free when the Term of his Apprenticeſhip is expired, the Chamberlain[h] will make him free, if the Maſter cannot ſhew Cauſe to the contrary. In other Corporations the Apprentice may have a *Mandamus* out of the *King's Bench*, directed to the proper Officer, to make him free, if the Maſter refuſes to do it.

By 22 H. 8. ch. 4. *The Fee for Entry of an Apprentice into a Fellowſhip is ſettled at* 2 s. 6 d. *and his Fee for Entry into his Freedom, at* 3 s. 4 d.

By 28 H. 8. ch. 9. *No Maſter or Ruler of any Guild or Fellowſhip ſhall, by Oath or Bond, reſtrain any Apprentice or Journeyman from uſing his Trade after his Apprenticeſhip or Term expired.*

But an Apprentice or Journeyman of full Age, may reſtrain himſelf upon a good Conſideration, either by Bond or otherwiſe, from exerciſing his Trade in a particular Place[i].

See 5 *El. ch.* 5. *Concerning* Apprentices to Owners of Ships and Veſſels, or Houſholders, uſing the Trade of the Sea by Fiſhing; 1 *Ja.* 1.

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[h] 11 Rep. 53, 54. Hob. 211.

[i] 11 Rep. 54. 1 Salk 67. 2 Salk 613. 1 Ld. Ray. 738.

[a] 8 Rep. 129. 11 Rep. 54. 13 Rep. 11, 12. 1 Salk. 373.

[b] 1 Ventr. 8, 9, 364. 1 Lev. 249. 2 Lev. 204. 3 Lev. 71.

[c] Hob. 134.

[d] Dalt. ch. 58. pag. 121. 2 Ld. Ray. 1117, 1410. 1 Str. 663.

[e] 1 Salk. 66, 68.

[f] 2 Stra. 1266. 1 Lev. 177. to the contrary not Law.

[g] Danvers. Abr. Tit. Cuſtom of London, 421. Quære & vide Barker v. Beardwell, Shower 4.

[h] See of his Court, poſt. B. 4. ch. 2.

1 Danv. Ab. 735.

[i] 1 Wms 181. in Point.

ch. 16. *Concerning* Apprentices to Wherrymen and Watermen. *And* for Binding poor Boys Apprentices to the Sea Service to Maſters of Veſſels, See 2 & 3 *Ann. ch.* 6. And 4 *Geo.* 1. *ch.* 11. Where any Perſon of the Age of fifteen, and under twenty-one, is willing to ſerve in any of the Colonies or Plantations in *America*.

See 43 *El. ch.* 2. 1 *Ja.* 1. *ch.* 25. 7 *Ja.* 1. *ch.* 3. 3 *Char.* 1. *ch.* 4. 8 & 9 *W.* 3. *ch.* 30. *For* poor Apprentices bound out by the Church-wardens and Overſeers; and 15 *Car.* 2. *ch.* 15. Of Apprentices to Hemp-Dreſſers, and making Cloth of Hemp, Nets and Tapeſtry-Hangings; 4 *W. & M. ch.* 23. Againſt Apprentices hunting, *&c.* 12 *Ann. ch.* 18. *Concerning* Apprentices to Perſons that come into a Pariſh by Certificate; 1 *Geo.* 1. *ſſ.* 2. *ch.* 41. *For* giving Liberty to Perſons to work who have ſerved their Apprenticeſhips to the Woollen Manufacture in *Colcheſter*, &c. and 22 *Geo.* 2. *ch.* 44. *To* enable Officers, Mariners and Soldiers, to ſet up Trades.

2 Str. 1110, 1268.
1 Str. 48.

See Dalton, Nelſon, and Burn's Juſt. Tit. Apprentice per Tott'

2. *Servants* are either *Menial*, or not *Menial*.

1. *Menial* Servants are the Domeſticks living (*infra Mœnia*) within the *Walls* of the Houſe.

4 Burn. Tit. Servant.

[a] If one retains a Servant generally without expreſſing any Time, the Law conſtrues it to be for a Year, according to the Statute of 5 *El. ch.* 4. By which *It is enacted, that no Clothier, Woollen Weaver, Taylor,* &c. *ſhall retain a Servant for leſs Time than a Year; and Perſons unmarried, or under thirty Years of Age, though married, are* compellable *to ſerve one Year at leaſt, in thoſe Trades, if brought up therein, or have uſed the ſame for three Years, for the Wages limited by the Statute: And others are* compellable *to ſerve in Husbandry by the Year: Alſo unmarried Women, between the Age of twelve and forty, may be* compelled *to ſerve by the Year, Week, or Day, for ſuch Wages as two Juſtices of the Peace ſhall think fit, on Pain of Impriſonment.*

[a] F.N B.168. 1 Inſt. 42. b. Noy's Max. 91.

If any Servant make any Aſſault *upon his Maſter, Miſtreſs, or Overſeer of him or his Work, he ſhall be impriſoned for one Year or leſs, and have farther Puniſhment as the Juſtices in open Seſſions ſhall think convenient.*

A Servant retained according to the Statute, cannot be put away *before the End of his Term, unleſs for ſome reaſonable Cauſe to be allowed by a Juſtice of Peace: And none ſhall put away any ſuch Servant at the End of his Term without a Quarter's Warning, on Forfeiture of forty Shillings. And no Perſon ſo retained ſhall* depart *from his Maſter before the End of the Term, unleſs for ſome reaſonable Cauſe to be allowed as aforeſaid, or at the End of his Term without a Quarter's Warning, upon the Penalty of Impriſonment.*

If a Servant ſhall refuſe to do his Service, this is a Departure in Law, altho' he continue with his Maſter.

[b] It is a reaſonable Cauſe of *Departure* from Service, if the Servant is not allowed ſufficient Meat, Drink, *&c.* or if the Maſter's Wife beats him: But Apprentices and Servants may be corrected with Moderation by their Maſters.

[b] F.N.B.168.

If a Woman that is a Servant doth marry, yet ſhe muſt ſerve out her Time, and her Huſband cannot take her out of her Maſter's Service. And if a Woman being with Child of a Baſtard, procures herſelf to be retained with a Maſter, who knoweth nothing thereof, or if ſhe be gotten with Child during her Service; this is a reaſonable Cauſe why the Juſtices ſhould diſcharge her from her Service; for ſhe has made herſelf uncapable to ſerve any longer. But if a Servant retained for a Year falls ſick, the Maſter cannot put him away or abate his Wages; nor is Marriage of itſelf any reaſonable Cauſe of Diſcharge within the Statute, and the Diſcharge by the Juſtice muſt be in Writing [c].

If a Man retains a Servant for ten Pounds *per Annum*, and he *departs* within the Year, [d] he can have no Wages. And if Wages are to be paid Half-yearly, and the Maſter dies after the firſt Half-year, the Servant ſhall have Wages only for the firſt Half-year.

A Servant, when his Maſter is dead, is legally diſcharged.

[a] If my Servant damages my Goods by his Negligence, an Action of the Caſe lieth againſt him.

See 33 *H.* 6. *ch.* 1. and 21 *H.* 8. *ch.* 7. [b] Where Servants imbezil their Maſters Goods, or ſteal from their Maſters to the Value of forty Shillings; and 12 *Ann. ch.* 7. as to *Apprentices.*

Servants *not Menial*, or not Domeſticks, are *Labourers*, who not having a ſufficient Eſtate to live upon, and not employed in any Art, are [c] compellable to ſerve, by the above-mentioned Statute of 5 *El. ch.* 4. *Which alſo directs that all Perſons meet for Labour ſhall be* compelled *to ſerve by the Day, in the Time of Hay or Corn Harveſt*; and *that the* Wages *of Servants, Labourers, Artificers, Husbandmen, or Apprentices of Husbandry, ſhall be aſſeſſed Yearly at every Eaſter-Seſſions*; [See 1 *Ja.* 1. *ch.* 6. *By which Statute,* The Sheriff ſhall cauſe the ſaid Rates to be proclaimed.] *And that None ſhall give greater Wages than thoſe rated as aforeſaid, in pain of five Pounds, and ten Days Impriſonment; nor take greater Wages on pain of twenty-one Days Impriſonment. And every Retainer, or Payment, or Writing contrary to the true Meaning of the Act, to be void.*

If any Labourer *ſhall make an* Aſſault *upon his Maſter, or the Overſeer, he ſhall ſuffer as Servants making ſuch Aſſault.*

Every Artificer, or Labourer that ſhall be retained for Building, or Repairing, or for any other Work done by the Great, ſhall not depart from the ſame before the Finiſhing thereof, unleſs it be for Non-payment of Wages, or other lawful Cauſe, without Licence, on pain of one Month's Impriſonment, and Forfeiture of five Pounds to the Party grieved; nor if retained in any Service, depart without Finiſhing the Work, upon pain of one Month's Impriſonment.

The Statutes of 5 *El. ch.* 4. and 43 *El. ch.* 2. are excellent Statutes for the Government of Apprentices, Servants and Labourers; but they are not put in Execution as they ought, as to the *Ability* of Parents of Apprentices, *Teſtimonials*, *Rates* for *Wages*, Workers in *Harveſt*, &c. which makes Servants intolerably inſolent.

[d] The *Teſtimonial* concerns only hired Servants in Trades and Husbandry. And the Statute does not extend to the Wages of other Servants than in Huſbandry and Trades [e].

By 2 & 3 Ed. 6. ch. 15. *Artificers, Workmen and Labourers, that conſpire together concerning their Work or Wages, or not to meddle with one another's Work, or finiſh what another hath begun, forfeit ten Pounds,* &c. [See 1 *Ann. S.* 2. *ch.* 18. For Labourers in the Woollen Manufacture.]

By 20 G. 2. ch. 19. [*and* 27 G. 2. ch. 6. *as to the Stannaries in* Devon *and* Cornwal.] *Complaints and Diſputes between Maſters or Miſtreſſes and Servants in Husbandry, hired for a Year or longer,* [*by* 31 G. 2. ch. 11. *extended to Servants employed in Husbandry tho' hired for leſs Time than a Year,*]

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[c] 2 Salk. 529. Rex. v. Hanbury, Trin. 27 G. 2. K. B.

[d] Noy's Max. 90.

[a] 5 Rep. 14.

[b] 3 Inſt. 105.

[c] F. N. B. 168.

[d] 1 Mod 78. Hetl. 164.

[e] Jones (Th.) 47.

2 Salk. 441. 2 Ld. Ray. 820, 1305. 1 Str. 8. 2 Str. 1002.

a Year,] *and Artificers, Handicraftſmen, Miners, Colliers, Keelmen, Pitmen, Glaſſmen, Potters and other Labourers, employed for any certain Time, or in any other Manner, may be determined by a Juſtice of the Peace of the County or Place where ſuch Maſter or Miſtreſs ſhall inhabit, though no Rate of Wages has been made that Year by the Juſtices. And the Juſtice may examine upon Oath ſuch Servant, Artificer,* &c. *or any other Witneſs, and make Order for Payment of ſo much Wages to ſuch Servant, Artificer,* &c. *as to ſuch Juſtice ſhall ſeem reaſonable, provided the Sum in queſtion exceed not* 10 l. *to a Servant, or* 5 l. *to an Artificer,* &c. *and on Non-payment in twenty-one Days, may cauſe the ſame to be levied by Diſtreſs and Sale of the Goods of ſuch Maſter or Miſtreſs. On Miſbehaviour of a Servant, Artificer,* &c. *the Juſtice, upon Complaint upon Oath, may puniſh the Offender by committing him to the Houſe of Correction, there to be held to hard Labour for any Time not exceeding a Calender Month, or by abating ſome Part of his Wages, or diſcharging him from his Service. And for Miſuſage, Refuſal of neceſſary Proviſion, Cruelty or other ill Treatment, committed by the Maſter or Miſtreſs, the Juſtice may, by Writing under his Hand and Seal, which is to be given gratis, diſcharge the Servant, Artificer,* &c. *from his Service.* [See 22 G. 2. *ch.* 27. *relating to Workmen in the Woollen and many other Trades.*]

Rep. tempore Ld. Hardwick Edit. 1770. 3, 4.
1 Burr. 401.

See 7 *Ann. ch.* 12. Concerning the Servants of Ambaſſadors.

A Chaplain to an Ambaſſador who does no Duty in his Houſe, ſhall not be protected from Arreſts. 1 *Wilſon* 20, 78.

There are ſome common Caſes neceſſary to be known concerning *Servants*, in a more particular Manner; which may be applied partly to *Apprentices*, as alſo to *Stewards* and *Bailiffs*. Therefore,

Let us ſee what the *Maſter* may do *Againſt* others with reſpect to his Servant, and how a *Servant* may *charge* his Maſter by his Act.

[a] 9 Rep. 113. 10 Rep. 130.
[b] 1 Salk. 407, Contra.
[c] 2 Str. 953.

1. The Maſter may maintain the Cauſe of his Servant againſt another. [a] He may have an Action of Treſpaſs for the Battery of his Servant, but then it muſt be alledged, *That by Reaſon of ſuch Battery he loſt his Service:* For otherwiſe the Servant muſt bring the Action. A Maſter may alſo juſtify an Aſſault and Battery in Defence of his Servant [b]; for otherwiſe he might loſe his Service; as a Servant may juſtify an Aſſault and Battery by way of Interpoſition [c] in Defence of his Maſter.

[d] Doct. and Stud. Dial. 2. ch. 42 & 47.

If a Servant rides upon his Maſter's Horſe to do an Errand, and the Horſe is attached upon a Plaint of Debt againſt the Servant, and forfeited for Non-appearance of the Servant, [d] the Maſter ſhall have an Action of Treſpaſs againſt the Officer that attached him.

[e] 8 Rep. 32, 33. Latch. 127.

If my Servant is travelling upon my Horſe, about my Buſineſs, and comes to a common Inn, and delivereth the Horſe to the Hoſteler, and it is ſtolen; [e] I ſhall have an Action againſt the Inn-keeper; but not if he is put to Graſs by the Servant's Order.

[f] Latch. 127. 2 Rol. Abr. 686. 1 Cro. 142. 3 Cro. 37, 336. See of Robbery, poſt. B. 3. ch. 1.

[f] If a Servant is robbed on the Highway, of the Maſter's Money, the Maſter being abſent; the Maſter, or the Servant may bring the Action againſt the Hundred; and the Maſter may be a Witneſs to prove the Delivery of the Money to the Servant before the Robbery, though he brings the Action in his own Name.

[g] 1 Rol. Abr. 98.

If my Servant is cozened of my Money; [g] I may have an Action of the Caſe againſt the Perſon that cozened him.

2 Cro. 223. Noy 105.
[h] Noy's Max. 94. Kitch. 371.

If a Servant that keepeth the Maſter's Shop, or uſeth to ſell for him, give away the Maſter's Goods, the [h] Maſter may have an Action againſt the Receiver.

[i] F. N. B. 167, 168. 2 Lev. 63.

The Maſter alſo may have an Action againſt one that entices away his Servant, or [i] hires and retains him, knowing him to be his Servant.

Theſe Actions the *Maſter* may have againſt others, in reſpect of his Servant.

2. On the other Side, The *Maſter* may be *charged* for the Act of the Servant, (*viz.*) by his *Offence* or Wrong, *Contract or Negligence.*

1. As to *Offences* and *Wrongs*, [a] An Innkeeper ſhall be charged to anſwer Damages for *Theft* committed by his Servant, or any other, upon one that lodgeth in his Inn as his Gueſt; not if the Gueſt is robbed by his own Servant, or Companion; for here the Innkeeper was in no Fault. If a Man is robbed in a private Family, or Tavern, by one of the Servants, or by any other, the Maſter is not chargeable: Neither is the Maſter chargeable, if his Servant ſteals the Goods of one of the ſame Town that lieth in the Inn, who was not a Traveller.

[a] 8 Rep. 32, 33. Dr. & Stud. Dial. 2. ch. 42.

Action of the Caſe lies againſt the Maſter for Damage [b] done by his Dog, if the Maſter knew him to be accuſtomed to bite, or if ſet on by the Servant by his Maſter's Order.

[b] Dr. & Stud. Dial. 2. ch 42. 8 Rep. 32. Noy's Max. 92, 93.

In [c] Treſpaſs, or Felony, the Maſter ſhall be charged Criminally for his Servant's Act, if the Servant did it by his Maſter's *Command.*

3 Cro. 254, 487. 4 Rep. 18.

[d] If a Vintner's Servant ſells Corrupt Wine, to the *Wrong* and *Injury* of another, an Action of the Caſe lies only againſt the Maſter; tho' the Maſter did not command the Servant to ſell to that particular Perſon. For he acts but as a Servant.

[c] Dr. & Stud. Dial 2. ch. 42. 1 Ld. Ray. 264.

[e] If a Maſter commands his Servant to Diſtrain, and he rides upon the Diſtreſs, the Servant only ſhall anſwer for ſuch Abuſe of the Diſtreſs.

[d] 1 Rol. Abr. 95.

[e] Kitch. 372.

2. As to *Contracts*; if a Maſter [f] *Agrees* to an Act done by his Servant, it ſhall be ſaid to be the Maſter's Act; as in borrowing or receiving Money: And whatſoever comes within the Compaſs of a Servant's uſual *Buſineſs*, the Maſter ſhall be chargeable therewith, as of his Command, and ſhall likewiſe have Advantage of the ſame againſt others. [g] But if a Servant borrows Money in his Maſter's Name, or takes it up of a Creditor of his Maſter's without Order, that does not bind the Maſter, unleſs it comes to the Maſter's Uſe, [h] or unleſs the Servant has been *uſed* to borrow or receive Money for his Maſter, which the Maſter has afterwards paid or allowed: Or if the Servant has been uſed to give Notes in the Maſter's Name, which the Maſter has afterwards paid, a Note ſo given ſhall bind the Maſter, whether the Money for which it was given, come to his Uſe or not [i]. So Action of Trover will lie againſt the Maſter for Goods delivered to the Servant, as ſuch, in the ordinary Courſe of Dealing, whether they actually come to the Maſter's Hands or no [k]. But Trover will alſo lie againſt a Servant, who diſpoſes of Goods being the Property of another, to his Maſter's Uſe, whether he has any Authority or not from his Maſter for ſo doing; for if a Servant is a *Tortfeaſor*, no Authority that he can derive from his Maſter can excuſe him from being liable in this Action. 1 *Wilſon* 328.

[f] Noy's Max. 93, 94.

[g] Dr. & Stud. Dial. 2. ch 42. Kitch. 371.

[h] Ld. Ray. 225.

[i] 1 Ld. Ray. 224.

[k] 1 Str. 505.

[l] If my Servant ſells my Horſe or other Goods in a Fair or Market with ſeveral Faults, which I knew of, the Buyer can have no Action againſt me the Maſter, unleſs I bid my Servant ſell to that certain Perſon. But if a Tradeſman's Servant makes a ſpecial Warranty as to Goods ſold by him in his Maſter's Name, in the uſual Courſe of that Trade, the Maſter is bound thereby [m].

[l] 1 Roll. Abr. 95. Kitch. 370.

[m] 1 Str. 653.

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[c] *Qui facit per alium, facit per ſe.* 1 Inſt. 258. a. 4 Inſt. 109. 10 Rep. 33.

[d] *Omnis ratihabitio retrotrahitur, et mandato æquiparatur.* 1 Inſt. 245. a. 258. a. 9 Rep. 106.

[n] Dr. & Stud. Dial. 2. ch. 42. F. N. B. 120. Kitch. 371.

[n] If a Servant makes a Contract in his Maſter's Name, not in the uſual Courſe of his Buſineſs, the Contract ſhall not bind his Maſter, unleſs it were by his Maſter's Command or Aſſent. But if one hath a known Bailiff who uſed to ſell the Beaſts of his Maſter at the Market, and he ſells ſeveral Oxen, this is a good Sale, tho' the Bailiff had no ſpecial Warrant to ſell them.

[a] 1 Roll Abr. 95. Kitch. 372.

[a] If my Servant lets a Leaſe of my Land for Years, reſerving Rent to me, and warrants it free from Incumbrances when it is incumbred, the Action lieth againſt the Servant, not againſt the Maſter; for it was the Warranty of the Servant, who exceeded his Power.

[b] Dr. & Stud. ubi ſupr. Noy's Max. 94, 95. Kitch. 371.

[c] 1 Ld. Ray. 225.

[d] 1 Str. 506. Dr. & Stud. Dial. 2. ch. 42.

[b] If a Man ſends his Servant to a Fair or Market to buy for him certain Things, tho' he doth not command him to buy of a certain Perſon, yet the Maſter ſhall be bound by the Servant's Contract, if he buys of any one; but if the Servant in that Caſe buys them in his own Name, not ſpeaking of his Maſter, the Maſter ſhall not be charged; unleſs the Things bought came to his Uſe, and he have Notice that they do ſo. And though a Maſter gives his Servant ready Money to buy Proviſions or the like, and the Servant buys them on Truſt, he ſhall anſwer for what the Servant ſo buys[c]: But *Qu.* if the Maſter has never before paid the Tradeſman for Goods delivered to the Servant on Truſt[d].

If a Man maketh another his general *Receiver*, and he receiveth Money of a Debtor of his Maſter, and giveth an Acquittance, and doth not pay his Maſter the Money; yet that Payment diſchargeth the Debtor, and the Act of the Servant ſhall bind the Maſter: But if the Debtor of the Maſter hath taken an Acquittance of the Servant without paying the Money, that Acquittance will be no Bar to the Maſter. Nor, if a Debtor delivers to a *Receiver* a Horſe, or other Thing, in Recompence of the Debt, will that Delivery diſcharge the Debtor, unleſs it is delivered over to the Maſter, and he agrees to it. For the Receiver hath no Power to make ſuch Exchange, unleſs his Maſter gives him a *ſpecial* Authority ſo to do.

[e] 1 Inſt 258. a. 8 Rep. 85.

[e] It is regularly true, That when a Man does leſs than he is commanded or authorized, there the Act is void; becauſe the Command or Authority was not purſued. But where one doth that which he is authorized to do, and more, it is good for that which was warranted, and void for the reſt: But theſe Rules are not without Exceptions.

[f] Noy's Max. 94. 1 Ld. Ray. 264, 739.

[g] Dr. & Stud. Dial. 2. ch. 41.

3. Maſters may often ſuffer for the *Negligence* of their Servants. As[f] a Maſter ſhall be charged if his Servant, or any of his Family, caſt any Thing into the Highway, to the Nuſance of the King's Subjects, or if his Servant driving his Cart do Damage therewith. [g] If Goods are delivered to the Servant of a Carrier, and the Goods are loſt, an Action lies againſt the Maſter.

If a Smith's Servant pricks a Horſe while he is ſhoeing him, the Maſter ſhall anſwer for the Damage.

If a Servant by keeping Fire negligently, burnt his Maſter's Houſe and his Neighbours, an Action laid at Common Law againſt the Maſter. But if the Servant bore Fire negligently in the Street, and thereby the Houſe of another was burnt, there no Action lay againſt the Maſter. But,

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[e] *Quando plus ſit quam fieri debet, videtur etiam ipſum fieri quod faciendum eſt.* 8 Rep. 85. a.

By 6 A. ch. 31. *and* 10 A. ch. 14. *No Action ſhall be maintained againſt any in whoſe Houſe or Chamber any Fire ſhall accidentally begin: But this Act does not make void any Agreement between Landlord and Tenant.*

And if any Servant, through Negligence, ſhall cauſe any Houſe or Outhouſe to be fired; ſuch Servant being Convict by Oath before two Juſtices of the Peace, ſhall forfeit one Hundred Pounds to the Churchwardens of the Pariſh, to be diſtributed amongſt the Sufferers; or upon Non-payment, ſuch Servant ſhall be committed to ſome Workhouſe for eighteen Months, to be kept to hard Labour.

[a] If a Servant, Bailiff of a Manor, a Receiver, or a Factor, or the like Accountant, is robbed without his Default or Negligence, he muſt be allowed on his Account by his Maſter ſo much as he loſt. But otherwiſe it is of a Carrier; for he hath his Hire, and undertaketh thereby the ſafe Cuſtody of the Goods. [See the 9 *Ann. ch.* 10. Concerning the *Poſt-Office.*]

[a] 1 Inſt. 89. a.

See Dr & Stud. Dial 2. ch. 42. per Tot'.

The [b] Diſcharge or Turning out of a Receiver, Factor, Attorney, in their Abſence, is not ſufficient in Law, till they have Notice of it.

[b] 1 Inſt. 55 b.

II. A Perſon may be *Baron* or *Feme*, (i. e.) *Huſband* or *Wife*. Huſband and Wife are made ſo by Marriage; and therefore it may be proper to ſet forth. 1. How, and by, and between whom, Marriages may be *Contracted*; 2. The *Effects* of Marriage, with Relation to Huſband and Wife; 3. How Marriages may be *diſſolved*; 4. What *Rights* do accrue to Huſband or Wife *after* the Diſſolution.

Of Huſband and Wife.

1 Black. Com. 433. ch. 15. Of Husband and Wife.

1. How, and by, and between whom, *Marriages may be contracted.* Eſpouſals go before them. *Eſpouſals* are a Contract or mutual Promiſe to marry each other hereafter. Marriage or Matrimony is an Eſpouſal *de præſenti*, and a Conjunction of Man and Woman in a conſtant Society of living together. [c] Mutual Conſent makes the Marriage before Conſummation. And it being a Conjunction of one Man and one Woman, *Polygamy* is thereby excluded; as alſo *Concubinage*, becauſe it conſiſts in a conſtant Society of living together without the Liberty of parting at Pleaſure. [See 1 *Ja.* 1. *ch.* 11.]

3 Burn Juſtice tit. Marriage.
2 Burn Eccl. Law. tit. Marriage.

[c] 6 Rep. 22. 1 Inſt. 33. a.

Where a Marriage is to be contracted, Reſpect ought to be had to the *Age* of the Parties, and the *Degrees* of *Conſanguinity* and *Affinity* betwixt them.

As to [d] *Age* of *Conſent*, the Woman may marry at twelve Years or after, and the Man at fourteen or after. And if they are married before, there needeth not a new Marriage if they agree at thoſe Ages; for at firſt they were Huſband and Wife in Law. But if they are married before thoſe Ages, they cannot diſagree till they come to thoſe Ages; and then at that Time, and not before, they may diſagree and marry again to others without any Divorce: But if they once give Conſent at thoſe Ages, they cannot diſagree afterwards. If a Man at the Age of Fourteen marries a Woman at the Age of Ten, he may as well diſagree at her Age of Twelve as the Woman, though he was at the Age of Conſent. Becauſe in Marriage, either both muſt be bound, or equal Election of Diſagreement be given to both. And ſo on the contrary, if the Woman is of the Age of Conſent, and the Man under that Age.

[d] 1 Inſt. 33. a. 78. b. 79 a. & b. 80. a. 2 Inſt. 182, 434. 3 Inſt. 88, 89. 6 Rep 22. 7 Rep. 43.

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[c] *Conſenſus, non concubitus, facit matrimonium.* 1 Inſt. 33. a. 6 Rep. 22.

[d] *Maturiora ſunt vota mulierum quam virorum.* 6 Rep. 71.

a 1 Sid. 112. 1 Rol. Abr. 357.

See ante P. 15.

If an [a] Idiot or Lunatick take a Wife, they are *Baron* and *Feme* in Law, and their Iſſue legitimate. But it ſhould ſeem that ſuch Marriage may be declared void by Sentence, where the Party was ſo much an Idiot as to be incapable of Conſenting, or where the Lunatick married during his Frenzy. And *by* 25 *G.* 2. ch. 30. *If any Perſon found a Lunatick on Commiſſion* [b], *or whoſe Perſon or Eſtate is committed to the Cuſtody of Truſtees by Act of Parliament, ſhall marry before he is declared to be of ſane Mind by the Lord Chancellor, or the Majority of ſuch Truſtees, the Marriage is declared to be abſolutely void.*

See 3 *H.* 7. *ch.* 2. and 39 *El. ch.* 9. For the Penalty for carrying away a Woman againſt her Will, and *B.* 3. *ch.* 1. *poſt.* Of Felonies againſt the *Body*. And ſee the 4 & 5 *Ph.* & *M. ch.* 8. Concerning the taking away Maidens or Women-Children unmarried within the Age of ſixteen Years, and of Offences againſt the publick *Peace*, B. 3. *ch.* 3. *poſt.*

c 1 Inſt. 24. a. 235. a. 2 Inſt. 684.

Comyns 318. Bunb. 156.

As to the *Degrees*, [c] all Perſons may lawfully marry, that are not prohibited by the *Levitical* Degrees, or otherwiſe by *God's Law*; For,

By 32 H. 8. ch. 38. *Nothing* (*God's Law excepted*) *ſhall trouble or impeach any Marriage without the* Levitical *Degrees.* [See *Levit.* 18. and 25 *H.* 8. *ch.* 22. Where the Degrees prohibited are mentioned.]

d Vaugh. 206. 2 Ventr. 9. 2 Lev. 254. 3 Lev. 364.

e 2 Inſt. 683, 684. Hob. 181. 2 Ventr. 12. 2 Lev. 254.

Bunb. 145.

Therefore the Son of a Father by another Wife, and the Daughter of a Mother by another Huſband, and ſo *è converſo*, may marry; as alſo Couſin Germans, by the ſaid Statute. [d] So one may marry the Wife of his Great Uncle upon the ſame Reaſon.

[e] *Note*, That tho' the Marriage of the Nephew with his Father's Siſter and the Mother's Siſter, is forbid in the 18th and 20th Chapters of *Leviticus*, and the Marriage of the Uncle with the Niece is not prohibited in expreſs Words; yet the ſame is implicitly prohibited, becauſe it comes within the ſame Reaſon: Tho' it has been pretended, that it does not come within the ſame Reaſon, becauſe where the Uncle marries the Niece, both keep the ſame Degree and Order according to Nature, which they had before; which the Aunt does not in reſpect of her Nephew, loſing her Superiority by the Marriage, by being brought into Subjection to her Huſband. So if you muſt not marry your Brother's Wife, you muſt not marry your Wife's Siſter, *v.* 16. And thus you muſt conclude in like Caſes, where an expreſs Prohibition is on one ſide only. But none of theſe Marriages are void in themſelves, but voidable by Sentence in the Spiritual Court. [f] For if a Man takes his Siſter to Wife, they are *Baron* and *Feme* till a Divorce, and till then the Iſſue are not Baſtards. It is ſaid, that no Marriage ſhall be impeached without the *Levitical* Degrees, [g] except where *God*'s Law doth prohibit.

f 1 Roll. 340, 357.

g 1 Inſt 235. a. 2 Inſt. 687. 7 Rep. 44.

Therefore where there is a perpetual *Impotency*, *Fear*, or *Impriſonment*, where there can be no Conſent, or the Perſon is *under* Age of Conſent, [or *precontracted*, *Qu.* ſince 26 *G.* 2.] or where a Woman hath a *Huſband* living, or a Man a *Wife living*, in ſuch Caſes the Marriages alſo are to be declared void as prohibited by *God's Law*. In *Leviticus* it is ſhewn what Marriages are unlawful as to *Conſanguinity*, (or Kindred by Blood) and *Affinity* (or Kindred by Marriage) only. Other Parts of Scripture are to be alledged againſt Marriages upon other Accounts.

a 1 Inſt. 134 a. 2 Inſt. 97, 99, 325. 2 Wilſ. 127.

The [a] *Loyalty* (or Lawfulneſs) of Marriage is always to be tried by the Biſhop's Certificate, upon an Iſſue, *Accoupled in lawful Matrimony or not*; as in a Writ of Dower, Appeal, Baſtardy; but this is ſeldom put in Practice. [b] But whether a Woman is a Feme Covert, or whether ſhe is the Wife of *A.* or *B.* is triable by a Jury upon ſuch an Iſſue. For the Iſſue is, whether there was a Marriage *de facto,* or in Reputation, that is whether a Marriage was contracted betwixt the Parties or not, or whether the Parties lived in a married Eſtate, where the *Legality* of it does not come in Queſtion. As to the Lawfulneſs, the Biſhop's Opinion, after he hath heard the Cauſe, muſt determine it.

By 7 & 8 W. 3. ch. 35. *If a Parſon marries, or knowingly ſuffers any other Miniſter to marry any Perſons in any Church or Chapel to ſuch Parſon belonging, without Publication of the Banns of Matrimony, or Licence, he forfeits one hundred Pounds; and the Man ſo married ten Pounds; and the Sexton or Pariſh-Clerk, aiding and aſſiſting, five Pounds. The ſaid Forfeitures to be recovered by Action of Debt, one Moiety thereof to the King, and the other to the Informer.* [See 10 *Ann. ch.* 19. §. 176.] And by 26 *G.* 2. *ch.* 33. *Every Perſon who ſhall ſolemnize Matrimony in any other Place than a Church, or publick Chapel, where Banns have been uſually publiſhed, unleſs by ſpecial Licence, or without Publication of Banns, unleſs Licence of Marriage be firſt had from ſome Perſon having Authority to grant the ſame, ſhall be guilty of Felony, and tranſported for fourteen Years.*

Though if the Marriage was once ſolemnized by one in Orders, it was held good, notwithſtanding theſe outward Irregularities.

But now ſeveral Regulations as to Marriage are introduced by the Act to prevent clandeſtine Marriages, of 26 *Geo.* 2. *ch.* 33. whereby it is enacted, *That after the twenty-fifth of* March *one thouſand ſeven hundred and fifty-four, all Marriages (except in* Scotland, *or beyond the Seas, and except the Marriages of any of the Royal Family, and of* Jews *and* Quakers, *where both the Parties are ſuch) which ſhall be ſolemnized without Licence or Publication of Banns, or in any other Place than a Church or publick Chapel wherein Banns have been uſually publiſhed (unleſs by ſpecial Licence, from the Archbiſhop of* Canterbury), *or ſolemnized by Licence without the Conſent of the Father, if living, or if dead, of the Guardians, or if none ſuch, then of the Mother of the Infant, (where either of the Parties, not being a Widower or Widow, is under the Age of twenty-one) ſhall be null and void to all Intents and Purpoſes; and where ſuch Parents or Guardians of the Party under Age ſhall, at the Time of the Publication of Banns, openly declare or cauſe to be declared their Diſſent to ſuch Marriage, ſuch Publication of Banns ſhall be abſolutely void.*

And in order to preſerve the Evidence of Marriages, it directs the Form of the Regiſter thereof, which is to be entered in a proper Book, to be provided by the Churchwardens, and to be ſigned by the Miniſter, the Parties, and two credible Witneſſes preſent at ſuch Marriage, Immediately after the Celebration thereof.

This Act alſo directs that all Banns of Matrimony ſhall be publiſhed audibly in the Church or Chapel where Banns have been uſually publiſhed, belonging to the Pariſh or Chapelry wherein each of the Parties ſhall dwell, upon three Sundays preceding the Marriage, immediately after the ſecond Leſſon, in the Morning Service, or in the Evening Service, if no Morning Service; or in the Church or Chapel next adjoining, where either Party lives in an extraparochial Place; and the Parties are to give the Miniſter Notice of their Names, Places of Abode, and Time of Reſidence in the Pariſh, ſeven Days before ſuch Publication: And the Marriage ſhall be ſolemnized in one of ſuch Churches or Chapels and no where elſe.

This

[b] 1 Salk. 119, 120.

This Statute alſo enacts, That in no Caſe whatſoever ſhall any Suit be had in any Eccleſiaſtical Court, to compel Celebration of Marriage, by Reaſon of any Contract of Matrimony entered into after the twenty-fifth Day of March *one thouſand ſeven hundred and fifty-four; and alſo that no Licence, except Special Licences from the Archbiſhop of* Canterbury *ſhall be granted, to ſolemnize any Marriage, but in the Church or Chapel of ſuch Pariſh or Chapelry, where one of the Parties ſhall have reſided for four Weeks before, or in ſome Pariſh Church or Chapel, where Banns have been uſually publiſhed, next adjoining to the Place of Reſidence of one of the Parties, where ſuch Place is extraparochial.*

But in this Act there is an expreſs Proviſo, *That it ſhall not be neceſſary in ſupport of any Marriage, either after Publication of Banns, or by Licence, to prove the Reſidence of the Parties or either of them, in the Pariſh or Chapelry where ſuch Marriage was had; nor ſhall any Evidence be received to prove the Contrary in any Suit touching the Validity of ſuch Marriage.*

2. The *Effects and Conſequences of Marriage*, with Relation to Huſband and Wife, are, 1. That the *Huſband* and *Wife* are accounted to be but [a] *one Perſon* in Law. Therefore a Man cannot [b] grant Lands to his Wife, during the Coverture, nor any Eſtate or Intereſt to her, nor enter into Covenant with her. But he may by his Deed covenant with others for her Uſe, and he may give to her by [c] Deviſe or Will; becauſe the Deviſe or Will doth not take Effect till after the Death of the Deviſor or Teſtator. And though a Feme Covert cannot properly ſpeaking, make a Will, becauſe ſhe is under the Power of her Huſband, and expreſly excepted out of the 34 & 35 *H.* 8. *ch.* 5. whereby [d] Perſons ſeiſed of Eſtates of Inheritance are enabled to diſpoſe of the ſame by Will; yet if ſhe has a ſeparate Eſtate, and a Power of Appointing reſerved to her, ſhe may, by Deed or Deviſe, appoint or deviſe Lands or Goods to her Huſband or any other, and it is good in Equity. They cannot be Witneſſes for or againſt each other, [e] except they may be Witneſſes againſt each other in Caſe of High Treaſon for the ſake of the Government, or upon the Statute of 3 *H.* 7. *ch.* 2. where the Wife may be Evidence[f] againſt her Huſband for forcibly taking her away and marrying her. But ſhe cannot be examined to prove her Huſband a Bankrupt[g]; although the Commiſſioners are authorized to examine her touching any Concealment of his Goods, Effects, or Eſtate. [As to their being Witneſſes for each other, it does not appear that they have been admitted in any Caſe, becauſe they are conſidered as intereſted; but as to their being Witneſſes againſt each other, they have been admitted not only in the Caſes above, and alſo in Caſes where there is no Poſſibility of having other Evidence[h], or on behalf of the Crown, where he or ſhe is the Party injured, but in ſome other Caſes[i]; tho' the Authority of ſome of thoſe Caſes may be queſtioned.] 2. The Huſband hath *Power* over his Wife's *Perſon*, but cannot confine her without Cauſe[a]: She is ſo much under his Power, that ſhe is diſabled to [b] *Contract* with any Perſon without his Conſent, precedent or ſubſequent, expreſs or preſumed. For though our Law does not exclude the Wife from *uſing* the Goods of her Huſband, (nay it is [c] not Felony if ſhe takes them away) yet ſhe may not diſpoſe of them, nor pawn them. [d] If the Wife plays and loſes her Huſband's Money, the Huſband may recover it. But if ſhe win at Play, and gives Truſt for the Money won by her, the Huſband may recover the Debt. She cannot bind her Huſband

[a] Lit. 168. 291. 1 Inſt. 112. a. 123. a. 187. b. 1 Black. Com. ch. 15.

[b] 1 Inſt. 112. a. 187. b. 2 Wilſon 254. 3 Atk. 72.

[c] Lit. 168. 1 Inſt. 112. b. 1 Burr. 432, 433.

[d] 1 Inſt. 6. b. 2 Vern. 79.

[e] Raym. 1.

[f] 3 Cro. 488. 1 Ventr. 243. State Trials, Reg. v. Swanſpen. 1 Burn 487. 1 Burr. 424. Caſes temp. Ld. Hardwicke 82, 83, 266.

[g] 1 Wms. 611.

[h] Rex. v. Reading. Mich. 8. G. 2. K. B.

[i] 1 Str. 504, 527, 633.

[a] 1 Str. 478. 1 Burr. 542. Caſes temp. Lord Hardwicke 74.

[b] 1 Inſt. 112. a. 1 Ld. Ray. 224.

[c] 3 Inſt. 110. 2 Inſt. 713.

[d] 1 Sid. 109, 121, &c. 1 Lev. 4. Kitch. 369, 370.

band in Strictneſs for *Neceſſaries* by any Contract, unleſs a precedent or ſubſequent Aſſent is proved or preſumed: [e] But Cohabitation is a Ground to preſume ſuch Aſſent, and therefore her Contracts are allowed, if ſhe buys Neceſſaries for herſelf, Children or Family, as Bread, Apparel or the like. And if Goods come to the Huſband's *Uſe*, it is Evidence to prove his Aſſent; but this Preſumption may be contradicted by other Proof; as that he gave his Wife ready Money; or if he forbids particular Perſons to truſt his Wife, he ſhall not be charged by them after ſuch Prohibition[f]. As to a Prohibition in general not to truſt a Wife, as by putting her in the *Gazette*, it cannot amount to a legal Notice. If the Huſband allows the Wife a Stipend for Cloaths, and it is conſtantly paid, and he hath not before paid for what ſhe hath bought on Credit, he ſhall not be charged. [g] The Neceſſaries bought without the Huſband's Conſent, muſt not only be according to the *Degree* of the Huſband, but his *Eſtate*, or they muſt be Neceſſaries generally. The Huſband is not chargeable for Neceſſaries for his Wife where ſhe elopes from him[h]; nor upon a Separation by Conſent, where he allows her a competent Maintenance: The ſame being the general Reputation in the Place where the Huſband lives[i]. But if he turns her away without Cauſe, and allows her no Maintenance, he is liable[k] for Neceſſaries. A Man ſhall not be charged by the Contract of his Wife in other Caſes[l] if he hath no Notice of it, though the Things do come to his Uſe; for it was not his Contract: But Cohabitation is Evidence of Notice, and if the Contract was originally made to his Uſe, or if the Wife has been uſed to make ſuch Contracts for Goods, which he hath paid for, or if they are made in the Courſe of Trade which ſhe carries on with his Conſent, or in his Name, while they cohabit, he ſhall[m] be charged with them. Neither ſhall a Huſband be bound by the Wife's [n] Receipt of his Money, unleſs ſhe cohabit with him, and hath been uſed to receive Money for him. But notwithſtanding what hath been ſaid, and though the Woman is under the Power of her Huſband, and though all Power is transferred to him by the Marriage[o], yet if he threaten his Wife to beat, or to kill her, ſhe may make him find Security for the Peace. A Cuſtom for a *Feme Covert* to ſurrender her Copyhold without the Aſſent of her Baron is void, 2 *Wilſon* 1. 3. The Huſband hath *Power* over the Wife's *Eſtate*, by the Marriage. It was formerly held, that agreements between Huſband and Wife before Marriage, were extinguiſhed by the Marriage[p]; but it has been of late Years determined[q], that Promiſes, Covenants and Bonds between Huſband and Wife before Marriage are only *ſuſpended* during the Coverture, though it is uſual and the beſt Way to make the Huſband covenant with others for the Uſe of his Wife. But when there are no ſuch Agreements or Settlements before Marriage, the Huſband gaineth by the Marriage a [a] *Freehold* in Right of his Wife during their joint Lives, if he taketh a Woman to Wife that is ſeiſed in Fee. And he may make a Leaſe for twenty-one Years, or three Lives, of her Eſtate, and it ſhall be good and effectual in Law, againſt the Wife, if it is made according to the Statute of 32 *H.* 8. *ch.* 28. [b] But by the ſame Statute, he ſhall not, by his own Act only, diſpoſe of, or prejudice his Wife's Freehold or Inheritance in any other Manner. If the Wife is attainted of Felony, the Lord by Eſcheat ſhall enter, and put out the Huſband; [c] otherwiſe if the Felony is committed after Iſſue had betwixt them. [d] The Huſband alſo gaineth a *Chattel Real* in Poſſeſſion, as a Term for Years, to diſpoſe of, if

[e] 2 Ld. Ray. 1006. 1 Salk. 118. S. C. 1 Wms. 482. Prec. Chan. 502. S. C.

[f] 1 Ld. Ray. 445. 1 Salk. 116, 119. 2 Str. 1214.

[g] 1 Sid. 109, &c. 1 Roll. Abr. 350, 351. 1 Mod. 129, 130, &c. 1 Lev. 4, 5. &c. Kitch. 370.

[h] 2 Str. 875.

[i] 1 Ld. Ray. 444. 1 Salk. 116. S. C.

[k] 1 Salk. 118. 2 Str. 1214.

[l] Noy's Max. 94. Kitch. 370.

[m] 1 Rol. Ab. 351. 1 Salk. 113. 6 Mod. 162. S. C. 1 Lev. 4, 5.

[n] 1 Leon 320.

[o] F. N. B. 80.

[p] 1 Inſt. 112. a.

[q] 1 Ld. Ray. 515. 1 Salk. 325. S. C. 2 Wms. 244.

[a] 1 Inſt 351. a. 299. b. 300. a.

[b] 2 Inſt 681. See B. 2. ch. 3. of Leaſes, poſt.

[c] 1 Inſt. 40. a. 351. a.

[d] Dr. & Stud. Dial. 1. ch. 7. 1 Inſt 40 b. 184. 699. b. 300. a. 351. a.

he pleaſes, by Grant or Leaſe in her Life-time, or by ſurviving her. Otherwiſe it remains with the Wife; for the Huſband cannot charge it with a Rent, and can make no Diſpoſition thereof by his laſt Will, if he doth not ſurvive his Wife. If he grants away only Part of the Term, the Wife ſhall have the Reverſion; but if he grants the whole Term of his Wife upon Condition, and the Condition is broken, the Wife is barred; for the whole Intereſt is paſſed away. Where he may diſpoſe of the Wife's Term, he may forfeit it. Upon Execution for the Huſband's Debt, the Sheriff may ſell the Term during the Life of the Wife. [e] Where the Wife is *out of Poſſeſſion* during the Coverture, or hath only a *Poſſibility*, or is poſſeſſed of a Chattel Real as *Executrix*, the Huſband cannot have it, though he ſurvives her. *Laſtly*, the Huſband by the Marriage hath an abſolute Gift of all [f] *Chattels perſonal* in Poſſeſſion of the Wife in her own Right; whether the Huſband ſurvives the Wife or no. But if theſe Chattels perſonal are *Choſes in Action*, (*i. e.* Things to be demanded by Action) as Debts by Obligation, or Contract, the Huſband ſhall not have them, unleſs he and his Wife recover them, or he ſurvive her, and adminiſter to her. A *Choſe in Action*, though not aſſignable at Law, yet is ſo in Equity; and the Huſband may aſſign it alone, as he may any other Part of his Wife's perſonal Eſtate: So he may a contingent Intereſt which he has in Right of her, or a Poſſibility, which though not ſtrictly good by Way of Aſſignment; yet will operate as an Agreement in Equity, when there is a valuable Conſideration. And Debts of the Wife contracted *dum ſola*, are diſcharged by the Bankruptcy of the Huſband; as on the other Hand, Debts due to the Wife are aſſignable by the Commiſſioners on the Huſband's Bankruptcy [g]. Perſonal Goods, which the Wife has as *Executrix*, or *in autre droit*, are not given to the Huſband by Marriage, though he ſurvives his Wife. But they ſhall go to the Adminiſtrator *de Bonis non*. For ſhould they go to the Huſband, the Creditors of the deceaſed would be wronged. Thus it is concerning the *Eſtate in Fee*, *Chattels Real* and *Perſonal* of the Wife, which the Huſband gains by Marriage. A Judgment confeſſed to a *Feme Covert* is void and ſo is her Bond. 2 *Wilſon* 3. 4. The Wife is *diſabled* to bring an [h] *Action* without her Huſband for any Wrong done to her, or for Recovery of her Eſtate; except when the Huſband is baniſhed for Life by Statute, which is a civil Death, in which Caſe ſhe may act as a *Feme Sole*, and make a Will, Contract, ſue or be ſued. [And *Qu.* if not the ſame Caſe when the Huſband is tranſported for Life [i].] ([k] But by the Cuſtom of *London*, a Feme Covert ſhall ſue and be ſued alone, if ſhe is a ſole Merchant or Trader, and where the Huſband does not intermeddle.) So the Wife cannot be ſued or impleaded without the Huſband. And therefore in Actions of the Caſe for ſcandalous Words, Treſpaſs, &c. by the Wife, the Huſband muſt be made Defendant [a] with her; but an Alien living here as a *Feme Sole*, ſhall not be allowed to give in Evidence againſt her Creditors, that ſhe hath an Huſband alien reſident beyond Sea [b]. [c] If the Wife before Marriage was in Debt, the Huſband and Wife muſt be ſued for this Debt, living the Wife. But if the Wife dies, the Huſband, as ſuch, ſhall not be charged either in Law or Equity, for the Debt of his Wife after her Death, if the Creditor of the Wife doth not get Judgment during the Coverture, even though he had a large Fortune with her; as on the other Hand he is, during the Coverture, liable to all her Debts, although he did not get a Shilling with her [d]. But if he take out Adminiſtration to his Wife, he is liable

[e] 1 Inſt. 351. a.

[f] Dr. & Stud. Dial 1. ch. 7. 1 Inſt. 351 b. Comyns 725. Prec. in Chan. 118, 209. Caſes temp. Ld. Hardwicke 119. 1 Wilſon 168, 169. 3 Atkyns 526. 3 Atkyns 21. 2 Wms. 244, 608.

[g] 1 Wms. 249, 382, 458.

[h] 1 Inſt. 132, 133. a.

[i] 3 Wms. 37.

[k] 3 Cro. 69. 2 Inſt. 713.

[a] 2 Str. 1167, 1237.

[b] 1 Ld. Ray. 147. 1 Salk. 116. 2 Salk. 646.

[c] F.N.B. 120. 1 Roll. Abr. 351. Kitch. 373. Comyns 31.

[d] 1 Wms. 469. Ca. Temp. Ld. Talbot, 173. 3 Wms. 409.

to her Creditors, ſo far as he hath Aſſets of his Wife ariſing from *Choſes in Action* which belonged to her, and which were not recovered during the Coverture. [e] A Woman, for her own *Offence*, may be indicted or convicted without her Husband; and ſhe only ſhall be Party to the Judgment, and fined, and committed till it is paid. If ſhe ſteals by the Compulſion of her Husband, or with him, it is not Felony in her. But this Privilege does not extend to Treaſon or Murder. And ſhe may ſue and be ſued [f] in Court-Chriſtian without her Husband. And in Courts of Equity they may ſue each other [g].

[e] 9 Rep. 72.
11 Rep. 61, 62.
2 Str. 1120.
[f] 2 Roll. Abr. 298.
3 Cro. 16, 222.
[g] 2 Wms. 244.

3. Marriages may be *diſſolved* by the natural *Death* of Husband or Wife, or by *Divorce*.

[h] *Divorce* is two-fold, (*viz.*) 1. *à Menſâ & Thoro*, from Bed and Board, and 2. *à Vinculo Matrimonii*, from the very Bond of Matrimony. 1. A Divorce *à Menſâ & Thoro* diſſolveth not the Marriage; for it is ſubſequent to the Marriage, and ſuppoſes it to be a juſt and lawful Marriage. This Divorce *à Menſâ & Thoro* may be by Reaſon of Adultery in either of the Parties, for Fear of Death, or for Cruelty. But as it doth not diſſolve the Marriage, [i] ſo it doth not debar the Woman of Dower, or [k] baſtardize the Iſſue afterwards, or make void any Eſtate for Life of the Husband and Wife. But Dower may be loſt in the Caſe of continual Elopement, by Force of the Statute of *Weſt.* 2. *ch.* 34. And tho' the Sentence of Divorce doth not of itſelf baſtardize the Iſſue, yet as Obedience to the Sentence ſhall be intended, unleſs the contrary be proved, the Children of a Woman ſo divorced ſhall be deemed Baſtards *prima facie* [l]. If a Woman is divorced *à Menſâ & Thoro*, ſhe muſt ſue by her next Friend, and not with her Husband. And ſhe may ſue the Husband in her own Name for *Alimony*, (or Maintenance out of the Husband's Eſtate, during the Separation) either in the *Chancery* or the Spiritual Court. And it will be allowed except in the Caſe of Elopement or Adultery. The innocent Party in Caſe of Adultery, by an Act of Parliament may be enabled to marry again. 2. [m] A Divorce *à Vinculo Matrimonii* may be by Reaſon of Impuberty, [Precontract in both or one of the Parties with ſome other, *Qu.* ſince 26 *G.* 2.[n]] See 2 & 3 *Ed.* 6. *ch.* 23. and 1 *El. ch.* 1.] Impotency or Frigidity, Conſanguinity or Affinity within the *Levitical* Degrees. Here the Marriage is abſolutely diſſolved as void from the Beginning. And if the Divorce is by Reaſon of *Pre-contract*, or *Conſanguinity*, or *Affinity*, the Children gotten betwixt the Parties are Baſtards. [o] But if a Man is divorced by Reaſon of *Frigidity*, it ſhall not baſtardize the Iſſue by another Wife. For he may be *Habilis* and *Inhabilis* at different Times.

1 Black. Com. 440.
3 Black. Com. 94.
[h] 1 Inſt. 235. a.
3 Inſt. 89.
3 Cro. 461.
2 Burn Eccl. law tit. Divorce 428, &c.
[i] 7 Rep. 43.
1 Inſt. 32. a. & b.
3 Cro. 461.
[k] 2 Inſt. 435, 436.
1 Inſt. 235. a. 244. a.
1 Salk. 122, 123.
Prec. Ch. 111.
[m] 1 Inſt. 235 a.
2 Inſt. 93, 687.
[n] 3 Cro. 462.
[o] 5 Rep. 98.

a A Sentence in the Spiritual Court may diſſolve a Marriage, by Reaſon of a *Pre-contract*, though the Husband *de facto* is not Party to the Suit or Sentence.

a 4 Rep. 29.

b If a Marriage *de facto* be voidable by Divorce, yet if the Husband dies before any Divorce, the Wife *de facto* ſhall be endowed.

b 1 Inſt. 33. a. & b.

c Sentence muſt be given in the Spiritual Court in the Life of the Parties, and not afterwards: (For it is in Effect to baſtardize the Iſſue, of which that Court hath no Cognizance;) though a Sentence of Divorce given in the Spiritual Court in the Life-time of the Parties may be repealed after the Death of the Parties.

c 1 Inſt. 33. a, 244. a.
2 Inſt. 614.
5 Rep. 98.
7 Rep. 44.
3 Lev. 410.

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[c] *Sententia contra matrimonium nunquam tranſit in rem judicatam.* 7 Rep. 43.

A Divorce ſhall be tried by the Biſhop's Certificate, and not by a Jury.

4. The Marriage being diſſolved by Death of either Party, ſeveral *Rights* do accrue to the Survivor.

1. If a Husband hath married a Wife [d] ſeiſed of Lands or Tenements in Fee-ſimple or in *Fee-tail* general, or ſeiſed as Heir in Special Tail and hath Iſſue by her born alive, he ſhall be Tenant for Life by the *Courteſy of England* [e]. And [f] if a Husband ſeiſed in Fee, or for Life in Right of his Wife, do ſow the Land, and his Wife dies before Severance, he ſhall have the Corn. Or if he himſelf dies before his Wife, his Executors ſhall have it. 2. *Chattels Real*; as [g] the *Term* of the Wife, or a *Leaſe* for *Years* of the Wife, are a Gift in Law to him, if he doth ſurvive her; and ſo it is of her other Chattels Real in Poſſeſſion, as Eſtates by Statute Merchant, Staple and *Elegit*. But if a Woman grants a Term to own her Uſe, and taketh Husband and dieth, the Husband ſurviving ſhall not have this Truſt; but the Executors or Adminiſtrators of the Wife. The Husband ſhall have all Chattels Real that are of a [h] *mixed* Nature. (partly in Poſſeſſion, and partly in Action) as Rents in Arrear incurred before the Marriage or after; [See 32 *H.* 8. *ch.* 37.] Alſo a Preſentation of a Church being void during the Coverture, if he ſurvives his Wife, though he reduces them not into Poſſeſſion in her Life-time. But of Things merely [i] in Action (as of an Obligation or Bond) the Husband can claim them only as Adminiſtrator to his Wife, if he ſurvives her.

2. As for the Wife; [k] if ſhe hath married a Man ſeiſed of Lands or Tenements in Fee-ſimple, Fee-tail General, or as Heir in Special Tail, the Wife, after the Husband's Deceaſe, ſhall be *endowed* [l] of the third Part. A Wife alſo after the Death of her Husband, may claim her [m] *Paraphernalia*, (παρὰ beſides, and φέρνη Dower) or neceſſary Apparel for her Body, and Cloth given her to make a Garment, beſides her Dower or Jointure. So that the Husband cannot give them away by his Will. But ſhe ſhall not have exceſſive Apparel beyond her Rank or Degree. Pearl Necklaces, Chains of Diamonds, Gold Watches, may be included under *Paraphernalia*, if they were uſually worn by the Wife, and were ſuitable to her Degree, according to the Faſhion of the Times, if there are Aſſets to pay Debts and Legacies, provided the Husband does not give *Theſe* away by Will. Sometimes, by Cuſtom, ſhe may have the Furniture of her Chamber. [n] If ſhe ſurvives her Husband, ſhe ſhall have her *Term* for Years again if the Husband hath not altered the Property, or hath not made any Diſpoſition of it in his Life-time. And ſo it is of other Chattels Real in Poſſeſſion. And if the Husband charges the Chattels Real of his Wife with a Rent, it ſhall not bind her, if ſhe ſurvives him; for her Right is paramount the Charge. Chattels Real of a *mixed* Nature, as Rents and Advowſons, will come to the Wife again, if ſhe ſurvives. And if a Church becomes void during the Coverture, the Wife ſhall preſent to her Advowſon, if ſhe ſurvives her Husband. Chattels Real or Perſonal *in autre Droit*, in the Right of another, as Executrix or Adminiſtratrix, ſhe may retain [a]; and ſo *Choſes in Action*, or Things recoverable by Action, remain to her, if they were not recovered during the Marriage. If a Leaſe for Years, Statute, or Obligation is made to Baron and Feme, the Feme ſhall have it by Survivorſhip, or if they jointly recover Judgment, or obtain a Decree, the Feme

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[d] Lit. 35, 52. Dr. & Stud. Dial. 1. ch. 7. 2 Black. Com. 126.

[e] See poſt. B. 2. ch. 1.

[f] 1 Inſt. 55.b.

[g] 1 Inſt. 351.a. Doct. & Stud. Dial. 1. ch. 7.

[h] 4 Rep. 51. 1 Inſt. 351.

[i] 1 Inſt. 120.a. 351. b.

[k] Lit. 36. Doct. & Stud. Dial. 1. ch. 7. 2 Black. Com. 129, 132, 135, 136, 133. 3 Black Com. Com. 183, 194. 4 Black. Com. 417.

[l] See of Dower, poſt, B. 2. ch. 1.

[m] 1 Rol. Abr. 911. 3 Cro. 343. Noy's Max. 168. Kitch. 369, 370. Pr. Ch. 27, 295. 2 Wms. 79.

[n] 1 Inſt. 351. a.

[a] 1 Inſt. 120.a. 351. a. & b. 2 Wms. 496, 497.

ſurviving ſhall have the Benefit thereof. But if perſonal Goods are given to Baron and Feme, ſhe cannot have them by Survivorſhip[b].

[b] See of Adminiſtration, poſt. B. 2. ch 6.

III. A Perſon alſo may be a *Parent* or *Child*.

Parent and Child. 1 Black. Com. cap. 16. per totum.

The Law takes Notice of the *Power* of Parents over their lawful Children, the reciprocal *Intereſt* in each other's Eſtate, and the Caſe of *Baſtards*.

1. The Parents have ſuch *Power* as is given to them by the Law of Nature, and the Divine Law. By thoſe Laws the Parents muſt educate, maintain, and defend them. [See for *Statute* Law the 4 and 5 *Ph. & M. ch.* 8. and of *Offences againſt the publick Peace B.* 3. *ch.* 3. and ſee the 12 *Car.* 2. *cb.* 24. and of *Guardians infra.*]

[c] If a Man hath a Wife, and dieth, and within a very ſhort Time after, the Wife marrieth again, and within nine Months hath a Child, ſo as it may be the Child of either the one or the other, this Child may chuſe either of them for his Father.

[c] 1 Inſt. 8. a.

2. The Father hath *Intereſt* in the Profits of the Childrens *Labour* while they are under Age, if they live with him, and are maintained by him. But the Father has no Intereſt in the *Eſtate* of the Children, either Real or Perſonal, otherwiſe than as their Guardian. For he muſt account to them for it, and for the Profits received, when they come of Age.

The Father alone hath a Right to the *Adminiſtration* of his Child's Goods and Chattels, if the Child dieth Inteſtate and unmarried, and hath no Children of his own. The Mother's Intereſt, if ſhe ſurvives the Father, in her Childrens Perſonal Eſtate, if they die Inteſtate, is ſettled by 1 *Ja.* 2. *ch.* 17.

The eldeſt Son is Heir to his Father, and if there be no Sons but Daughters, then all the Daughters ſhall be Heirs. As for the Childrens Right in the Father's Perſonal Eſtate. [See 22 and 23 *Car.* 2. *ch.* 10. And of *Adminiſtration, B.* 2. *ch.* 6. *poſt.*]

[d] Parents and Children may maintain each others Suits, and may juſtify the Defence of each others Perſons.

[d] 2 Inſt. 564.

By 43 El. ch. 2. *Father and Grandfather, Mother and Grandmother, and the Children of every poor and impotent Perſon of ſufficient Ability, ſhall maintain every ſuch poor Perſon as the Juſtices at Seſſions ſhall appoint upon pain to forfeit twenty Shillings per Month.*

A Grandfather or Father in [e] Law married to the Grandmother or Mother (of Ability) is, during the Wife's Life, within this Clauſe of the Statute. *Sed Qu.*

[e] Dalton. ch. 73. § 26. 2 Bulſt. 346. Foley 39, 42, 44. 1 Str. 190. 2 Str. 955. Contra.

[See 11 and 12 *W.* 3. *ch.* 4. As to the Proteſtant Children of Popiſh Parents; and 1 *Ann. St.* 1. *ch.* 30. To oblige the *Jews* to maintain and provide for their Proteſtant Children.]

[a] A *Baſtard* is he that is born out of lawful Marriage. He ſhall never inherit or be Heir to any one. He cannot be of kin to one in the aſcending or collateral Line, but he may in the deſcending Line. For in Law he is *Quaſi nullius Filius*, and no Man's Iſſue; and he can have no Heir but of his own body. A Child born in lawful Marriage, whether Son or Daughter, is ſometimes termed *Mulier, quaſi melior*.

[a] Dr. & Stud. Dial. 1. ch. 7. Lit. 188, 399, 400. 1 Black. Com. 454. 1 Burn. tit. Baſtard. 1 Inſt. 517. a. 243. b. 244. a.

It was formerly held that if the Husband was within the [b] four Seas, (the Juriſdiction of the King of *England*) ſo that by Intendment of Law

[b] 1 Inſt. 244 a. 1 Roll. Abr. 358.

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[b] *Semper præſumitur pro legitimatione puerorum.* 5 Rep. 98. *Filiatio non poteſt probari.* 5 Rep. 98. 1 Inſt. 126. a. 244. b.

Brac. li. 1. c. 9. §. ult. li 2. c. 29, 32. §. 5.
[c] 2 Str. 940, 925. 3 Wms. 275, 1076. 1 Salk. 123.
[d] Rex. v. Rooke Mich. T. 26 G. 2. K.B.

he might come to his Wife, and the Wife had Iſſue, no Proof could be admitted to prove the Child a Baſtard; but that Notion is now exploded, and though the Huſband be in *England*, the Courts admit Proof that he had no Acceſs to his Wife, ([c] but of this the Wife cannot be Evidence) and in ſuch Caſe, or if there is [d] an apparent Impoſſibility that the Huſband ſhould be the Father of it, as if the Huſband is but eight Years old, then, ſuch Iſſue is a Baſtard, tho' born within Marriage. But if the Iſſue is born within a Day after Marriage between Parties of full Age, where the Huſband is under no apparent Impoſſibility, the Child is legitimate, and is to be ſuppoſed the Child of the Huſband. If the Woman is delivered after forty Weeks from the Death of the Huſband, the Child is a Baſtard, unleſs ſome probable Reaſon can be given for the greater length of Time [e].

[e] See P. 12. ante.

[f] 1 Inſt. 3. b. 6 Rep. 65. 1 Wms. 529.
[g] 1 Inſt. 123. a.

A Baſtard having got a Name by [f] *Reputation*, may purchaſe by his reputed Name to him and his Heirs, though he can have no Heir but of his Body. He can have no Name of Reputation as ſoon as he is born. But after a Baſtard is born, and he hath gained by Time a Reputation that he is the Son of *B.* or known by the Name of a Son, then a Remainder limited to him by the Name of the Son of his reputed Father is good. He cannot take by the Name of *Iſſue* before he is born, tho' the Limitation is to the Illegitimate Iſſue; becauſe he could not take at the Time when he was born by that Limitation. [g] But though a Baſtard may be a reputed Son, yet he is not ſuch a Son, in Conſideration whereof, or of natural Affection towards him, an Uſe may be raiſed. He is not a Child within the Statute of *Wills*, (*viz.*) the 32 *H.* 8. *ch.* 1. which ſpeaketh of Children; and the Baſtard of a Woman is no Child within that Statute, where the Mother gives Lands to him as ſuch.

[h] 1 Inſt. 134. a. 2 Inſt. 97, 99. 1 Roll. Abr. 361. 2 Rol. Abr. 586. Dav. 51.

[h] *General* Baſtardy, or whether the Father and Mother were ever joined in lawful Matrimony, is triable by the Biſhop's Certificate after Examination in Court Chriſtian. [See 9 *H.* 6. *ch.* 11.] But not *Special* Baſtardy, or whether the Defendant was born before Matrimony; for that is a Matter of Fact triable in the Temporal Courts.

1 Inſt. 244. a. 1 Roll. Abr. 624.

The Learning concerning *Baſtard Eigne*, who is one born before Marriage, whoſe Mother is afterwards married to the Father, and *Mulier Puiſne*, is out of Uſe.

See of Murder poſt. B. 3. ch. 3.

By 21 Ja. 1. ch. 27. *It ſhall be eſteemed Murder for a Mother to* Conceal *the Death of the Baſtard-Child when ſhe is delivered of it, unleſs ſhe can prove by one Witneſs at leaſt, That it was ſtill-born.*

By 18 El. ch. 3. *The two next Juſtices of the Peace,* (*one* Quorum) *may take Order as well for the Puniſhment of the Mother and reputed Father of a Baſtard Child; as alſo for the Relief of that Pariſh where it is born.*

[a] 2 Inſt. 733. 3 Cro. 436.

[a] But corporal Puniſhment of the reputed Father or Mother is ſeldom inflicted, where the Pariſh is ſaved harmleſs, tho' it may be inflicted.

[b] 1 Ventr. 173. 1 Mod. 287.
[c] 1 Salk. 122. 2 Ld. Ray. 1157. S. C.

[b] The Seſſions may make an Original Order in Baſtardy. For the 3 *Car.* 1. *ch.* 4. which gave the Seſſions that Power, is not expired, as ſome have ſaid by Miſtake, but continued by 16 *Car.* 1. *ch.* 4 [c].

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[g] *Qui ex damnato coitu naſcuntur, inter liberos non computantur.* 1 Inſt. 3. b. 8. a.
[a] *Solus Deus hæredem facere poteſt, non homo.* 1 Inſt. 7. b.

By 7. Ja. 1. ch. 4. *Juſtices of Peace ſhall commit to the Houſe of Correction lewd Women that have Baſtards, which may be chargeable to the Pariſh, there to be puniſhed, and ſet at Work one whole Year.*

So that if the Mother will diſcharge the Pariſh from keeping the Baſtard, ſhe cannot be puniſhed by this Statute. But in Strictneſs ſhe may be puniſhed by 18 *El.* before-mentioned. *Qu.*

2 Inſt 733. See Burn's Juſt. Tit. Baſtard.

By the 13 *and* 14 Car. 2. ch. 12. *Church-wardens and Overſeers of the Poor* [d], *where any Baſtards ſhall be born, may ſeize ſo much of the Goods and Profits of the Lands of the putative Father and lewd Mother that run away and leave their Baſtards upon the Pariſh, as two Juſtices of the Peace ſhall order towards the Diſcharge of the Pariſh.*

[d] See ch. 7. poſt.

But the Seſſions muſt make the Order to ſell the Goods.

[See 6 *Geo.* 2. *ch.* 31. for Relief of Pariſhes from Charges ariſing from Baſtard Children.]

IV. Becauſe many Perſons are *Anceſtors* as to Hereditary Succeſſion, that are not Parents, and may inherit as Heirs who are not Children of thoſe to whom they inherit, this Head may be conſidered as a diſtinct Capacity.

Of Anceſtor and Heir. 2 Black. Com. 201, 208, 209.

Anceſtor is different from *Predeceſſor* [e]; for Anceſtor is applied to a natural Perſon, as *J. S.* and his Anceſtors. But *Predeceſſor* is applied to a Body Politick or Corporate, as the Biſhop of *L.* and his Predeceſſors.

[e] 1 Inſt. 78. b. 113. b.

A Son, as ſuch, cannot be an Anceſtor to tranſmit an Eſtate to his Father or Grandfather by Hereditary Succeſſion. For an Inheritance may lineally deſcend, but not aſcend.

1 Inſt. 11. a.

[f] He is only *Heir* That is born in Lawful Matrimony, and ſucceedeth by Deſcent, Right of Blood, and by the Act of God, to Lands, Tenements, or Hereditaments, being an Eſtate of Inheritance. [g] Under the Word *Heirs* the Heirs of Heirs are comprehended *in infinitum.* [h] So that if Lands are given to a Man and his Heirs, all his Heirs are ſo totally in him, that he may give his Lands to whom he will. But one cannot be Heir till after the [a] Death of the Anceſtor. He is in his Life-time only Heir apparent. [b] One that is born deaf, dumb and blind, Idiots, Madmen, Outlaws in civil Actions, Perſons excommunicate, attainted in a *Præmunire*, may be Heirs. An Hermaphrodite may be Heir according to the Prevalency of the Sex. [c] Baſtards, Monſters, that have not human Shape, Aliens, (though Alien Friends,) [ſee the 11 and 12 *W.* 3 *ch.* 6. 7 *Ann. ch.* 5. 4 *G.* 2. *ch.* 21. 5 *G.* 1. *ch* 27. and 25 *G.* 2. *ch.* 39.] a Man attainted of Treaſon or Felony, or whoſe Blood is corrupted, cannot be Heir.

[f] 1 Inſt. 7. b. 237. b.
[g] 1 Inſt. 9. a.
[h] 1 Inſt. 22. b.
[a] 1 Inſt. 8. a. & b.
[b] 1 Inſt. 8. a.
[c] 1 Inſt. 3. b. 8. a.
See P. 25 ante.

By 11 & 12 W. 3. ch. 4. Papiſts, *who ſhall not within ſix Months after they attain the Age of eighteen Years, take the Oaths of Allegiance and Supremacy, and make and ſubſcribe the Declaration in the* 30 Car. 2. *St.* 2. *ch.* 1. *are in reſpect of themſelves only, but not of their Heirs or Poſterity, incapable of taking by Deſcent or Purchaſe any real Eſtate. And the next of Kin that is a Proteſtant ſhall hold the ſame to his own Uſe, until ſuch Papiſt ſhall take the Oaths,* &c. [See 12 *Ann. St.* 2. *ch.* 14. 1 *G.* 1. *St.* 2. *ch.* 55. 3 *G.* 1. *ch.* 18. 8 *G.* 2. *ch.* 25. 9 *G.* 2. *ch.* 26. 11 *G.* 2. *ch.* 17.]

1 Wms. 353. 2 Wms. 3, 6, 132, 361. 3 Wms. 43. 1 Str. 267. Com. 207, 570.

A Man by the [d] *Common Law* cannot be Heir to *Goods* and *Chattels*, but an *Heir-Loom* by [e] *Cuſtom* may go to the Heir. The Ancient Jewels of the Crown are Heir-looms, and ſhall deſcend to the next Succeſſor, and are not deviſeable by Teſtament. For the Law preferreth

[d] 1 Inſt 8. a. 2 Black Com. 427.
[e] 1 Inſt. 18 b. 185. b 1 Ld Ray. 728.

[f] 3 Inſt. 202, 203. 2 Cro 367. [g] See P. 33. ante [h] 12 Rep. 105.

the Cuſtom before the Deviſe. Obligations and Specialties in the Caſe of the King may go to Heirs. [See 33 *H.* 8. *ch.* 39] [f] And an Heir may have an Action againſt one that defaces the Monument, Coat-Armour, or Penon with the Arms of his Anceſtor in a Church, though the Freehold is in the Parſon [g]. The dead Body belongs to no one; but the Coffin, Shrowd, *&c.* belong to the Executors or Adminiſtrators. [h] Alſo the Ornaments of the *Chapel* of a Biſhop ſhall go in Succeſſion, not to Executors.

[i] 2 Inſt. 700, 701.

[i] A natural Perſon cannot be bound by Act of his Anceſtor, without a Binding and Aſſets. *Aſſets* are either *Real* or *Perſonal. Real*, which come to the Heir by Deſcent in Fee-ſimple; not by Purchaſe. And by 29 *Car.* 2. *ch.* 3. Truſts in Fee-ſimple, and Eſtates *pur Auter vie*, are declared to be Aſſets. *Perſonal* Aſſets are Goods and Chattels which come to the Hands of an Executor or Adminiſtrator.

[But ſee *poſt* of *Heirs, Tit.* Fee-ſimple, and of *Eſtates upon Condition, B.* 2. *ch.* 1. and of *Deſcent*, Warranty, Covenant, Obligations, *B.* 2. *ch.* 3. Whether Heirs are chargeable with the Debt or Covenant of the Anceſtor or no? See alſo the 3 & 4 *W. & M. ch.* 14. Where Lands deſcending to the Heir ſhall be aliened before Action brought. See likewiſe Of *Actions, B.* 4. *ch.* 4.]

[k] 1 Inſt. 7. b. 237. b. 2 Inſt 97, 523.

I have hitherto ſpoken of Heirs that ſucceed by Right of *Blood.* [k] But one may in a large Senſe be called an Heir, who has an Eſtate given him by Teſtament; but even then the Word in the Common Law hath not altogether ſo large a Signification as in the Civil Law. For by that Law one may be Heir to Goods and Chattels.

Landlord and Tenant. [a] F.N.B. 135, 136. [b] 1 Inſt. 65. a.

V. The *Landlord*, or Lord, is he of whom the Land is holden. [a] He is either *Meſne* Lord or Paramount; *Meſne* Lord (*Medius*, mean) is he that is Lord of a Manor, and hath Tenants holding of him, yet he himſelf holds of a ſuperior Lord. The Lord *Paramount* (*per* and *monter*, to aſcend) is the ſuperior Lord. [b] But all Lands are originally derived from the Crown, and therefore the King is Lord *Paramount*, either mediately or immediately of all and every Parcel of Land in *England*; and cannot be a Tenant. His Lands are called the *Demeſne* Lands of the Crown, or the Domain Lands, *i. e.* Lands *(Domini)* of the ſupreme Lord.

[c] 1 Inſt. 1. a. & b. 65. a. 2 Black. Com. 59.

[c] The *Tenant* (*à tenendo*, from holding) is one that occupieth Land, held of ſome Lord by Rent, or Fealty at leaſt. No Subject hath properly *Allodium* or free Lands. For all Lands, in the Hands of a Subject are or were holden of ſome Lord or Landlord by ſome Tenure or Service.

[d] 2 Inſt. 296.

A Tenant is either *Very* Tenant, that holds immediately of the Lord; or [d] *Paravail*, that hath Profit and *Avail*, of the Land holden of one that holdeth of another.

The Word *Tenant* is uſed with divers Additions, as Tenant in Fee-ſimple, Fee-tail, for Life, for Years, at Will, Tenant in Dower, Tenant by Copy of Court-roll, Tenant in Mortgage, Tenant by Statute Merchant, *&c.*

The Law concerning Landlord and Tenant will be ſet forth, when I ſpeak in Order of *Eſtates, Tenures* and *Services, Rents, Diſtreſſes, Waſte, Eſcheats*, &c.

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[i] *Nemo eſt hæres viventis.* 1 Inſt. 8. b. 378. a.

VI. A *Guardian* is he that hath the Cuſtody and Education of ſuch a Perſon as is not of ſufficient Diſcretion to guide *himſelf* and his *Eſtate*; as Minors, Idiots, and Lunaticks; but it is generally underſtood of him who hath the Care of the firſt of theſe: As to Idiots and Lunaticks, I have ſpoken before of them and their Committees [e]. [f] A Guardianſhip then of a *Minor* is an Intereſt in the Body or Lands of one within Age, that is under twenty-one Years, who is called an Infant. There is a Difference bewixt a *Guardian* and a *Committee* of the King. Oftentimes a Guardian is taken for *Prochein Amy*, and a *Prochein Amy* for a Guardian.

Of Guardian and Minor
See 1. Black. Com. c. 17. *per totum.*
[e] See P. 14. ante
[f] Noy's Max. 49.
2 Inſt. 13. 305, 390.

But there are [g] *Three* Manners of Guardianſhip, (*viz.*) By the *Common Law*, by *Statute Law*, and by particular *Cuſtom*.

[g] 1 Inſt. 88. b.
Lit. 114, 123.
3 Rep. 37.
2 Inſt. 305.

1. By *Common Law*, there are 1. Guardian in *Chivalry* or *Knight Service*; but this by the 12 *Car.* 2. *ch.* 24. is taken away. 2 Guardian by *Nature*, as the Father or Mother. 3. Guardian in *Socage*, who is next of Blood to whom the Inheritance cannot deſcend. This continues till the Heir accompliſhes the Age of fourteen Years, and then the Minor may chuſe his Guardian before a Judge at his Chamber or in Court, or in Chancery. 4. Guardian becauſe of *Nurture*, which is when the Father by his laſt Will and Teſtament, appoints one to be Guardian of the Body of the Child. The *Ordinary* may appoint a Guardian over the Body and the *Perſonal* Eſtate of the Minor, till he is fourteen Years of Age [h].

See of Tenures, poſt. B. 2. ch. 9.
See of Adminiſtration, poſt. B. 2. ch. 6.
[h] 2 Ld. Ray. 1334.
2 Str. 682.

2. *By Statute* Law. For,

By 4 & 5 P. & M. ch. 8. *A Father, or Mother (after the Father's Death) without Aſſignation, are Guardians of Women Children, for the Purpoſes of this Statute.*

By 12 Car. 2. ch. 24. *A Father under Age, or of full Age, by Deed in his Life-Time, or by Will, in Preſence of two Witneſſes, may diſpoſe of the Cuſtody of his Child under twenty-one Years of Age, and not married at the Time of his Death, whether then born, or in* Ventre ſa mere, *during his Non-age, to any in Poſſeſſion or Remainder, other than to* Popiſh *Recuſants. Which Perſons may maintain an Action of Treſpaſs againſt wrongful Takers away or Detainers of ſuch Child, and recover Damages for the Child's Uſe, and may take into their Cuſtody his* Lands *and* Perſonal *Eſtate, according to ſuch Diſpoſition, and bring Actions as Guardian in* Socage *might do.*

This Act ſhall not prejudice the Cuſtom of London, *nor of any other City or Town Corporate.*

This Act doth not extend to [a] Copyhold Lands. So that a Copyholder cannot thereby diſpoſe of the Cuſtody of his Children's [Copyhold] for That belongs to the Lord, according to the Cuſtom, where there is a particular Cuſtom for the Lord to have the Cuſtody. But the Teſtamentary Guardian takes Place of all other Guardians, except ſuch cuſtomary Guardians [b].

[a] 3 Lev. 395.
Lutw. 1190.
1 Ld. Ray. 131.
[b] 2 Wms. 115, 125.

Where the Perſon appointed by the Father's Will becomes diſabled, as by Attainder, the Care of the Infant devolves on the Great Seal; and where there are more Guardians than one appointed, the Guardianſhip will ſurvive [c].

[c] 1 Wms. 706.
2 Wms. 102. &c.

3. [d] By particular *Cuſtom*, the Tuition and Cuſtody of Orphans [e], Children of Citizens and Freemen, is committed to the Mayor and Aldermen of the City of *London*, and of other Cities and Boroughs.

[d] 1 Inſt. 88. b.
[e] See poſt. B. 4 ch. 2.

[f] Lit. 123. 1 Inſt. 89. a. & b.

[f] But now obſerve in general, That Guardians ſhall not take any Profits of the *Minor*'s Lands, to their own Uſe, but only to the Uſe and Profit of the *Minor*; and of this they ſhall render an Account to him. Yet a Guardian on his Account ſhall have Allowance of all Reaſonable Expences. And if he is robbed of the Rents and Profits of the Land without his Default or Negligence, he ſhall be diſcharged thereof upon his Account. The ſame is to be underſtood of all other like Accidents.

Guardians of great Eſtates uſually paſs their Accounts yearly in the Court of *Chancery*, which is a ſafe Way to juſtify themſelves, when the *Minor* at his full Age calls them to a general Account.

See *Weſt* 2. *ch.* 23. 25 *Ed.* 3. *St.* 5. *ch.* 5. 31 *Ed.* 3. *ch.* 11. By 4 & 5 *Ann. ch.* 16. *Actions of Account may be brought againſt the Executors or Adminiſtrators of any Guardian, Bailiff or Receiver.*

See 6. *Ann. ch* 18. Concerning the Concealment by Guardians of Infants believed to be dead, from thoſe in Remainder, and the Method of Enquiry and Diſcovery, and concerning Guardians holding over after the Death of Infants.

I go on to treat of other Perſons in *Civil* Capacities, (*viz.*) Of Publick *Officers*, and *Bodies Politick*, or Corporations.

CHAP VII.

Of Publick Officers, *as Sheriffs, Juſtices of the Peace, Coroners, Treaſurers of the County, Conſtables, Churchwardens, Overſeers of the Poor, Surveyors of the Highways, Clerks of the Market, and Governors of Houſes of Correction.*

1 Black.Com. 338. **Of Publick Officers.**

Publick Officers are Perſons in *Civil* Capacities.

I do not intend to ſpeak here of the Lord *Chancellor*, or *Lord Keeper* of the Great Seal, the Lord High *Treaſurer*, the Lord *Preſident* of the *Privy Council*, Lord *Privy Seal*, the Lord *High Conſtable* and *Earl Marſhal*, Lord *High Admiral*, the *Judges* in the Courts at *Weſtminſter*, &c. Theſe will come in more properly when I treat of the Courts of Juſtice, or *Juriſdiction* of *Courts*. At preſent I ſhall point out only ſuch *Publick Officers* with whom we have daily Buſineſs in the Country, as the *Sheriffs*, *Juſtices* of the *Peace*, *Coroners*, *Treaſurers* of the Counties, *Conſtables*, *Churchwardens*, *Overſeers* of the *Poor*, *Surveyors of the Highways*, *Clerks* of the *Market*, and *Governors* of Houſes of *Correction*.

See the Note on word Sheriff. ante. 3. 4 Burn. tit. Sheriff, 1 Burn. tit. Arreſt.

I. The *Sheriff*, (or *Shire-Reeve*, i. e. *Governor* of the *Shire*, otherwiſe *Vice-Comes* in the *Stead* of the [a] *Earl* of the County; for *Comites* or *Earls* heretofore had the Cuſtody of Counties) is a yearly Officer to whom the Government of a Shire or County is committed.

The Sheriff at the Common Law was to be *choſen* by the County, but now by Statutes the Lord Chancellor, Treaſurer, *&c.* and the Judges nominate three Perſons of every County yearly, at the Exchequer, on the Morrow of *St. Martin*, to be preſented to the King, that he may chooſe one of them. He is created by Letters Patent for a Year. [b] The King cannot reſtrain any Part of the Sheriff's Power as to any particular Town or Hundred, (unleſs he make that Town, &c. a County by itſelf, and appoint a Sheriff there) nor abridge the Sheriff in any Thing that is incident to his Office. For the Office is one intire Thing, and cannot be divided but by Act of Parliament. [See 9 *Ed.* 2. *St.* 2. 14 *Ed.* 3. *St.* 1. *ch.* 7. 12 *Rich.* 2. *ch.* 2. 23 *H.* 6. *ch* 7. and 3 *Geo.* 1. *ch.* 15. where ſee his Oath.]

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[a] 1 Inſt. 168.a. 2 Inſt. 174, 559.

[b] 4 Rep. 32.

The new Sheriff being elected and ſworn, he ought at or before the County Court next ſucceeding his Election to deliver a Writ of *Diſcharge* to the old Sheriff, who is to ſet over all the Priſoners in the Gaol ſeverally by their Names, (together with all his Writs) preciſely by View and Indenture between the two Sheriffs; wherein muſt be comprehended all the Actions which the old Sheriff hath againſt every Priſoner, tho' the Executions are of Record. And till the Delivery of the Priſoners to the new Sheriff, they remain in the Cuſtody of the old Sheriff, notwithſtanding the *Letters Patents*, the Writ of *Diſcharge*, and the Writ of *Delivery*. The new Sheriff is obliged to receive the Priſoners at the Gaol only. But the Office of the old Sheriff ceaſes, when the Writ of Diſcharge cometh to him.

3 Rep 71, 72.

The Lord Mayor and Citizens of [a] *London* have the Shrievalty of *London* and *Middleſex* in Fee by Charter; and two Sheriffs are annually elected by them, for whom the Mayor and Commonalty muſt anſwer, becauſe they have the Shrievalty in Fee. When one of the Sheriffs of *London* dies, the other cannot act till another is made; for there muſt be two Sheriffs of *London*, which is a City and County; but they both make but one Sheriff of the County of *Middleſex*.

[a] 3 Rep. 72. Shower's Rep. 289.

One may be Sheriff of [b] two Counties at the ſame Time.

[b] 3 Rep. 34.

The Sheriff hath a *Judicial* and *Miniſterial* Power.

His [c] *Judicial* Authority and Power conſiſts in hearing certain Cauſes in his *Torn* and *County*-Courts [d], and in preſerving the Peace of the County, for he is the principal [e] Conſervator of the Peace there. [f] Therefore by the Common Law, he may upon Requeſt cauſe one to find Sureties of the Peace, and may take the ſame Sureties by Recognizance. [g] He may (to aſſiſt the Juſtices of Peace of his County) charge any Number of Men (called the *Poſſe Comitatûs*) to attend him to ſuppreſs Riots [h], and ſuch as go about to diſturb the publick Peace, and record it. Such as do refuſe to aſſiſt him, when required, may be fined and impriſoned. [See 13 *H.* 4. *ch.* 7. 2 *H.* 5. *St.* 1. *ch.* 8 & 9. 1 *Geo.* 1. *ch.* 5.]

[c] 1 Inſt. 168. a.
[d] See B. 4. ch. 1. poſt. See note on the Word Torn ante. 3.
[e] 2 Inſt. 175.
[f] F. N. B. 81, 82.
[g] 2 Inſt. 193, 194.
[h] See poſt. B. 3. ch. 3.

But this Judicial Authority of Sheriffs as Conſervators of the Peace of the County is ſeldom put in Practice. It is uſually executed by the Juſtices of the Peace.

[i] His *Miniſterial Power* conſiſts in executing all the Writs iſſuing out of the King's Courts. [k] For no Proceſs is ſerved but by the Sheriff from the Beginning of the Suit to the Execution. [See *Weſt.* 2. *ch.* 39. 12 *Ed.* 2. *St.* 1. *ch.* 5. 2 *Ed.* 3. *ch.* 5. 23 *H.* 6. *ch.* 9. Concerning the Return of Writs by Sheriffs and Bailiffs of Liberties.] [l] A Sheriff ought not to diſpute the Validity of the Writ; but muſt execute it. If the Court goes beyond their Juriſdiction, an Action will lie againſt the

[i] Forteſcue, &c. ch. 24.
[k] 1 Inſt. 168. a. 2 Inſt. 451.
16 Rep. 54. 9 Rep. 68. 10 Rep. 75, 76. 2 Inſt. 452. 3 Cro. 395. 1 Ventr. 273. 2 Saund. 193. See of Writs, poſt. B 4 ch. 4.

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[l] *Quicunque juſſu judicis aliquid fecerit, non videtur dolo malo feciſſe, quia parere neceſſe eſt.* 10 Rep. 70, 76.
Judicium à non ſuo judice datum nullius eſt momenti. 10 Rep. 76.

Sheriff, otherwiſe not, tho' the Writ was illegal. He or his Officers, upon an Arreſt, ought to ſhew at whoſe Suit it is, out of what Court, for what Cauſe; and if he does not make a Return, the Court will *amerce* him, and order an *Attachment* againſt him for his Contempt; or if he makes an inſufficient Return, he may be *amerced*; but if he makes a falſe Return, the Party grieved may have his *Action* againſt him. The *Return* is the Certificate of the Sheriff made to the Court of what he hath done touching the Execution of the Writ directed to him.

[m] 5 Rep. 91, 92
11 Rep. 82.
4 Inſt. 177.

[m] In all Caſes where the Proceſs concerns the King, as in a Writ of *Quo minus* out of the *Exchequer*-Court in a Civil Cauſe, or other Action, where the King is Party, and in Criminal Cauſes, as Treaſon, Felony, *&c.* the Sheriff or other Officer (after a Demand to open the Door, and ſignifying the Cauſe of his Coming, and a Refuſal) may break open the Door of a *Houſe* to execute his Proceſs: But at the Suit of a Subject only, he cannot do it, even upon Execution, unleſs it be upon *Ejectment* to deliver Poſſeſſion of a Houſe. For by Colour of a Suit, the Houſe of any Man might be broke open by his Bailiffs.

[a] Hob. 62.

[b] 1 Ventr. 306.

[a] A Sheriff knock'd gently at the Door with Deſign to arreſt one upon mean Proceſs, and the Wife opened the Door a little to ſee who it was; whereupon the Sheriff forced his Way with his Sword drawn, and broke open the Door where the Defendant lay, and arreſted him; this was held to be unlawful. [b] But if upon ſuch Proceſs, he catches the Defendant by his Hand as he holds it out at a Window, this is ſuch a Taking that he may juſtify the Breaking open of the Door.

5 Rep. 93.
11 Rep. 82.

The Privilege of a Houſe extends to a Man and his own Family only, not to others that fly thither, or remove their Goods thither in a fraudulent Manner to avoid Execution.

[c] Dr. & Stud. Dial. 2. ch. 41.

[d] 9 Rep. 67, 68.
See of Murder, poſt B. 3. ch. 1.

[e] 2 Inſt. 193, 194, 454.

If the Party arreſted makes [c] *Reſiſtance*, or makes an Aſſault upon the Sheriff, or Bailiff he may juſtify Beating him; and if the Party is ſlain, it is juſtifiable. [d] But if any Sheriff, *&c.* who hath Execution of Proceſs, is ſlain in doing his Duty, it is Murder in him that kills him, though there was not any precedent Malice, between them. For the Law preſumes Malice, though none is proved, and though the Proceſs was apparently erroneous. If a Sheriff is oppoſed in executing the King's Writs, [e] He cannot make a *Return* of ſuch Reſiſtance; [See *Weſt.* 2. *ch.* 39.] for he may by the Common Law take a *Poſſe Comitatûs* to ſuppreſs ſuch Force and Reſiſtance, tho' a Reſcous upon a mean Proceſs before he could ſummon the County to his Aſſiſtance might be pardonable.

[f] 5 Rep. 66.

He or his Officers may arreſt one by [f] Night or Day, at the Suit of the King or a Subject.

[g] See poſt. B. 4. ch. 1.

He ought alſo, as a Miniſterial Officer, to proclaim ſuch *Statutes* as are ordered to be proclaimed by him; return indifferent *Juries* for the Trial of Men's Lives, Liberties, Lands, or Goods; and upon Delivery of the Writ to chooſe *Knights* of the Shire, to make Proclamation at the next County-Court, of the Day and Place of Election [g]; and he muſt make out his Precepts to every Mayor of Cities, and Bailiffs of Boroughs, to chooſe *Citizens* and *Burgeſſes*, but he cannot be choſen himſelf.

It is his Duty alſo to preſerve the *Rights* of the King within his County, and to enquire what Lands are concealed from, to collect his

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[m] *Domus ſua cuique eſt tutiſſimum refugium.* 5 Rep. 91. 11 Rep. 82. 3 Inſt. 162.

Rents and Dues, and to ſeize to the King's Uſe the Profits of ſuch Lands as come to him by Attainder or Eſcheat, (for the Office of *Eſcheator*, having its Dependance on the Court of Wards, is now almoſt out of Uſe) and likewiſe the Goods of any Felon, Fugitive, Outlaw, Wreck of the Sea. And he muſt levy his Majeſty's Debts, and be accountable to the King for all Iſſues and Profits of his County; and upon Proceſs out of the *Exchequer*, he is to gather and bring into the *Exchequer* ſuch Iſſues and Profits, and likewiſe thoſe growing by Fines and Amerciaments in Reſpect of the Non-appearance of Defendants and Jurors, and all forfeited Recognizances. But theſe muſt be firſt eſtreated (or extracted) by Copies of the Originals into the Court of *Exchequer*, and from thence Proceſs muſt be awarded to levy the ſame to the King's Uſe. [See 22 & 23 *Car.* 2. *ch.* 22. 4 & 5 *W. & M. ch.* 24. 3 *Geo.* 1. *ch.* 15.]

He muſt alſo ſee that [a] *Criminals* be executed, and muſt ſee that he obſerves the Order of Law in putting Criminals to Death; elſe he will be guilty of Homicide.

Laſtly; he muſt give up his *Accompts* in the *Exchequer*, and ſue out his *Quietus*. [See 21 *Ja.* 1. *ch.* 5. 13 & 14 *Car.* 2. *ch.* 21. and 3 *Geo.* 1. *ch.* 15, 16. For the better regulating the Office of Sheriffs, and aſcertaining their Fees, and the Fees for ſuing out their Patents, and paſſing their Accounts.]

By [b] Demiſe of the King, the Authority of Sheriffs doth determine. [But See 1 *Ann. ch.* 8.]

By 14 Ed. 3. St. 1. ch. 7. 23 H. 6. ch. 7. *No Sheriff ſhall continue in his Office above one Year, except in* London *and* Middleſex, *and Towns being Counties of themſelves, and Counties where the Office is inheritable; upon the Penalty of two hundred Pounds yearly, to be divided betwixt the King and Proſecutor.*

And by 1 R. 2. ch. 11. *None that hath been Sheriff ſhall be ſo again within three Years, if there be others ſufficient.* [See 28 Ed. 3. *ch.* 7. 42 Ed. 3. *ch.* 9. 1 *H.* 5. *ch.* 4 23 *H.* 6. *ch.* 8]

But by 12 Ed. 4. ch. 1. 17 Ed. 4. ch. 6. *Every old Sheriff may execute his Office during* Michaelmas *and* Hillary *Term, if he hath not before a Writ of Diſcharge.*

By 23 H. 6. ch. 10. *Sheriffs muſt make Deputies in the King's Courts at* Weſtminſter *to receive Writs.*

By 4 H. 4. ch. 5. *and* 23 H. 6. ch. 7. *Every Sheriff ſhall abide in proper Perſon within his Bailiwick, and ſhall not let his Bailiwick or Hundred to Farm.*

The Profits whereof were very conſiderable heretofore, when moſt Law-Suits were tranſacted there.

By 3 Geo. 1. ch. 15. *If any Sheriff ſell or lett the Office of Under Sheriff, Gaoler, or Bailiff, or any other Office under him, or take any Reward for the ſame, directly or indirectly,* he forfeits five hundred Pounds. And ſee 5 & 6 *Ed.* 6. *ch.* 16. Againſt buying and ſelling of Offices.

By 1 Mar. Seſſ. 2. ch. 8. *No Sheriff can* act *as a Juſtice of Peace during his Shrievalty, notwithſtanding the* 1 Ed. 6. ch. 7.

By 3 Geo. 1. ch. 15. *If any Sheriff dies before the Expiration of his Year, the Under-Sheriff ſhall execute the Office in the Name of the deceaſed, till another is appointed and ſworn.*

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[a] Dr. & Stud. Dial. 2. ch 21. See of Execution, poſt B. 4. ch. 5.

[b] 3 Rep. 72. See of Offices poſt. B. 2. ch. 2.

By 20 Geo. 2. ch. 37. *Sheriffs ſhall, at the Expiration of their Office, turn over to the ſucceeding Sheriff by Indenture and Schedule all Writs unexecuted, who ſhall execute and return the ſame. And no Sheriff ſhall be liable to make a Return to any Writ, unleſs required ſo to do within ſix Months after the Expiration of his Office.*

The Sheriff hath for his Aſſiſtance under him a County-Clerk or *Under-Sheriff*, *Bailiffs*, and a *Gaoler*.

1 Black. Com. 345. 4 Burn. Tit. Sheriff.

c 9 Rep. 49.

d The High Sheriff cannot depute two Under-Sheriffs extraordinary. 2 Wilſon, 379.

a Hob. 12, 13.

1. The *Under-Sheriff*, (or County-Clerk) is the Sheriff's Deputy, and acts in his Stead; except in ſome particular Caſes which are to be done by the Sheriff himſelf; as when a Writ ſaith, That the Sheriff ſhall go in Perſon. [c] The Sheriff (not the King) hath Power to delegate the Office to whom he pleaſes, tho' there is no particular Power given in his Patent to make a [d] Deputy. For this is an Incident to the Sheriff's Office. And it would be very inconvenient that the Sheriff ſhould be reſponſible for his Deputy that is to be choſen by another. The High-Sheriff cannot abridge his Power, or reſtrain him by Covenant to act for him in Part only. Therefore the High-Sheriff ought to be very cautious in taking Security of the Under-Sheriff, to ſave him harmleſs from Eſcapes, *&c.* [a] The Covenants to this Purpoſe are allowed to be good, as being made to prevent Eſcapes, *&c.* [See his *Oath*, 3 *Geo.* 1. *ch.* 15.]

The High-Sheriff may execute his Office himſelf if he pleaſes.

Dr. & Stud. Dial. 2. ch. 42. 2 Inſt. 452, 466. 4 Inſt. 114.

All *Returns* made by the Under-Sheriff, muſt be made in the Name of the High-Sheriff; for the High-Sheriff only is ſworn to execute the Office of Sheriff, and therefore he muſt anſwer for all.

The Power of the Under-Sheriff (where he may act) is the ſame with that of the High-Sheriff, becauſe he acts in his Stead.

Hob. 13.

He is, as other Deputies or Attornies, *removeable* at Pleaſure. And tho' the Sheriff ſhould make him irrevocable, yet he may diſplace him. He is but in the Nature of a general Bailiff Errant to the Sheriff through the whole County, as other Baliffs are over a particular Hundred.

By 42 Ed. 3. ch. 9. *and* 23 H. 6. ch. 7. *No Under-Sheriff ſhall continue in his Office above one Year, except in* London, *on pain of forfeiting two hundred Pounds Yearly.*

Yet the ſame Perſons often continue to exerciſe the Office in other Men's Names for many Years together.

By 1 H. 5. ch. 4. *An Under-Sheriff cannot execute that Office and practice as an Attorney at the ſame Time.*

For it would be a Cauſe of encreaſing Suits, a Temptation to Partiality, and an Hindrance in Diſpach of his proper Buſineſs. But notwithſtanding that act, the Under-Sheriffs (being uſually bred Attornies) practice in the Name of other Attornies.

By 29 El. ch. 4. *No Sheriff, Under-Sheriff, or Bailiff of a Liberty, ſhall take more for ſerving an Extent or Execution than twelve-pence for every Pound levied under a Hundred Pounds; and ſix-pence for every Pound levied above a hundred Pounds; in Pain of treble Damages to the Party grieved, and forty Pounds betwixt the King and the Proſecutor.*

And by 3 G. 1. ch. 15. *and* 8 G. 1. ch. 25. ſ. 5. *He ſhall not take Poundage, on executing a* Capias ad Satisfaciendum, *on more than the Sum then remaining due, which ſhall be indorſed on the back of the Writ; nor upon an* Elegit Habere facias Poſſeſſionem, *or* Seiſinam, Extent, *or* Liberate *upon any real Eſtate, more than one Shilling for every twenty Shillings of the yearly Value of ſuch Eſtate, where it is under one hundred Pounds* per

Annum; *and ſix-pence for every twenty Shillings, if of one hundred Pounds or upwards* per Annum.

But in ſome Caſes you muſt compound with the Sheriff, as upon Writs of Enquiry for Waſte, Damages, *&c.*

By 5 Ann. ch. 31. *No Sheriff of* London *and* Middleſex *ſhall take directly or indirectly any Sum or Preſent for the Execution of the Place of Under-Sheriff, or oblige him by Covenant or otherwiſe to be at any Expence or Charge which ought to be, and hath been uſually paid by the High-Sheriff.*

By 3 Geo. 1. ch. 15. *No Perſon ſhall buy, or take to Farm the Office of Under-Sheriff; nor give any Reward for the ſame, directly or indirectly, on Forfeiture of five hundred Pounds.*

By 6 Geo. 1. ch. 21. ſ. 53. *No Sheriff, or Under-Sheriff, ſhall make out any Warrant before they have in their Cuſtody the Writs upon which ſuch Warrants ought to iſſue, on pain of ten Pounds.*

2. A *Bailiff* is a Servant and Miniſter of the Law, and a Servant to the Party who employs him, to ſummon, arreſt, diſtrain, *&c.* [a] The Sheriff himſelf is called *Ballivus*, and his County *Balliva*. But there Bailiff ſignifies an Officer concerned in the Adminiſtration of Juſtice. But by Bailiffs in this Place, I mean thoſe Under-Officers that more immediately belong to the Sheriff, and are appointed by him as his Servants; ſuch are Bailiffs of *Hundreds*, and *Special* Bailiffs. Bailiffs Errant or Itinerant are out of Uſe. Bailiffs of *Hundreds* are Officers to execute Writs, to collect the Poſt-Fines, Fee-Farms of the King, *&c.* for the Sheriff; to attend the Juſtices of Aſſize and Gaol Delivery, and Juſtices of the Peace, in their Courts. The Execution of all Writs which come to the Sheriff, or his Under-Sheriff, ought to be by Bailiffs of *Hundreds*, though now the Uſe is to put in *Special* Bailiffs with them. A *Special* Bailiff is an Officer of the Sheriff to execute ſome particular Writ, and for that Time only. His Arreſt is the Arreſt of the Sheriff; and if he ſuffers a Priſoner to eſcape, an Action lies againſt the Sheriff: And if the Priſoner is reſcued, the Return of the Reſcous ſhall be, *That it was done to the Sheriff himſelf.*

1 Black. Com. 345.
[a] 1 Inſt. 61 b. 168. b. 2 Inſt. 19, 44.

The 27 El. ch. 12. *Directs that Bailiffs ſhall, before they act, take the Oath of Office there preſcribed before the Judge of Aſſize,* Cuſtos Rotulorum, *or two Juſtices* (1 Qu.) *under the Penalty of forty Pounds; and if they commit any Act contrary to their Oaths, they ſhall forfeit to the Party grieved his treble Damages.* But this Act does not extend to ſpecial Bailiffs, ſo that in Effect the Deſign of that Statute is evaded, and too looſe a Reſtraint laid upon thoſe who are uſually a great Grievance to the People. [b] However, the Sheriff ſhall anſwer for the Miſdemeanors of his Bailiffs, if they offend in their Office, though he may have his Remedy over againſt them.

[b] Dr. & Stud. Dial. 2. ch. 42.

[c] Every one is bound by the Common Law to aſſiſt not only the Sheriff in his Office for the Execution of the King's Writs according to Law, but alſo his Bailiff that hath the Sheriff's Warrant and his Authority in that Caſe. If he refuſes to do it, being required, he ſhall be fined and impriſoned.

[c] 2 Inſt. 193.

[d] A Bailiff ought to ſhew his Warrant when the Party ſubmits Himſelf to the Arreſt, if required. [See Of *Murder in Reſpect of the Perſon killed*, B. 3. ch. 1. *Of Arreſt*, B. 4. ch. 4. See alſo Of *Bailiffs* of *Liberties*, B. 2. ch. 2. *Bailiffs* of *Lords of Manors*, B. 4. ch. 1.]

[d] 6 Rep 54. 9 Rep. 69.

By 1 H. 5. ch. 4. *They who have been Sheriffs Bailiffs, except where the Sheriffwick is inheritable for one Year, ſhall not bear that Office for three Years next following.*

e See Title Writs, poſt, B. 4 ch. 4.

By 23 H. 6. ch. 9. *The Bailiff's Fee for an Arreſt* [e] *is Four Pence.*

By 3 G. 1. ch. 15. *None ſhall take to Farm or buy the Office of Bailiff, in Pain of five hundred Pounds.*

In civil Suits brought for recovering Debts or Damages, Sheriffs and their Bailiffs are obliged to let Perſons arreſted out upon Bail, upon reaſonable Sureties of ſufficent Perſons; and it is Oppreſſion to take Money for doing it; and puniſhable by Attachment or Indictment. 2 *Burr.* 926, 927, 928.

1 Black. Com. 346.
2 Burn. tit. Gaol & Gaoler.
a 2 Inſt. 382.
8 Rep. 44.
b 2 Inſt. 100, 589.
c 4 Rep. 34.

3. The next Officer under the Sheriff is the *Gaoler* (from *Geol* a *Priſon*) or Keeper of his Priſon. [a] *Feme Coverts* or *Infants* may be Keepers of Gaols, and are liable to be charged for Eſcapes.

The Cuſtody of County Gaols is [b] incident to the Office of Sheriff, and inſeparable from it, [See 19 *H.* 7. *ch.* 10] tho' the Gaol itſelf does belong to the King, and is to be repaired at the common Charge of the County. The Sheriff being the immediate Officer of the King's Courts, ſhall be [c] anſwerable for all Eſcapes, and be ſubject to Amerciaments; and therefore he ſhall put in ſuch Gaolers as he will anſwer for; from whom he ought to take good Security to Indemnify him. [See 14 *Ed* 3. *ch.* 10.]

d 2 Inſt. 589.

The [d] Cuſtody of Gaols may be *granted* to one in Fee, and may be held by *Preſcription*, and yet the Priſon itſelf is the King's, as before obſerved.

1 Ld. Ray. 136.
e 2 Inſt. 705.

Where there is no publick Gaol, the Sheriff may remove his Gaol from one Place to another within his County; but cannot demand a particular Place without Preſcription. [e] New Gaols cannot be erected without an Act of Parliament. In many Places the Gaol of a Town, which is a County of itſelf, or a Place privileged from the County, is yet a Gaol of the County, and ſerves for the County at large. As *Newgate* in *London* ſerves as well for the County of *Middleſex* as *London*; which was ſo ordered when *London* was taken out of *Middleſex*, and made a County by itſelf.

f 2 Inſt. 382, 592.
3 Inſt. 91.
g Dr. & Stud. Dial. 2. ch. 42.
9 Rep. 98.
2 Inſt. 382, 466.
4 Inſt. 114.

Tho' the Sheriff muſt make ſuch Gaolers for which he will anſwer; yet if there is a Default in the Gaoler, an Action does lie againſt him. And [f] he who hath the Cuſtody of the Gaol wrongfully, or of Right, ſhall be charged with the Eſcape of Priſoners. And if he who hath the Cuſtody of a Gaol in [g] Fee, doth ſubſtitute another at Will, or for Life under him; he ſhall be charged by Action upon Eſcape, that hath the actual Poſſeſſion, if he is ſufficient. But if he is not ſufficient, *Reſpondeat Superior*. This is to be underſtood when one hath the Cuſtody of a Gaol of Freehold or Inheritance. In common Caſes the Sheriff or Gaoler are chargeable at the Diſcretion of the Party. But the Sheriff is moſt uſually charged.

3 Black. Com. 163, 290, 415.
4 Black. Com. 130, 131.
1 Burn. tit. Eſcape.
1 Wilſon 255.
2 Wilſon 294.
Caſes temp. Ld. Hardwicke Edit. 1770, 310, 311. 1 Burr. 439, 440.

An *Eſcape* is when one, that is impriſoned, gets his Liberty before he is delivered by Order of Law. [h] An Eſcape is either negligent or voluntary. *Negligent*, when one is arreſted and in Priſon, and afterwards eſcapeth againſt the Will of him that had him in Cuſtody, and is not freſhly purſued and taken. *Voluntary*, when one hath another under an Arreſt or in Priſon, and afterwards conſents to let him go whether he will, and he goeth accordingly.

[h] Terms of the Law, v. Eſcape.

[i] If after a *Negligent* Eſcape, the Gaoler at any Time retakes the Priſoner upon freſh Purſuit, (*i. e.* upon a [k] ſpeedy and continual Purſuit) he ſhall be excuſed, and the Priſoner ſhall be ſaid to be in Execution again. Under this Pretence of Re-taking, or freſh Purſuit, Gaolers frequently protect themſelves, when they are ſued for letting Priſoners go at large. If a Priſoner of his own Wrong eſcapes and flies into another County, the Sheriff or his Officers, upon ſuch Purſuit, may retake him; and though he is out of the View, yet if freſh Purſuit is made, and the Priſoner is retaken a long Time after, he ſhall ſtill be ſaid to be in Execution, if he was retaken before any Action brought againſt the Sheriff, &c. [a] If Traytors and Rebels break the Priſon, by which the Priſoners eſcape, the Gaoler may be charged with the Eſcape and puniſhed; for he may have his Remedy over againſt them; not if they are the King's Enemies that break the Gaol. On a negligent Eſcape, in criminal Caſes, either the Gaoler or Sheriff may be fined or impriſoned. But in ſuch Caſes the [b] Judges uſually make favourable Conſtructions on the Behalf of the Gaoler.

[i] 3 Rep. 52. H.P.C.ch. 52.
[k] 2 Inſt. 319.
[a] 4 Rep. 84. H.P.C.ch.51. 1 Ld Ray. 651.
[b] 3 Rep 44.

[c] A *Reſcous* of a Priſoner upon an Arreſt or Mean Proceſs before he is brought to Gaol may excuſe the Sheriff in an Action for the Eſcape, becauſe he is not obliged to have a *Poſſe Comitatus* ready to attend him in the Service of every Mean Proceſs. But otherwiſe when the Priſoner is taken upon Execution, or when the Priſoner is in the Gaol and is reſcued.

[c] 1 Roll. Abr. 807. 2 Inſt. 105, 193, 194. 3 Black Com. 146, 12, 170. 4 Black. Com. 125, 131. 4 Burn. tit. Reſcue.

But now for *Voluntary* Eſcapes. [d] A Priſoner in Execution ought not to be allowed to go out of the Gaol; for it is an Eſcape. The Sheriff ought to keep him *in arcta & ſalvâ Cuſtodiâ.* [See *Weſt.* 2. *ch.* 11.] If he is removed by the Gaoler from County to County, by Virtue of an *Habeas Corpus*, it is no Eſcape; though he does not go the direct Way to that County. If a Man eſcapes with the [e] Conſent of the Gaoler in Civil Caſes, or with the Conſent of the Plaintiff, he cannot retake him. If he doth, the Priſoner may have an *Audita Querela.* [f] If a Woman is Warden of the *Fleet*-Priſon, and a Priſoner in the *Fleet* marrieth her, this is a voluntary eſcape in the Woman; for now the Priſoner cannot be under her Power. Thus if the Sheriff or Gaoler marrieth a Woman that is in Execution for Debt, ſhe cannot be a Priſoner to her Huſband. [g] If the Sheriff, &c conſents that one in Execution ſhall go out of the Goal for a while, this is an Eſcape, tho' he returns at the Time appointed.

[d] 3 Rep. 43, 44. 1 Inſt. 260. a. 2 Inſt. 381. 3 Cro. 14, 466, 492.
[e] 3 Rep. 52.
[f] Plowd. 17.
[g] 3 Rep. 44. 8 Rep. 100.

It is often to be conſidered, Whether an Eſcape is upon a *Mean* Proceſs, (*i. e.* after one is committed to Priſon upon the firſt Arreſt) or upon an *Execution*, which is by Proceſs after Judgment. Now Gaolers are more cautious of voluntary Eſcapes, after Execution, than upon Mean Proceſs: Becauſe upon Execution, the Debt and Damages will appear upon Record, and ſo are more eaſily recovered againſt them, than upon Eſcapes on Mean Proceſs, where there is a greater Liberty to make an artful Defence.

Voluntary Eſcapes in [h] *Criminal* Caſes (as Treaſon or Felony) are very dangerous to the Sheriff or Gaoler. The Sheriff or Gaoler is eſteemed to be guilty of the Crime, for which the Priſoner eſcaping was committed, if he was committed, by lawful Warrant. If he was committed for Treaſon or Felony, the Sheriff or Gaoler who permitted the Eſcape ſhall anſwer for Treaſon or for Felony, and ſuffer the Puniſhment. [i] For though the Sheriff is reſponſible for the Gaoler in Civil Caſes, yet in

[h] 2 Inſt. 589, 590. H.P.C.ch 51. Dalt. ch. 140, page 330.
[i] Dr. & Stud. Dial 2 ch 42. H.P.C. ch. 51.

in Criminal Caſes it is only Treaſon or Felony in him that was immediately truſted with the Cuſtody. But the Sheriff may be indicted for it, ſo as to ſubject him to Fine and Impriſonment for the Offence of his Gaoler[k]. [l] If a Priſon be ſet on Fire, unleſs it be by Privity of the Priſoner, he may break Priſon to ſave his Life. If a Conſtable brings a Perſon to Gaol, and the Gaoler refuſeth to take him, the [a] Vill where the Conſtable liveth ſhall be charged with him, and the Gaoler fined[b].

[k] 1 Ld. Ray. 424.
1 Salk. 272. S. C.
[l] 2 Inſt. 590.
[a] H. P. C. ch. 51.
S. P. C. 34. b.
Dalt. ch .170. pag. 451.
[b] See of Felonies, poſt. B. 3. ch. 1.

By 8 & 9 W. 3. ch. 27. *If the Keeper of any Priſon ſuffers any Priſoner committed on Mean Proceſs, or Execution, to be out of the Rules, except by virtue of a* Habeas Corpus, *or Rule of Court, it ſhall be deemed an Eſcape.*

Every Perſon obtaining Judgment in an Action of Eſcape againſt the Marſhal of the King's Bench, *or Warden of the* Fleet, *ſhall have not only the Remedies allowed by Law, but the Profits of the ſaid Marſhal and Warden, or ſome fit Part thereof; which ſhall be ſequeſtered towards Satisfaction of the ſaid Debt, with Coſts and Damages.* [And by 27 G. 2. *ch.* 17. The *King's Bench* Priſon, and the Power of appointing the Marſhal, is reveſted in the Crown, and the Mortgage thereon directed to be paid off; and the Saving Clauſes relating thereto in that Act are repealed.]

And if the Keeper of any Priſon take any Gratuity or Security for the ſame, to procure or permit any Eſcape, he ſhall forfeit five hundred Pounds, and his Office.

And no Re-taking, or freſh Purſuit ſhall be given in Evidence in an Action of Eſcape, unleſs eſpecially pleaded, and Oath made by the Defendant that ſuch Eſcape was without his Conſent. But if ſuch Affidavit *prove falſe, he ſhall forfeit five hundred Pounds.*

Likewiſe, if any Priſoner in Execution eſcapes, the Creditor may retake ſuch Priſoner by any new Capias, *or may ſue forth any other kind of Execution.*

And if any Keeper refuſes after one Day's Notice, to ſhew the Priſoner in Execution to the Creditor, or his Attorney, it ſhall be judged an Eſcape.

By 1 Ann. St. 2. ch. 6. *If any Priſoner in the* King's Bench *or* Fleet *in Execution, or on any Mean Proceſs or Proceſs of Contempt, ſhall eſcape or go at large; upon Oath thereof made in Writing before any Judge of the Court where the Commitment, Action, Judgment or Execution was, ſuch Judge may grant a Warrant for the Re-taking ſuch Priſoner, and for the Commitment of him to the Common Gaol of the County where retaken, there to remain without Bail, till diſcharged by Law. And if the Sheriff ſuffers ſuch Priſoner, ſo retaken, to eſcape, he ſhall be liable as in the Caſe of any other Eſcape.*

But by 5 Ann. ch. 9. *One that eſcapes, (being taken by Virtue of the* 1 Ann.) *ſhall be committed to the Priſon where the Sheriff keeps Debtors, inſtead of the common Gaol. And if the Priſoner eſcapes, the Sheriff ſhall be anſwerable as in other Eſcapes. And the Judge may grant his Warrant upon Oath made in Writing before Commiſſioners empowered to take* Affidavits *in the Country; and the Priſoner may be retaken upon the Lord's Day.*

If any Perſon in Cuſtody for not performing any Decree of Chancery *or* Exchequer, *whereby Money is decreed, ſhall eſcape; the Perſon to whom the Money is decreed, ſhall have the ſame Remedy againſt the Sheriff, as if the Perſon eſcaping had been in Cuſtody upon Execution; and recover the Money decreed with Coſts, in any of the Courts at* Weſtminſter.

By 5 H. 4. ch. 10. *None ſhall be impriſoned by any Juſtice of Peace, but only in the* [c] *common Gaol.* But by 6 G. 1. ch. 19. *Juſtices may commit Vagrants, and Perſons charged with ſmall Offences, either to the common Gaol or Houſe of Correction.*

[c] 9 Rep. 119.

By 7 H. 4. ch. 4. *In an Action of Debt brought againſt a Gaoler which letteth a Priſoner eſcape, a Protection ſhall not lie.*

By 23 H. 6. ch. 9. *The Gaoler's Fee for a Commitment is four-pence. And if he doth any Thing contrary to this Act, he forfeits treble to the Party grieved, beſides forty Pounds to be divided betwixt the King and Proſecutor.*

By 3 H. 7. ch. 3. *Thoſe that have the Cuſtody of Gaols muſt certify the Names of all Priſoners to the Juſtices of Gaol-Delivery, in pain of five Pounds for every Default.*

By 8 & 9 W. 3. ch. 27. *If the Keeper of any Priſon take more than two Shillings and ſix-pence by the Week for Chamber Rent he ſhall forfeit twenty Pounds.*

By 11 & 12 W. 3. ch. 19. 6 G. 1. ch. 19. *The Juſtices of the Peace upon Preſentment of the Grand Jury at the Aſſiſes, may aſſeſs the County for building or repairing County Gaols.*

All Felons ſhall be impriſoned in the Common Gaols only, whereof the Sheriff ſhall have the Keeping.

This Act ſhall not prejudice ſuch as have any common Gaols by Inheritance, for Life, or Years; nor charge any Perſon in any City, Town, &c. which have common Gaols for Felons taken in the ſame, with any Aſſeſſment to the County Gaol.

By 3 Geo. 1. ch. 15. *None ſhall take to Farm or buy the Office of Gaoler, in pain of five hundred Pounds.*

[See the 5 *Geo.* 2. *ch.* 30. Concerning the Gaoler's Duty in the Cuſtody of *Bankrupts.*]

[a] By the Common Law, no Sheriff, Gaoler, or other of the King's Miniſters, ought to take any Reward for doing his Office, only of the King. But ſince the Common Law has been altered, incredible Extortions and Oppreſſions have enſued.

[a] 2 Inſt. 74.

II. *Juſtices* of the *Peace* are thoſe that are appointed by the King's Commiſſion to keep the Peace of the County where they dwell. Of whom ſome are made of the *Quorum*, (from the Words in the Commiſſion, *Quorum* A. B. C. D. E. F. *unum eſſe volumus*) becauſe ſome Buſineſs of Importance ſhall not be diſpatched without the Preſence of them, or one of them.

Juſtices of the Peace.
1 Black. Com. 349 to 355.
3 Burn. 3. title Juſtices of the Peace.
See 2 Burr. Rep. 787. 1162 2 Wilſon 281, &c.

Heretofore there were [b] *Conſervators* of the Peace at Common Law, elected by the County, upon a Writ directed to the Sheriff. But the Election of Conſervators was transferred by Statutes from the People to the King; and at laſt Juſtices of the Peace were created Conſervators of the Peace by Commiſſion or Letters Patent under the Great Seal. The Power of conſtituting them is only in the King, though they are uſually made at the Diſcretion of the Lord Chancellor or Lord Keeper; not that the Power can be transferred or lodged in a Subject: The King may appoint in every County in *England* and *Wales* as many as he ſhall think fit.

[b] 2 Inſt. 174, 175.

They are Juſtices of *Record*; for none but Juſtices of Record can take a Recognizance of the Peace. Their Power ariſes from their *Commiſſion*, or from Statutes.

1. By Virtue of ſome Words in their *Commiſſion*, (*viz. Sciatis quod aſſignavimus vos conjunctim & diviſim & quemlibet veſtrum Juſticiarios noſtros ad Pacem noſtram in Comitatu noſtro* B. Conſervandam, *&c.*) every Juſtice is appointed *Conſervator* of the Peace, and hath a ſeparate Power, and may do all Acts concerning it apart and by himſelf, and even commit a Fellow-Juſtice upon Treaſon, Felony, or Breach of the Peace. This is the ancient Power touching the Peace, which a Conſervator of the Peace had at Common Law. As ſuch, every Juſtice of the Peace may bind to the Peace or good Behaviour at Diſcretion; and for Defect of Sureties may commit to the common Gaol, or Houſe of Correction.

By Virtue of another *Aſſignavimus* or Clauſe in the Commiſſion, two Juſtices of the Peace, (one *Quorum*) have a joint Power, 1. To enquire by a Jury of all Offences mentioned in the Commiſſion. 2. To take Indictments. 3. To grant Proceſs thereupon. 4. To hear or try the Offence upon Indictment. Theſe are Matters that are to be tranſacted at the General Quarter-Seſſions[a].

2. By *Statutes*, Power is given to Juſtices of the Peace, to which their Commiſſion does not reach. And the Statutes of 4 *H.* 7. *ch.* 12. and 37 *H.* 8. *ch.* 7. give a further general Power than is expreſſed either in their Commiſſion, or in any particular Statute. There are alſo ſeveral Statutes which are not mentioned in their Commiſſion, and yet the Execution thereof is committed to the Care of the Juſtices by expreſs Words in the Statutes. But all ſuch Statutes which do give Authority to the Juſtices, are a ſufficient Commiſſion of themſelves, though thoſe Statutes are not referred to in their Commiſſion. Theſe Statutes are to be executed as they direct; wherein if no expreſs Power is given to any *one* Juſtice, he can admoniſh only; and if not obeyed, may make Preſentment of it upon the Statute, and with his Fellow-Juſtices hear and determine it in Seſſions; or he may bind the Offender to the Peace, or the good Behaviour.

See Dalton and Burn's Juſtice.

Some Statutes impower *one* Juſtice of the Peace alone to act. Some Statutes require *two*, *three*, *four*, *ſix*. Of which Statutes where one, *&c.* may act, there are ſeveral Collections in Print.

The *Authority* that they uſually exerciſe from *Statutes*, is concerning Ale-houſes, Apprentices, Badgers, Bail, Bakers, Baſtards, Beer and Ale, Carriers and Prices of Land-Carriage, Church-wardens, Conſtables, Cottages, Curſing and Swearing, Drunkenneſs, Exciſe, Felonies, Forcible Entry and Detainer, Foreſtallers, Games not lawful, the Game, (and in relation to it concerning Game-keepers, Guns, Greyhounds, Setting-Dogs, Ferrits, Snares, Nets, Hares, Partridges, Pheaſants, Pigeons, Hawks, Fiſh, Deer, *&c.*) Gaols, Gun-powder, Hackney-Coaches, Hedge-Breakers, Highways, and Surveyors of Highways, Houſes of Correction, Labourers, Leather, Lord's Day, Defaults about Money, Poor (as ſetting them to Work, ſettling them in a Pariſh, or removing them from a Pariſh) and Overſeers of the Poor, Papiſts, Plague, Quakers, Rates and Pariſh Taxes, Regrators, Riots, Robbing Orchards, *&c.* Servants, Soldiers, and providing Carts and Carriages for them upon their March, Tithes, Treaſurers of the County, Vagabonds and Vagrants, Wages, Weights and Meaſures, Woodſtealers, and Deſtroyers of Timber, or other Trees, *&c.*

Dalton. ch. 192.

Several Statutes do impower Mayors and other Magiſtrates in Corporations to act as Juſtices of the Peace within their particular Precincts, who, beſides what the Juſtices of the County may do, take eſpecial Care

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[a] See of this Court, post. B. 4. ch. 1.

concerning the Aſſiſe (or Ordinance) of Ale and Beer, the Aſſiſe of Wood Billet and Faggot, Artificers and Victuallers, Beer-Veſſels, Veſſels for Salmon, Herrings and Eels, Dying, and of many other Matters relating to Trade.

The Power executed by the Juſtices *out* of Seſſions is chiefly by *Warrant*, *Recognizance* and *Mittimus*.

A *Warrant* is a Precept to ſome Officer to bring an Offender before the Juſtice, or to levy a Penalty by Diſtreſs, and muſt be under the Hand and Seal of the Juſtice, or his Hand at leaſt. If it iſſues out for the Peace or good Behaviour, it muſt contain the ſpecial Matter.

For General Warrant of a Secretary of State ſee 2 Wilſon 288. 4 Burn tit. Warrant.

[*By* 27 *G.* 2. *ch.* 20. *Juſtices, in all Warrants of Diſtreſs for levying any Penalty, or Sum of Money, in Purſuance of any Act of Parliament, may limit the Time for Sale of the Diſtreſs, not leſs than four, nor more than eight Days; and the Officer diſtraining may, out of the Money ariſing from the Sale, deduct the reaſonable Charges of taking, keeping and ſelling ſuch Diſtreſs; and ſhall return the Overplus on Demand to the Owner of the Goods.*]

A *Recognizance* is a Bond of Record acknowledged to the King, upon Condition to pay a certain Sum of Money if the Condition is not performed, as to appear at the Aſſiſes or Quarter-Seſſions, to be of the good Behaviour, &c. If a Juſtice [a] compounds Recognizances, and does not return them to Seſſions, an Information lies againſt him.

1 Burr. 10, 54, 55; 431. Caſes temp. Ld. Hardwicke 74, 98. 4 Burn. tit. Recognizance.

[b] A *Mittimus* is a Precept in Writing directed to the Gaoler under the Hand and Seal of the Juſtice, (containing the Cauſe of the Commitment) for the Receiving and ſafe Keeping of an Offender in Priſon until he is delivered by Law. A *Mittimus* need not be under Hand and Seal, if it is made by Order of Seſſions.

[c] The Power to demand Security for the Keeping of the *Peace* or for the *good Behaviour*, and for Want of Security to commit to Priſon, prevents a World of Miſchief. [See 21 *Ja.* 1. *ch.* 8.] The [d] Wife may have it againſt the Huſband, and the Huſband againſt the Wife. But Feme Coverts and Infants ought to find Security by their Friends, and not be bound themſelves. A Juſtice may not only grant it at the [e] Requeſt of any Perſon, but he may demand it *ex Officio* at Diſcretion. But he ought not to demand Surety for the good Behaviour againſt one for Defaming another. It may be granted againſt any Perſon whatſoever, being of ſane Memory, whether he be a Magiſtrate or private Perſon, and whether of full Age or under Age; tho' it may be the ſafeſt Way to proceed againſt a Peer by Complaint to the Court of Chancery or King's Bench. Breaches of the Peace [f] or the good Behaviour may be in many Inſtances. But he that demands Security for the Peace, muſt make Oath before the Juſtice, of Blows, or Threats, given, and that he ſtands in Fear of his Life or ſome Bodily Hurt, or that he fears that another will burn his Houſe, before the Juſtice can grant his Warrant.

[a] 1 Sid. 192.

[b] 2 Inſt. 52, 590, 591, 592. 1 H. P. C. ch. 50. 1 Burn. tit. Commitment.

[c] 1 Inſt. 293. b. 4 Inſt. 180, &c.

[d] Dalton, p. 268, 269, ch. 117. 2 Str. 1207.

[e] Dalton, p. 270, 271. ch. 117.

[f] See B. 3. ch. 3. poſt.

If one makes an Aſſault upon a Juſtice of Peace in the Execution of his Office, he may not only defend himſelf, but may alſo apprehend the Offender, and ſend him to Gaol till he find Sureties for the Peace. And he may likewiſe record a forcible Entry upon his own Poſſeſſion. In other Caſes he cannot be Judge in his own Cauſe in any Thing relating to himſelf[g]. Here therefore it would be adviſable to act in Conjunction with another Juſtice. [See 43 *El. ch.* 7. If one abuſeth him by Words before his Face, in relation to his Office, he may be bound to the

[g] 1 Salk. 396. 2 Salk. 607. 2 Str. 1173.

the good Behaviour for his Sawcineſs to a Magiſtrate[a]; and if he is abuſed in the *Execution* of his Office, the Offender may be alſo indicted at the Quarter-Seſſions and fined. To ſpeak contemptibly of his Warrant, or to caſt it into the Dirt, is a Contempt againſt the King's Proceſs. But if one abuſes a Juſtice of Peace by Words that do not relate to his Office, it ſeems to ſtand only as in the Caſe of other Perſons that are not Magiſtrates. And for Slandering a Juſtice in Relation to his Office, an Action may lie where no Indictment lies.

[b] One or more Juſtices of the Peace cannot make a Warrant upon a bare *Surmiſe*, to break open any Man's Houſe to ſearch for a Felon or ſtolen Goods, tho' commonly the Houſes of poor People are often ſearched by Virtue of ſuch Warrants for ſtolen Goods. But for Breaches of the Peace, Doors may be broke open to take an Offender. And a Sworn Officer need not ſhew his Warrant, unleſs required, but he ought to tell the Contents of it.

The Power of Juſtices of the Peace is *determined*, 1. By the Death of the King [or at the End of ſix Months after, by 1 *Ann. ch.* 8.] 2. By Diſcharge under the Great Seal. 3. By a *Superſedeas*. 4. By granting a new Commiſſion, [c] of which they that are left out, muſt take Notice after Publication at the next Seſſions. [See 2 & 3 *Ph. & M. ch.* 18.] 5. By Acceſſion of an Office, as by being made Sheriff or Coroner, the Power of acting is ſuſpended during the Continuance of the Office.

[d] *By* 34 Ed. 3. ch. 1. *Authority is given to Juſtices for preventing Offences, as to bind to the good Behaviour*, &c.

By 2 H. 5. ch. 4. *Juſtices of the Peace in every Shire named of the* Quorum, *ought to be reſident in the ſame; except Lords, Juſtices of the King's Bench and Common Pleas, the Chief Baron of the Exchequer, Serjeants at Law, and the King's Attorney.*

[*By* 9 Geo. 1. ch. 7. *Juſtices reſiding in a City, or Town that is a County of itſelf, and within the County for which they are Juſtices, may act at their Dwelling-Houſes.*]

By 15 Geo. 2. ch. 24. *Juſtices of Liberties or Corporations may commit Offenders, liable to be committed, and apprehended within ſuch Liberty, where Inhabitants are contributory to the Support of the Houſe of Correction in the County, to be dealt with as if committed by a Juſtice of the County.*

By 25 G. 2. ch. 55. *If any Perſon againſt whom a legal Warrant is iſſued, ſhall eſcape, go, or be, either before or after the iſſuing it, out of the Juriſdiction of the Juſtice who granted ſuch Warrant, any Juſtice for the County or Place where ſuch Perſon ſhall ſo eſcape or be, upon Proof on Oath of the Hand-writing of the Juſtice granting ſuch Warrant, ſhall indorſe his Name thereon, which ſhall be a ſufficient Authority for the Executing the ſame in ſuch other County.*

By 16 G. 2. ch. 18. *Juſtices may Act in Execution of the Laws relating to the Poor, Vagrants, Highways and parochial Taxes, tho' chargeable themſelves; but not to extend to impower them to act in the Determination of any Appeal relating to any Pariſh or Place where they are chargeable.*

By 26 G. 2. ch. 27. *No Act or Order of two or more Juſtices ſhall be ſet aſide, for want of Expreſſing that one or more of them is of the* Quorum.

By 18 H. 6. ch. 11. *None ſhall be Juſtices of the Peace for a County, unleſs they have Lands of the Value of twenty Pounds a-year. But by* 5 Geo. 2. ch. 18. *and* 18 Geo. 2. ch. 20. *No Perſon ſhall be capable of be-*

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[a] Crompt. 149. 1 Sid. 144. Dalt. ch. 114. p. 258. ch. 269. p. 445. 2 Roll Abr. 78. 1 Lev. 52. Dalt. ch. 124. p. 295. 2 Salk. 698. 2 Str. 1157. 1 Str. 617, 420.

[b] 4 Inſt. 176, 177, 178. 5 Rep. 91, 92. See of Proceſs, poſt. B. 4. ch. 5.

[c] 4 Inſt. 165.

[d] 4 Inſt. 181.

ing, nor upon pain of one hundred Pounds ſhall act as a Juſtice of the Peace for any County, unleſs he have to his own Uſe in Poſſeſſion a Freehold or Copyhold Eſtate, for Life, or for ſome greater Eſtate, or an Eſtate for ſome long Term of Years, determinable upon one or more Life or Lives, or for a certain Term originally created for twenty-one Years, or more, in Lands, Tenements or Hereditaments, in England *or* Wales, *of the clear yearly Value of one hundred Pounds, over and above all Incumbrances and Rents; or who ſhall not be ſeiſed of or intitled unto, for his own Uſe, the immediate Reverſion or Remainder of and in Lands,* &c. *lying as aforeſaid, which are leaſed for one, two or three Lives; or for any Term of Years determinable upon the Death of one, two or three Lives, upon reſerved Rents, and which are of the clear yearly Value of three hundred Pounds; and take and ſubſcribe the Oath of ſuch his Qualification in the Act mentioned at the County Seſſions. But this Act ſhall not extend to any City, Town or Liberty, having Juſtices of their own; nor to any Peer, Privy Councellor, Judge, Attorney or Solicitor General, or the Juſtices of the great Seſſions in* Cheſhire *or* Wales, *or the eldeſt Son or Heir Apparent of a Peer, or of a Perſon qualified to ſerve as Knight of a Shire.* And,

By 5 G. 2. ch. 18. *No Attorney, Solicitor, or Proctor, ſhall be a Juſtice of the Peace during the Time he ſhall continue in the Practice of that Buſineſs.*

By 3 H. 7. ch. 1. *Juſtices of the Peace at the next General Seſſions ſhall certify Recognizances taken for keeping the Peace,* &c.

By 3 H. 7. ch. 3. *Two Juſtices (one* Quorum*) have Power to let to Bail Perſons bailable by Law; and ſhall certify the ſame at the next Quarter-Seſſions or Gaol Delivery, in Pain of ten Pounds.*

See of Bail, B. 4. ch. 4. poſt.

See 13 *H.* 4. *ch.* 7. 5 *El. ch.* 1 & 4. 13 *El. ch.* 2. 3 *&* 4 *W. & M. ch.* 12. For Forfeitures incurred by Juſtices for Neglect of Duty.

By 7 Ja. 1. ch. 5. *If an Action is brought againſt a Juſtice of the Peace, he may plead the general Iſſue, and give the ſpecial Matter in Evidence; and he ſhall be allowed double Coſts. And by* 21 Ja. 1. ch. 12. *Such Action ſhall not be laid but in the County where the Fact was committed.*

And by 24 G. 2. ch. 44. *The Action muſt be brought within ſix Months, and Notice of the Cauſe of Action in Writing, with the Attorney's Name and Place of Abode endorſed thereon, be given to, or left at the Houſe of, the the Juſtice, one Month before the ſuing out or ſerving the Writ; within which Time he may tender Amends, and if the ſame is not accepted, may plead ſuch Tender in Bar; and Plaintiff at Tryal ſhall not give Evidence of any Cauſe of Action but what is contained in ſuch Notice.*

III. [e] The Coroner (*Coronator à Coronâ*) is an Officer of the King, that hath Cogniſance of ſome Pleas of the Crown. He is to be [a] elected in full County, (*i. e.* at the County-Court) by the Freeholders, upon the King's Writ *De Coronatore eligendo:* [See 28 *Ed.* 3. *ch.* 6.] and ought to have Lands in Fee in the County to anſwer all People, [See 3 *Ed.* 1. *ch.* 10. 14 *Ed.* 3. *St.* 1. *ch.* 8.] though now mean Perſons execute the Office. But if the Coroner is inſufficient, the County, as his Superior, ſhall anſwer for him. He ought to execute his Office in Perſon, for he is a Judicial Officer, tho' Deputies are too often appointed. The Number of Coroners is not fixed. [b] In ſome Counties there are four, beſides ſeveral ſpecial Coroners in divers Liberties and privileged Places, as the Coroner of the [c] Verge, *&c.* [See 28 *E.* 1. *ch.* 3.] and by Charter ſeveral Corporations have Power to chooſe Coroners for their Precincts.

Of the Coroner.
1 Black. Co. 346 to 349.
1 Burn tit. Coroner.
1 Burr. 18, 19.
[e] 2 Inſt 31, 32, 176.
4 Inſt 271.
[a] 2 Inſt. 174, 175, 549.
F. N. B. 163.
[b] 2 Inſt. 175, 549.
4 Inſt. 271.
[c] 2 Inſt. 549, 550.
4 Rep. 46.

The

[d] 4 Rep. 57.
[e] 8 Rep. 126.
1 Inſt. 288. b.
4 Inſt. 247, 250.

The Lord *Chief Juſtice* of the King's Bench is [d] the Sovereign Coroner, and he may view a Body, and record it where-ever he is. [e] The Lord Mayor of *London* is Coroner of that City; but the Recorder pronounces the Judgment upon Outlawries there by Cuſtom.

The Power of Coroners is either *Judicial* or *Miniſterial*.

[f] 4 Inſt. 271.
9 Rep. 119.
2 Inſt. 32.
See of his Court, poſt. B. 4. ch. 1.

The [f] *Judicial* Authority (both of general and ſpecial Coroners) is in Caſe one comes to a violent Death by Felony or Miſchance, to inquire thereof, to pronounce Judgment upon Outlawries in the County-Court, to take and enter Appeals of Murder, *&c.* tho' he cannot proceed any further, but muſt deliver them over to the Juſtices. He may alſo enquire of the Eſcape of the Murderer, Treaſure-Trove, Wreck of Sea, Deodands, *&c.* but of no Felony, except of the Death of a Man, and upon View of the Body. [See 4 *Ed.* 1. *St.* 2. 14 *Ed.* 1. and 1 *H.* 8. *ch.* 7.]

[g] 4 Inſt. 271.
3 Lev. 399.
1 Mod. 199.

[g] The *Miniſterial* Power of a Coroner is exerciſed when Proceſs is ordered to the Coroner to execute the King's Writ, upon a juſt Exception made againſt the Sheriff; as that the Sheriff is a Party. *One* cannot return the Proceſs, if there are more in the County.

The Juſtices of Aſſize and of the Peace have Power to puniſh the Defaults of Coroners.

[h] F.N.B. 163.
8 Rep. 41.
[i] 2 Inſt. 175.

A Coroner may be *diſcharged* of his Office by the King's Writ, [h] *de Coronatore exonerando.* But a Coroner remaineth, tho' the [i] King dieth, becauſe he is choſen by the County, and his Election returned of Record in Chancery.

See 25 *Geo.* 2. *ch.* 29. An Act for giving a proper Reward to Coroners, for the due Execution of their Office; and for the Removal of Coroners upon a lawful Conviction, for certain Miſdemeanors.

Of the Treaſurer of the County.
1 Burn 407, 408. tit. County Rate.

IV. The Treaſurer of the County is he that keeps the County-Stock. There are two of them in each County, to be choſen by the major Part of the Juſtices of the Peace, at *Eaſter* Seſſions. They muſt have ten Pounds a Year in Land, or one hundred and fifty Pounds in Perſonal Eſtate, and ſhall not continue in their Office above a Year. *By* 11 G. 2. ch. 20. *They muſt, within thirty Days after their Election, tranſmit their Names and Places of Abode to the Clerk of the Crown, in the Court of King's Bench.* The Treaſurer that refuſes to execute the Office, may be fined by the Juſtices three Pounds at the leaſt. The County-Stock is raiſed by rating every Pariſh yearly at *Eaſter* Seſſions; and is to be diſpoſed of to charitable Uſes, as for the Relief of maimed Soldiers and Mariners, Priſoners in the *King's Bench* and *Marſhalſea*, and in the County-Gaol, for paying the Salary of the Governors of Houſes of Correction, as alſo for the Relief of poor Hoſpitals and Alms-houſes, ſituate within their ſeveral Juriſdictions, *&c.*

The Treaſurers are to *Account* yearly at *Eaſter* Seſſions, or within ten Days after, to their Succeſſors, in pain of five Pounds at leaſt, to be impoſed by the Juſtices in their Seſſions.

Their *Duty* is ſet forth, the Manner of raiſing a *Stock*, how it ſhall be diſpoſed of, and how they ſhall *Account*, &c. in the Statutes of 43 *El. ch.* 2. 43 *El. ch.* 3. 14 *El. ch.* 5. 7 *Ja.* 1. *ch.* 4. 5 *Ann. ch.* 32. 11 *G.* 2. *ch.* 20. and 17 *G.* 2. *ch.* 5 [See of the *Receiver* of Monies collected for building Gaols 11 & 12 *W.* 3. *ch.* 19. and of the *Treaſurer* of Monies collected for the Repair of Bridges, 1 *Ann. ch.* 18. and for his Duty concerning Tranſportation of Offenders. 6 *Geo.* 1. *ch.* 23.]

But by 12 G. 2. ch. 29. [which by 13 *G.* 2. *ch.* 18. is extended to Liberties] *There is to be one general Aſſeſſment inſtead of the ſeveral Rates* *directed by the above Acts. The Juſtices at the General or Quarter-Seſſions ſhall appoint one or more Treaſurers, being Perſons reſident in the County or Diviſion, who ſhall give Security to be accountable, and for the due Execution of their Office, and keep Books for Entry of their Receipts and Payments, and account upon Oath, if required, at every General or Quarter-Seſſions; and they may continue ſuch Treaſurers or remove them at their Pleaſure; and may allow each Treaſurer a Salary, not exceeding twenty Pounds a Year, to be paid out of the County Rates.*

V. [a] *Conſtables* (anciently written *Coningſtables*, from *Coning* a *Saxon* Word, ſignifying *King*, and *Staple*, Stability or Safeguard) are Officers appointed for the Preſervation of the Peace in Hundreds, Pariſhes and Towns.

Of Conſtables.
1 Black. Com. 355, to 357.
1 Burn. tit. Conſtable per totum.
[a] 4 Inſt. 123.

A Conſtable is either a *Chief* or *High* Conſtable, or a *Petty* Conſtable.

1. The [b] *High* Conſtable is an Officer over the whole Hundred, and is uſually appointed and ſworn before the Juſtices of the Peace at their Quarter-Seſſions. He is ſometimes choſen by the Juſtices in their ſeveral Diviſions; tho' by the Common Law he ought to be choſen in the Turn or Leet. He is forced to ſerve, if legally nominated and choſen. [See 34 *H.* 8. *ch.* 26. for *Wales.*]

[b] 4 Inſt. 267.
Dalton, ch. 28. §. 1. §. 5.

This Chief Conſtable is as it were the Overſeer and Director of the Petty Conſtables, Headboroughs, and Tithing-men within his Hundred. His Duty is chiefly contained in his Oath, which is in Effect to ſee the Peace kept, to apprehend Felons, Rioters, *&c.* Or to make Hue and Cry, to ſee the Watch duly kept in his Hundred, to ſee that the Statutes made for the Puniſhment of Rogues and Vagabonds be duly executed, to have a watchful Eye on unlawful Gaming-Houſes, to preſent all inordinate Tippling and Drunkenneſs, Blood-ſheddings and Affrays, and Popiſh Recuſants within his Liberty; to execute Precepts and Warrants to him directed from the Juſtices of the Peace, *&c.* He ought to make Returns before the Juſtices of Peace in Seſſions, or in the monthly Meetings of their Diviſions, and to cauſe the Petty Conſtables to make Returns to all the Articles contained in their Oath, or that concern their Office. Beſides what is expreſly contained in their Oaths, they are to return all Victuallers and Ale-houſe-keepers that ſell without Licence, all ſuch Perſons as divide their Houſes into ſeveral Tenements, and entertain Inmates to the Annoyance of the Neighbourhood, and who are likely to be a Charge to the Pariſh; the Defaults of Petty Conſtables, Tithing-Men, *&c.* for neglecting to apprehend and puniſh Beggars, Vagabonds, idle and ſuſpicious Perſons, Whores, Night-walkers, Mothers of Baſtards who are like to be chargeable to the Pariſh; thoſe that refuſe to take poor Apprentices; all Defects in Highways and Bridges, with the Names of ſuch as ought to repair them; all Scavengers that neglect their Duty; and all common Nuſances in Streets, Lanes or Alleys; Bakers ſelling Bread ſhort of Weight; Brewers ſelling Beer and Ale to unlicenſed Ale-houſes; Regrators, Foreſtallers, Ingroſſers of any dead Victual, *&c.* and at every Quarter-Seſſions to pay over to the Treaſurers of the County, or one of them, all ſuch Sums as have been levied by Church-wardens in their Pariſhes towards the Relief of Priſons, Hoſpitals, Alms-houſes, *&c.*

The Chief or High Conſtable may be *Removed* by the ſame Authority which appointed him.

By 5 El. ch. 4. *The High Conſtable may hold a Petty Seſſions* (*otherwiſe called* Statute *Seſſions*) *for Hiring Servants.* [See 43 *El. ch.* 2 & 3.]

1 Burn. Conſtable.
[a] 8 Rep. 38, 41.
Dalton, ch. 28. § 5.
[b] 1 Sid. 355.
[c] Dalton, ch. 28. §. 5.

2. A *Petty Conſtable* is an Officer appointed in each Town, Village or Pariſh of every Hundred to aſſiſt the High Conſtable. The Chooſing and Swearing of him does properly belong to the [a] Court-Leet. But now he is choſen by the Pariſhioners; and a Juſtice of Peace uſually ſwears him, and upon juſt Cauſe removes him. He is to be choſen every Year, but muſt execute the Office till another is appointed, or till he is diſcharged. [b] A Cuſtom for every Inhabitant to ſerve by Turns according to their Houſes, is good; and if it happen upon a Woman, ſhe muſt hire one to ſerve in the Office of Conſtable, according to that Cuſtom. But *Reſpondeat Superior* upon any Miſcarriage; unleſs the Deputy is ſworn and allowed in the Court; for then he is Conſtable. The Oath of the Petty Conſtable is in general Terms to execute the Office. [c] But if he refuſes to ſerve, he may be bound over to the Aſſiſes or Seſſions, and indicted and fined.

There is frequently a *Tithingman* in the ſame Town with a Petty Conſtable; who is in the Nature of a Deputy to execute the Office in the Petty Conſtable's Abſence.

The *Duty* of a Petty Conſtable is to execute the Office of the High Conſtable in his Abſence, to keep the Peace, to aid and aſſiſt the High Conſtable to make Preſentments at every Aſſiſes and Quarter-Seſſions of every Thing that is amiſs under his Cognizance. But they uſually make formal Returns, (tho' upon Oath) that all Things are well, and get a Juſtice of Peace to ſign their Preſentments. More particularly, the Duty of Petty Conſtables ariſes from the *Common Law* and by *Statutes*.

1 Burn. tit. Conſtable.
[d] Dalton, ch. 1. §. 7. ch. 8. §. 6.
H. P. C. ch. 11. §. 4.
[a] Lamb. 125.
Dalt. ch. 8. §. 6.
H. P. C. ch. 11. §. 4.
[b] Dalt. ch. 8. §. 6.

1. By *Common Law* the Petty Conſtable is [d] Conſervator of the Peace, and in the King's Name may command Affrayers to keep the Peace and depart. He may without a Warrant commit to the Stocks, *&c.* any that make an Affray, or aſſault others, or threaten to beat or kill another, or are about to break the Peace in his Preſence, till he can get Aſſiſtance to carry the Offender before a Juſtice of the Peace to be committed to Priſon, if he will not find Sureties. But if the Affray is over, ſome ſay, he muſt have a Warrant to carry the Offender before a Juſtice of the Peace. If the Affray is in a [a] Houſe, the Conſtable may break into the Houſe to ſee the Peace kept. If ſuch Offenders fly into another County, or into ſome Franchiſe in the ſame County, he may make freſh Purſuit, and take them there. If an [b] Aſſault is made upon the Conſtable, he may defend himſelf and juſtify the Beating another. And if he happen to be killed in doing his Duty, it is conſtrued to be premeditated Murder. He may command all Perſons to aſſiſt him to prevent a Breach of the Peace; and if any one refuſes, he may be bound over to the Seſſions and fined,

[c] F. N. B. 81.
10 Rep. 76.
3 Cro. 395.
[d] 2 Inſt. 591.

It is moreover the Duty of the Petty Conſtable by the *Common* Law to execute Warrants directed to him, with Speed and Secrecy, and not to diſpute the Authority, if the Juſtice of Peace has [c] Juriſdiction. But if any Juſtice ſends his Warrant to a Conſtable, to bring one before him to anſwer all ſuch Matters as ſhall be objected againſt him by *A.* and doth not ſet forth the ſpecial Matter in the Warrant , the Warrant is unlawful; and therefore the Officer is liable to an Action of falſe Impriſonment if he executes it; tho' ſuch Warrants are commonly iſſued forth. So if a Juſtice of Peace ſends a Warrant to a Conſtable to take up one for Slander, the Juſtice hath no Juriſdiction in ſuch Caſes, and the Conſtable ought to refuſe the Execution of it. As he is a ſworn Officer he need not ſhew his Warrant. But by 27 *G.* 2. *ch.* 20. Conſtables and other Officers executing Warrants of Diſtreſs, iſſued by any Juſtice of the Peace, muſt, if required, ſhew their Warrant to the Perſon whoſe Goods they diſtrain, and ſuffer a Copy thereof to be taken. If a Conſtable lets one go upon his promiſe to return, and he fails of his Promiſe at the Time appointed, the Conſtable cannot retake him by Virtue of the ſame Warrant; becauſe he was releaſed by his Conſent. He is not bound to go up and down with an Offender to get Sureties, but he may keep him till Sureties come to him; and then he is at Liberty to go to any Juſtice of Peace, provided it is not too far off, and the Conſtable conſents to it. It is at the [e] Election of the Conſtable before what Juſtice he will carry the Offender, if the Warrant is not ſpecial, (*viz.*) To bring the Party before the Juſtice who ſigned the Warrant. But if a Conſtable has a Warrant to execute, and afterwards a *Writ* of *Superſedeas* (being a Command to ſtay or ſtop) comes from another Juſtice, to whom the Party (hearing of the Warrant) offered Sureties before an Arreſt, the Conſtable muſt not then execute his Warrant. If he does, it is falſe Impriſonment. The Conſtable may juſtify the detaining an Offender for a Day, by verbal Order of a Juſtice, [f] without a Warrant; the Juſtice then not having an Opportunity to examine him.

This is the Power and Duty of a Petty Conſtable by the *Common Law*.

2. He hath much Power and Duty alſo by ſeveral *Statutes*, as concerning Ale-houſes, Arms, Drunkenneſs, and Tippling, Beggars, Bridges, Carts and Carriages for the King's Uſe, or the March of Soldiers, Cattle imported, Deer-ſtealers, Dogs, Guns, Nets, *&c.* Exciſe, Fiſh, Forcible Entries, unlawful Games, Game, (as Pheaſants, Hares, *&c.*) Hedge-Breakers, Highways, Hue and Cry, Labourers and Servants, Malt-making, Militia, carrying Offenders to Priſon, Popiſh Recuſants, Poor, Quarterly Money to be levied for maimed Soldiers, Mariners and Priſoners, Diſtreſſes for Rent and for Forfeitures, Rogues and Vagabonds, Sabbath-breaking, Swearing and Curſing, Night-Watches from *Aſcenſion-Day* till *Michaelmas*, Weights and Meaſures, Wood-ſtealers, *&c.*

[a] It has been doubted whether a Conſtable may make a Deputy; but now it is agreed that he may.

There are other Officers of like Authority with Conſtables; as the *Borſholders* in *Kent*, the *Third-borough* in *Warwickſhire*, the Tithingman, Borough-head or Head-borough, or Chief Pledge in other Places. But yet a Petty Conſtable ſeemeth to have greater Authority in ſome Caſes. If there is a Conſtable in the ſame Pariſh, he is the Head-Officer; but where there is no Conſtable, the Office and Authority ſeems to be all one under another Name.

If a Conſtable does not do his Duty, he may be indicted and fined by the Juſtices.

By 7 Ja. 1. ch. 5. *and* 21 Ja. 1. ch. 12. *An Action brought againſt him for any Thing done in his Office muſt be laid in the County where the Fact was committed, and he and his Aſſiſtants may plead the General Iſſue, and give the ſpecial Matter in Evidence, and ſhall have double Coſts.*

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[e] 5 Rep. 59.

[f] Moor 408. H. P. C. ch. 11. §. 4.

1 Burn. tit. Conſtable.

[a] 1 Sid. 355. Mo. 845. Dalt. ch. 1. §. 7. 1 Roll. Abr. 591.

And by 24 G. 2. ch. 44. *No Action ſhall be brought againſt him or his Aſſiſtants for any Thing done under the Warrant of a Juſtice, notwithſtanding any Defect of Juriſdiction in the Juſtice, till after Demand of Peruſal and Copy of ſuch Warrant, and the ſame hath been refuſed or neglected for ſix Days after ſuch Demand; and Action muſt be brought within ſix Months after the Fact.*

By 13 & 14 Car. 2. ch. 12. *Conſtables, Headboroughs and Tithing-men, out of Purſe, may, together with the Churchwardens, Overſeers and other Inhabitants, make a Rate and tax all Perſons who are chargeable by* 43 El. ch. 2. (as every Occupier of Lands, Tithes, Woods, *&c.*) *which Rate being confirmed by two Juſtices, ſuch Conſtable, Headborough or Tithing-man may levy it by Diſtreſs and Sale of Goods. And if Conſtables, Headboroughs or Tithingmen die or go out of the Pariſh, two Juſtices of the Peace may make and ſwear new ones till the Lord of the Manor hold a Court-Leet, or till the next Quarter Seſſions; who ſhall approve of them, or appoint others; and if any of them continue above a Year, the Juſtices of the Peace may diſcharge them, and put in others till the Lord of the Manor holds a Court.*

And by 27 G. 2. ch. 3. *They ſhall be paid by the Treaſurer of the County, for carrying to Gaol Offenders who have not ſufficient within the County to bear the ſame, ſuch reaſonable Expences as one Juſtice ſhall order by Warrant under Hand and Seal.*

Comyns. 312. By 5 H. 8. ch. 6. *and* 32 H. 8. ch. 40. Phyſicians *and* Surgeons *of* London *ſhall be excuſed from bearing the Office of Conſtable or any other Pariſh-Office.*

By 1 W. & M. S. 1. ch. 18. *Diſſenting* Teachers *qualified according to the Act, are freed from Pariſh Offices. And all Diſſenters may execute the Office of High Conſtable, Petit Conſtable, or any other Parochial or Ward Office, by Deputy.*

By 6 W. 3. ch. 4. *and* 9 G. 1. ch. 8. Apothecaries *are exempted from ſerving Pariſh-Offices.*

By 10 & 11 W. 3. ch. 23. *A Perſon that hath taken and* proſecuted *any* Felon *to Conviction, or he to whom ſuch Proſecutor ſhall aſſign the Certificate thereof, ſhall be excuſed from Parochial and Ward Offices in the Pariſh or Ward where the Felony was committed.*

Of Church-wardens. 1 Black. Com. 394. 1 Burn. tit. Church-Wardens per tot. [a] 1 Saund. 13, 14. 1 Lev. 196.

VI. *Church-wardens* are ancient Officers yearly choſen by the Conſent of the Miniſters and Pariſhioners, to look to the Church, Church-yard, and the Things that belong to both, to provide what is neceſſary for the Performance of Divine Service, and to obſerve the Behaviour of the Pariſhioners concerning ſuch Faults as belong to the Eccleſiaſtical juriſdiction. [a] If one ſits with his Hat on in Time of Divine Service, and refuſes to be uncovered, the Church-wardens may take it off. For tho' they may preſent it in the Spiritual Court, yet they ought not in the mean Time to ſuffer ſuch Irreverence.

[b] Can. 89, 90. Anno 1603. 2 Cro. 532. [c] 1 Vent. 267. [d] 2 Roll. Abr. 272.

They are Temporal Officers in the Pariſh employed in Eccleſiaſtical Affairs, (as Conſtables are in Civil) to be [b] choſen in *Eaſter* Week by the joint Conſent of the Miniſter and Pariſhioners, if it may be; in which Caſe the Miniſter has only a ſingle Voice, as every other Pariſhioner. But by *Cuſtom*, the Miniſter ſhall chuſe one, and the Pariſhioners another. And by Cuſtom the Pariſhioners may chuſe both. [c] Which Cuſtom muſt prevail againſt a Canon. [d] An Attorney, being choſe Church-warden, may have a Prohibition, by Reaſon of his Attendance on the Courts at *Weſtminſter*. They are to be ſworn by the Ordinary; and when they are choſen by Virtue of any Cuſtom, if the Ordinary

[e] refuſes to ſwear them, a *Mandamus* may compel him to it; tho' they may execute their Office before they are ſworn.

The *Authority* and *Duty* of Church-wardens is either by *Common* Law, or by *Statutes*.

1. By *Common* Law, Church-wardens, as ſoon as they are ſworn, are a [f] Corporation enabled to ſue and be ſued for the Goods belonging to the Church; and if a Suit is begun in their Year, they may proceed in it after the Year is out. [g] The Church Goods ought to be in their Cuſtody. They are not capable of Purchaſing [h] *Lands* for the uſe of the Church, except in [i] *London* by Cuſtom; but they may purchaſe Goods and Chattles. Lands muſt be purchaſed in the Name of Truſtees. They may have an [k] Action of Treſpaſs for ſuch Goods or Utenſils, taken out of the Church, as belonged to the Pariſhioners, tho' the Treſpaſs was committed in the Time of their Predeceſſors. They are a Corporation only as to the *moveable* Goods for the uſe of the Church; but not to have an Action for Goods of which they were never poſſeſſed. *Chancery* only can relieve them in that Caſe. [l] Therefore Church-wardens are not enabled to *take* by Feoffment, Leaſe for Life, or for Years; or ſuch other Things as have Continuance. Neither can they *make* a Leaſe of *Lands*, given to the Uſe of the Church, or act as Church-wardens, in any Thing concerning them. A Bond for the Pariſh-Money lent out at Intereſt, or to ſecure a Pariſh from keeping a Baſtard-child, ſhould be made to the Church-wardens (or to them and the Overſeers) by Name [a] [and not to them and their Succeſſors] and they will be Truſtees for the Pariſh. It is ſaid that Church-wardens are a Corporation enabled to ſue for any Thing belonging to the *Poor* of the Pariſh, as well as for any Thing belonging to the *Church* [b]. But they have no ſuch Property in the moveable Goods belonging to the Pariſh as to [c] ſell them, without the Conſent of the Pariſhioners and the Ordinary. For they are a Corporation for the Advantage of the Church, not to its Prejudice. If they waſte the Goods of the Church, the new Church-wardens may call them to an Account before their Ordinary, or bring their Action at Common Law. And the Releaſe of one of the new Church-wardens will be no Bar to the Action. Both of them together cannot releaſe to the Prejudice of the Church.

If any Thing belonging to the [d] *Freehold* of the Church is broken down, or if the Trees of the Church-yard are cut down, the Parſon or Vicar (not the Church-wardens) ſhall have the Action.

Further, their Duty by *Common* Law is to *repair* the Church, to make *Rates*, to make *Preſentments*, and to paſs their *Accompts*. Theſe Things indeed are of Eccleſiaſtical Cognizance, but neceſſary to be known by every one.

1. As to *Repairs*, [e] They muſt keep the Body of the Church in Repair, and the Seats belonging to it, as alſo repair the Mounds of the Church-yard, and ſee that all be kept in good Order. For of common Right this ought to be done at the Charge of the Pariſhioners, becauſe they have the Benefit of worſhipping God in the *Church*, and of Burying their Dead in the *Church-yard*; though they may by Preſcription charge the Repair of the Mounds of the Church-yard, on a particular Perſon, by reaſon of his Eſtate. [f] The Parſon only hath Power to give leave to bury in the Church; but the Church-wardens muſt be paid for repairing the Floor, if the Grave is made in the Body of the Church. If any one

[e] 2 Roll. Abr. 234. 1 Vent. 267. 1 Ld. Ray. 138. 2 Ld. Ray. 1405.

[f] Lamb. 70. 2 Str. 852.

[g] Terms of the Law, verb. Church-wardens.

[h] 1 Inſt. 3. a. 1 Roll. Abr. 393.

[i] 2 Cro. 532.

[k] Lamb. 71, 74. 1 Cro. 145, 179.

[l] Finch. B. 2. ch. 17. Lamb. 73. 75. Terms of the Law, verb. Church-wardens.

[a] See a Precedent thereof in Burn. Tit. Baſtard.

[b] See of a Sole Corporation, poſt. ch. 8.

[c] Lamb. 72, 73. 1 Danv. Abr. 788.

[d] 2 Roll. Abr. 337.

[e] 2 Inſt. 489, 653. 1 Burn. 317, 318. 1 Ld. Ray. 59.

[f] 2 Cro. 367. 1 Vent. 274.

claims an Iſle for a Burying-place, he only muſt make good the Pavement.

If a Church falls down, the Pariſhioners are not bound to rebuild it. Neither are Church-wardens bound to repair the *Ways* which lead from the Pariſhioners Houſes to the Church; except there is a Cuſtom for it. [See for *London*, 22 *Car.* 2. *ch.* 17.]

As they muſt *repair* the *Seats* in the Body of the Church, ſo with Conſent of the Miniſter, they may place the Pariſhioners in thoſe Seats; reſerving ſtill to the Ordinary (becauſe the Church-wardens are Officers under him) a Power to correct the ſame. For they are ſuppoſed to act by his Authority; becauſe he [g] originally hath the Diſpoſition of all the Seats in the Church and Chancel. The Church-wardens may have this Authority in themſelves by Cuſtom as in *London*; and particular Perſons may [h] preſcribe to have a Seat, as belonging to them by Reaſon of their Eſtates, which have been conſtantly repaired by them: The Repairing of them is neceſſary to ſupport the Claim. One may preſcribe to an Iſle in a Church, to ſit there with his Family to hear Divine Service, and to bury there. But the conſtant Sitting and Burying there, without uſing to repair it, does not gain any peculiar Property therein. If the Iſle hath been uſed to be repaired at the Charge of the Pariſh in common, the Ordinary may appoint whom he pleaſes to ſit there, notwithſtanding any Uſage to the contrary. So one cannot preſcribe to a Seat, or to Priority, or a Place in a Seat in the Body of the Church generally, without ſhewing, that he and all thoſe that lived in his Houſe have Time out of Mind ſat there, and alſo repaired it. No one can claim a Seat in a Church by Preſcription as appendant or belonging to [a] Land, but it muſt be laid as belonging to a Houſe, in Reſpect of the Inhabitancy thereof; tho' it hath been adjudged, that a Seat in an Iſle may be preſcribed for by an Inhabitant of another Pariſh.

[g] 3 Inſt. 202.

[h] Ibid. 2 Cro. 366.

See P. 33. ante.

[a] 1 Inſt. 122. a. 1 Sid. 361.

If the Church-wardens erect or add any *new* Thing, either as to the Fabrick of the Church, Utenſils, or Church-yard, they muſt have the Conſent of the Pariſhioners. And if the new Additions are in the Church, the Licence or Faculty of the Ordinary is requiſite, as well as the Conſent of the Pariſhioners; for he is the Judge in Law of what is proper and decent there; and in this Caſe, the major Part of the Pariſhioners cannot conclude him. In Matters of neceſſary Repairs, the greateſt Part ſhall bind the leaſt: [b] But if the major Part will not conſent where the Repairs are neceſſary, the Churchwardens may repair without their Conſent, if upon Notice of Time and Place to meet, they refuſed to meet; or meeting, refuſed to make a Rate. And as the Church-wardens are to lay out the Money, they are anſwerable only for Deceit, not for Indiſcretion, if they lay out more Money than was needful.

[b] 1 Ventr. 367.

[c] The *Chancel* is to be repaired by the Rector or Impropriator, by the Cuſtom of *England*; unleſs the Vicar is obliged to it by Compoſition, &c. But a Rectory impropriate (being a Lay Fee) cannot be ſequeſtred by the Court-Chriſtian for the Repair of the Chancel. By Immemorial Cuſtom the Pariſhioners in the City of *London* repair the Chancel as well as the Body of the Church. Such a Cuſtom alſo is in other Cities and large Towns, where there are no Tithes to be charged for the Repair of the Chancel.

[c] 2 Inſt. 489. 2 Ventr. 35. 1 Mod. 258. 2 Mod. 254. 1 Ld. Ray. 59.

2. *Rates* and Levies alſo are to be made by Church-wardens to defray 1 Burn. 314.
the Charge of Repairs. The Rate ought to be laid upon every Occupier
of Lands within the Pariſh, tho' the Occupier lives in [d] another Pariſh; [d] 5 Rep. 67.
for he is a Pariſhoner for this Purpoſe, and may come to the Aſſemblies or 2 Inſt. 702.
Veſtries of the Pariſhioners when they meet to make a Rate. A Perſon 1 Cro. 659, 843.
living in one Pariſh, and occupying Lands in another, ſhall not be charged
for the *Ornaments* of the Church or Utenſils, Bells, Repair of Seats, for
Bread and Wine for the Sacrement, Clerk's Wages, Viſitation-Charges,
by Reaſon of thoſe Lands: for the Perſonal Eſtates of the Inhabitants are
chargeable for every Thing that cannot be referred to the Fabrick of the
Church or the Repairs of the Church-yard, or other Matters which may
concern the Freehold. [e] Therefore ſome are of Opinion that Church- [e] 2 Roll. Abr.
wardens ſhould make two Rates; one upon Lands and Houſes, for what 289, 290,
concerns the Freehold of the Church, and another upon Perſonal Eſtates 291.
and Stock, to defray other Expences. But as this Method creates Confuſion, ſo it is ſeldom practiſed.

[f] A Hamlet having a Chapel of Eaſe, muſt pay to the Repairs of the [f] Hob. 66, 67.
Mother-Church.

The Rates muſt be made with the Conſent of [a] the major Part of the [a] 5 Rep. 67.
Pariſhoners, Houſe-keepers, or Occupiers of Land. In Order to which, 1 Ventr. 367.
they muſt have Notice of a Veſtry (a Place ſo called from the *Veſtments*
of the Miniſter kept there) and then all that are abſent are to be concluded by the Majority of thoſe that are preſent; who in Conſtruction
of Law are the whole Pariſh [b]. And if no Pariſhioners at all appear after [b] 2 Str. 1047.
convenient Notice given, the Churchwardens alone may make the Rate,
and recover it in the Eccleſiaſtical Court, if the Defendant cannot ſhew
that he is illegally or unequally taxed, in [c] Reſpect of the *Quantity* of his [c] Poph. 197.
Land, as being rated for more than he has; or that the Land which he Ventr. 308.
hath is *over-rated*; or that the Rate was *needleſs*; or that ſome Lands
in the Pariſh are *omitted* in the Rate. Some pretend that the Confirmation of the Archdeacon is neceſſary, when the major Part of thoſe preſent will not agree to the Rate.

[d] By Cuſtom there may be *Select* Veſtries, or a certain Number of Per- [d] 2 Str. 728.
ſons choſen to have the Government of the Pariſh, to make Rates, to
take the Accounts of Church-wardens.

Thoſe that pay no Church Rates, have not any Vote in Affairs relating to it; except the Rector or Vicar, becauſe they, having the Freehold of the Church and Church-yard in them, have a ſpecial Intereſt to ſee that Rates be made to enable Churchwardens to repair it.

A Taxation by the Pound Rent is the moſt equitable Way, and not according to the Quantity of the Land.

By the Statute of Circumſpecte agatis 13 Ed. 1. **Rates** *for repair* 2 Inſt. 489.
of Churches, Church-yards, providing decent Ornaments for the Celebration of Divine Service, are allowed to be of Eccleſiaſtical Cognizance.

By 4 & 5 W. & M. ch. 12. *Where Churches in* Cities *and Towns Corporate are united by Virtue of the Statute of* 17 Car. 2. ch. 3. *and one of them is demoliſhed, the Pariſhioners of the demoliſhed Church ſhall pay to the Repair of the other Church, and the Ornaments thereof in Proportion as the Archbiſhop or Biſhop that made the Union ſhall direct; and for want of ſuch direction, ſhall bear one third Part.* [See 10 *Ann. ch.* 11.]

By 7 & 8 W. 3. ch. 34. *Where a* Quaker *refuſes to pay any Church-Rates, two next Juſtices of the Peace may ſummon him before them, and ſettle what is due, and make Order, for Payment thereof if the Sum be under* *ten Pounds; and upon Refuſal to obey the Order, one of them may by Warrant levy the Money by Diſtreſs.* [See 1 *Geo.* 1. *ch.* 6.]

1 Burn tit. Church-wardens Sect. 3, 4, 5, 6.
[e] 3 Cro. 291.
[f] 1 Ventr. 114.
[a] 1 Vent. 127.
[b] 2 Ventr. 43.

3. The Duty of Church-wardens alſo is to *preſent* or certify to the Ordinary all Things preſentable by the Eccleſiaſtical Laws, which relate to the *Church*, the *Parſon*, and the *Pariſhioners*. The Articles delivered to the Church-wardens are for the moſt Part founded upon the Book of Canons agreed on in the Year 1603, and the Rubricks of our Liturgy. They are bound to preſent Crimes and Offences, not only from their own Knowledge but common [e] Fame; that ſo every Scandal that gives Offence may be puniſhed. The ordinary tendered an Oath to a Church-warden, to preſent according to the [f] *Articles*, which he refuſing to take was excommunicated; upon which a Prohibition was granted, becauſe ſome of the Articles might comprehend Things out of the *Eccleſiaſtical* Juriſdiction. But if the oath is [a] *To make Preſentments according to the King's Eccleſiaſtical Laws*, and the Articles are offered by Way of Charge and Direction, no Prohibition ought to be granted. In larger Pariſhes, *Sideſmem* (anciently *Synods Men*, otherwiſe called *Queſt-men*) are annually choſen to aſſiſt the Church-wardens in their Enquiries and Preſentment of Offenders to the Ordinary. A Rector, Vicar, (or Curate in their Abſence) may make Preſentments, but they ought to be upon their [b] Oaths.

1 Burn. tit. Church-wardens Sect. 4.
[c] Can. 89.
[d] 1 Roll. Abr. 121.
1 Mod. 95.
2 Str. 974, 1133.

4. Laſtly; By the *Common Law* Church-wardens are at an End of the Year, or within a Month after at moſt, upon Notice beforehand, to give an [c] *Account* of their Receipts and Diſburſements to the Miniſter and Pariſhioners, and deliver what remains in their Hands to the Pariſhioners, or to the new Church-wardens. If they refuſe, they may be preſented at the next Viſitation, or the new Officers, or any of the Pariſh that have Intereſt, may, by Proceſs, call them to Account before the Ordinary, and may there make their Exceptions againſt it; [d] or the ſucceeding Church-wardens may ſue them by Writ of Account at Common-Law. If their Receipts fall ſhort of their Diſburſements, the ſucceeding Church-wardens are bound to pay what is due to them, and account it amongſt their Diſburſements to the Pariſhioners at the End of the Year. When they have faithfully accounted, and their Account is allowed by the Miniſter and major Part of the Pariſhioners preſent, it ſhall not afterwards be in the Power of any to make them account again, unleſs ſome Fraud in their Accounts is afterwards diſcovered.

Note, That tho' a Pariſh ſtands in two or more Counties, yet the Authority of Church-wardens is the ſame in every Part of it, as if the the Pariſh had been only in one County. For they being Officers in Eccleſiaſtical Affairs muſt follow the Diviſion of the Eccleſiaſtical Juriſdiction into Dioceſes, Archdeaconries, Deaneries, Pariſhes. And conſequently muſt attend at the Viſitation (whether of the Biſhop, Archdeacon, or other Ordinary) to give an Account of the due Execution of their Offices to that Biſhop or Archdeacon, *&c.* in whoſe Dioceſe or Archdeaconry, *&c.* the Pariſh-Church does ſtand; that being the Place where the Pariſhioners are united, and to which the Buſineſs of the Church-wardens does almoſt wholly relate. But Conſtables and Tithingmen belonging to the Temporal Juriſdiction, muſt follow the Diviſion of that Juriſdiction into Counties, Hundreds, Tithings. And therefore where there is a Hundred or Tithing in two Counties, there muſt be different Conſtables and Tithingmen, though in the ſame Pariſh; and they muſt account for the Diſcharge of their Offices at different Aſſizes and at different Seſſions. *Overſeers* of the *Poor* and *Surveyors* of the *Highways* are not Officers at *Common* Law; but placed in Pariſhes and Towns by *Statutes.*

By 3 W. & M. ch. 11. *In all Actions to be brought in the Courts of* Weſtminſter, *or at the Aſſiſes for Money miſ-ſpent by Church-wardens or Overſeers, the Evidence of the Pariſhioners (other than ſuch as receive Alms) ſhall be admitted.*

2. The Authority of Church-wardens by *Statutes* is to preſent Recuſants, to levy by Diſtreſs one Shilling to the Uſe of the Poor of the Pariſh for every Offence upon all ſuch as come not to Church on every *Sunday* or other Days appointed to be holy, (except *Diſſenters* qualified according to 1 *W.* &. *M. Seſſ.* 1. *ch.* 18.) and on all thoſe that do not abide there till Divine Service and Sermon is ended; and on all thoſe that do not behave themſelves orderly and ſoberly while they are in the Church. [See 1 *El. ch.* 2.] To apprehend thoſe that diſturb the Miniſter, and bring them before a Juſtice of the Peace; to execute *Warrants*, and levy *Forfeitures* againſt thoſe that profane the Lord's Day in Paſtimes, Travelling, Tippling; and for Drunkenneſs, Curſing and Swearing, ſeditious Conventicles, and for not reading Prayers once a Month; or againſt thoſe that do not bury in Woollen; to join with the Overſeers of the Poor in making Rates for the Relief of the Poor, and to ſet poor People to work, and to regiſter their Notices of Settlement in a Pariſh; to take Order about Baſtard-Children, to collect the Charity Money upon Briefs or Letters Patent, and to atteſt them, to ſign (together with the Miniſter) Certificates of Receiving the Sacrament of the Lord's Supper by Perſons bearing Offices civil or military; to make a Tax for the Deſtruction of noiſom Vermin, *&c.*

Note, That notwithſtanding this Authority of Church-wardens by *Statutes*, yet Warrants are generally executed by the Petty Conſtables.

[See who are exempted from Serving in Parochial Offices, *ſupra* Tit. *Conſtables*, at the End.]

By 7 Ja. 1. ch. 5. *and* 21 Ja. 1. ch. 12. *Church-wardens and Overſeers of the Poor and their Aſſiſtants, in Actions brought againſt them for any Thing done in the Execution of their Office, may plead the general Iſſue, and give the ſpecial Matter in Evidence, and ſhall be allowed double Coſts; and the Action muſt be laid in the County where the Fact was committed.* 3 Cro. 285.

Of Overſeers of the Poor.
1 Black. Com. 359 to 366.
3 Burn. tit. Poor (overſeers) 268 to 285. and from 502 to 515.
a 2 Ld. Ray. 1394.
b Dalt. ch. 73. §. 25.
1 Burn. 246, 247, 445, 453.

VII. *Overſeers* of the Poor are publick Officers created by Statute, (*viz.*) the 43 *El. ch.* 2. to provide for the Poor of every Pariſh, and are nominated yearly in *Eaſter* Week, or within a Month after, by two Juſtices of the Peace; (one *Quorum.*) They muſt be ſubſtantial [a] Houſe-holders, and are ſometimes two, three, or four, according to the Largeneſs of the Pariſh. [b] If a Pariſh extendeth into two Counties, the Overſeer ſhall not divide themſelves, but ſhall execute their Office in all Places within the Pariſh; tho' the Juſtices within their ſeveral Juriſdictions ſhall reſpectively nominate them, give Warrants to levy Taxes unpaid, *&c.* Before the Reformation, the Poor were maintained by Offerings and Oblations of pious Men, and by the religious Houſes.

Mandamus to appoint Overſeers where there never was any before, 1 Wilſon 138. A Single Overſeer appointed, tho' Stat. 43. Eliz. ſays that 4, 3 or 2, may be appointed, but ſays nothing of *One*. 1 Wilſon, 128.

Church-wardens by this Statute are called Overſeers of the Poor, and are to join with the Overſeers to make a Poor's Rate. But the Church-wardens having diſtinct Buſineſs of their own, do uſually leave the Care of the Poor to the Overſeers only; tho' anciently they were the ſole Overſeers of the Poor.

1 Str. 512.
2 Str. 1143, 1004, 1071.

And by 13 *and* 14 Char. 2. ch. 12. *Two or more Overſeers of the Poor ſhall be appointed in every Townſhip or Village, and ſuch Townſhip or Village ſhall provide for their own Poor; and the Powers given by* 43 Eliz. *to be executed in Pariſhes, are extended to all Townſhips and Villages, whether parochial or extraparochial, not only within the Counties therein particularly named, but alſo in all other Counties.*

For the better Underſtanding the Nature of this Office, let us examine what *Sort of Poor* the Overſeers are to provide for; their Duty in ſetting the Poor to *Work*, and in making *Rates*, as alſo their Duty in paſſing their *Accompts*.

[a] Dalt. ch. 73. §. 35.

1. It may happen that the Overſeers are to provide for *three* Sorts of Poor; 1. [a] By *Impotency*; as Infants, the Aged, the Decrepid, the Blind, the Sick, the Lunatick or Idiot. Theſe the Overſeers are to provide for. 2. By *Caſualty*; as Houſe-keepers ruined by Fire, Water and Robbery, Suretiſhip, or by Decay or Loſſes in Trade, or a poor Man overcharged with a Number of Children. Theſe, having Ability, are to be ſet to Work; but if not able to live on their Work, they are to be relieved with Money. 3. By *Prodigality*, and Debauchery; as idle Perſons, Pilferers, and Strumpets. Theſe are to be ſent to the Houſe of Correction to be put to hard Labour to maintain themſelves, without being chargeable to the Pariſh. However, if they are not ſent to the Houſe of Correction, they are not to periſh for Want; but Work muſt be provided for them. And if they become impotent by Sickneſs, or if their Work will not maintain them, there muſt be an Allowance by the Overſeers for their Support.

[b] Dalton, ch. 73. §. 28.

[b] The Overſeers are to provide an Houſe for Habitation for the impotent Poor only. But if others want Houſes for Habitation, the Juſtices uſally make them weekly ſuch Allowances in Money, as may ſupply that Want; thereby forcing the Overſeers to provide them an Habitation to leſſen the Allowance.

Overſeers ought to be very careful in inquiring whether the Poor that demand Relief of them are *ſettled* within their Pariſh, or within their Juriſdiction. If not, they muſt endeavour to *remove* them to their proper Pariſhes.

3 Burn. tit. Poor. Sect. 2. Of Settlements. Sect. 3 Of Removals. See Burrow's Settlement Caſes in 4°.
[c] 1 Str. 580. 2 Ld. Ray. 1332. S. P. 2 Str. 746. 2 Ld. Ray. 1473. S. C.
[d] Dalt. ch. 73. p. 165. Reſolutions of the Juſtices, 1633. 2 Seſſ. Caſ. 90.
[e] Dalt. ch. 73. p. 159. 167.
[f] 2 Bulſt. 358. 1 Seſſ. Caſ. 94.

Poor Perſons gain a *Settlement* in a Pariſh, 1. By *Birth*, if Baſtards or Vagrants; but the Settlement of a legitimate Child is that of its Father (or Mother, if the Father's Settlement is unknown) until ſuch Time as the Child gains a Settlement of its own; and this as well after the Death as during the Life of its Parents[c]. But if the Settlements of its Parents are unknown, it then gains a Settlement by its Birth. [d] A *Baſtard* muſt be with the Mother at the Charge of the Pariſh, whilſt a Nurſe-Child, till ſeven Years old, and afterwards be ſent to the Pariſh where born to be provided for; the Mother or reputed Father not being able. [e] As for Children born in common Gaols and Houſes of Correction, their Parents being Priſoners, they are to be maintained at the Charge of the County. But this can only mean during the Confinement of the Parent, and ſo long as it is neceſſary for the Child to remain with her for Nurture; for they do not by ſuch Birth gain a Settlement there, even if Baſtards: [f] And ſo the Place of the Mother's Settlement and not of the Birth, is the Settlement of a Baſtard born in a Place by Colluſion,

luſion, or born after the Order for Removing the Mother is made out, or born while the Mother is removing under an Order, or born after the Mother's Removal, and before or pending an Appeal therefrom, or born in a State of Vagrancy, by 17 *Geo.* 2. *ch.* 5. and *Obſerve* there, *who* are to be accounted Vagrants; The Manner of their *Conveyance* to the Place of their Birth, *&c*; 2. By Continuance for *forty Days* in a Pariſh, to be accounted from Publication of Notice in Writing, which he or ſhe ſhall deliver to the Churchwarden or Overſeer of the Poor, with Notice of the Houſe of his or her Abode, and Number of his or her Family; which Notice ſuch Church-warden or Overſeer ſhall read or cauſe to be read immediately after Divine Service in the Church or Chapel of the Place the next Lord's Day, and ſhall regiſter in a Book kept for the Accounts of the Poor, on Pain of forty Shillings to the Uſe of the Party grieved. [See 13 & 14 *Car.* 2. *ch.* 12. 1 *Ja.* 2. *ch.* 17. 3 *W.* & *M. ch.* 11.] 3. By executing a publick *Annual Office* [a] in a Pariſh or Town on his own Account, during one whole Year. 4. By being rated and paying a Share to the publick *Taxes* or Levies of a Town or Pariſh [b] [not to the Scavenger or Highway, 9 *G.* 1. *ch.* 7. nor to the Duty on Houſes and Windows, 21 *G.* 2. *ch.* 10.] 5. If any unmarried Perſon, not having Child or Children, ſhall be lawfully hired, unleſs to a Certificate Perſon, who has not gained a freſh Settlement there, for a *Year*, and ſhall continue in ſuch Service for a Year, it ſhall be deemed a good Settlement. 6. Being bound an Apprentice, unleſs to a Certificate Perſon, *&c.* and inhabiting in a Town or Pariſh [c]. [See 8 *Ann. ch* 9. and 9 *Ann. ch.* 21.] 7. *Renting* a Tenement of the Value of *ten* Pounds a Year. 8. Having a *Houſe* or *Land* of their own, tho' under ten Pounds a Year [d], [Not by Purchaſe, i. e. *if bought by the Pauper* [e], unleſs the Conſideration amount to thirty Pounds, 9 *Geo.* 1. *ch.* 7.] 9. By *Wandering* and *Begging* in a Pariſh without being apprehended, where the Place of their laſt legal Settlement or Birth connot be diſcovered, [See 17 *G.* 2. *ch.* 5.] 10. A Woman by Marriage to a Man makes his Settlement, if he has one, her own; and ſhe cannot during the Coverture, *gain* any Settlement diſtinct from her Huſband, even tho' he have none; but if the Huſband has no Settlement, her Settlement before Marriage ſtands [f].

All theſe Caſes gain a legal Settlement; ſo that if any poor Perſon was ſettled in a Pariſh by any ſuch Means, not having come into ſuch Pariſh with a Certificate as after-mentioned, and hath not gained a Settlement elſewhere ſince that Settlement, he is under the Care of the Overſeers of the Poor of that Pariſh where he laſt gained ſuch a Settlement, if he falls into Poverty, and wants Relief. And where he himſelf is ſettled, his Family muſt follow him. But in the Caſe of Apprentices and Servants, their laſt Settlement is in the Place where they ſerved the laſt forty Days. And obſerve, That in all the above Caſes, except the 1ſt, 9th, and 10th, there muſt be *Reſidence* within the Place in order to gain a Settlement; and that for forty Days, unleſs the Perſon reſide on an Eſtate of his own [g], or rent a Tenement of ten Pounds a Year [h]. For,

By 13 & 14 Car. 2. ch. 12. *Upon Complaint by the Church-wardens or Overſeers within forty Days after any Perſon ſhall come to ſettle in any Pariſh, on any Tenement under ten Pounds a Year; two Juſtices (one* Quorum) *may by Warrant remove him (that is likely to become chargeable to the Pariſh) to that Pariſh where he was laſt legally ſettled, either as a Native, Houſholder, Sojourner, Apprentice or Servant, for the Space*

of

See Burn's Juſt. Tit. Poor.

[a] 2 Salk. 536. 1 Str. 411, 544.

[b] 2 Str. 1023. 2 Salk. 478, 523.

[c] 2 Str. 849.

[d] 2 Str. 1131. 1 Str. 97, 608. 2 Str. 983.

[e] Marwood and Kentiſbury, K. B. Hil. 29 G. 2.

[f] St John, Wapping, and St. Buttolph, Biſhopgate, Hil. 28 G. 2. in point.

[g] 2 Str 1131, 983. 1 Str. 608.

[h] 2 Str 1156. 1 Str. 57.

of forty Days at the leaſt, unleſs he give Security to diſcharge the Pariſh. Perſons grieved may appeal to the Quarter-Seſſions. [*See* 9 Geo. 1. chap 7.] And,

By 1 Ja. 2. ch. 17. *and* 3 W. & M. ch. 11. *The ſaid forty Days are to be reckoned not from the Time of his coming to inhabit, but from the Time of the Publication of Notice in the Church (as before-mentioned.) But the executing a publick* Annual Office *in the Town or Pariſh, Payment of publick* Taxes *in the Town,* Hiring *of an unmarried Perſon for a Year, with Continuance in ſuch Service accordingly, and being bound an* Apprentice, [*by* 31 G. 2. ch. 11. *by any Deed, Writing or Contract legally ſtampt, altho' not indented*] *are declared to be Settlements, tho' no ſuch Notice in Writing be delivered and publiſhed.*

But tho' poor Perſons have gain'd a Settlement in a Pariſh, none are to be relieved whoſe Names are not regſtered *in the Pariſh-Book, with the Time when they were firſt admitted to have Relief, and the Occaſion of their Neceſſity. And no other ſhall be allowed to receive Collection, but by Authority under the Hand of one Juſtice of the Peace, or by Order of Seſſions; except in Caſes of peſtilential Diſeaſes, Plague or Small-Pox, happening upon them or their Families; where ſuch Authority is not requiſite. But,*

By 9 Geo. 1. ch. 7. *No Juſtice ſhall order Relief, until Oath be make of ſome reaſonable Cauſe, and that the Perſon has applied to the Pariſh; and until the Juſtice hath ſummoned the Overſeers. And ſuch Perſon ſhall be entred in the Pariſh Book and receive Collection ſo long as the Cauſe for Relief continues, and no longer.*

By 8 & 9 W. 3. ch. 30. *Poor Perſons that receive Relief ſhall, on the right Shoulder of the upper Garment, wear a large* Roman P. *with the firſt Letter of the Name of the Pariſh or Place where the ſaid Perſon inhabits; the poor Perſon refuſing to wear ſuch* Badge, *may by Order of one Juſtice be ſuſpended from his Allowance, or committed to the Houſe of Correction: And if any Church-warden or Overſeer relieve any ſuch poor Perſon not wearing ſuch Badge, and be thereof convicted on the Oath of one Witneſs, before one Juſtice, he forfeits twenty Shillings, to be levied by Diſtreſs and Sale of Goods, one Moiety to the Informer, the other to the Poor of the Pariſh.*

And if any Perſon ſhall come into a Place to inhabit, and deliver a Certificate *to the Church-wardens or Overſeers of the Poor of the Place where he comes, under the Hands and Seals of the Church-wardens and Overſeers of any other Place, or the major Part of them, atteſted by two Witneſſes, thereby owning the Perſon mentioned in the Certificate to be an Inhabitant legally ſettled in that Pariſh or Place, ſuch Certificate being allowed and ſubſcribed by two Juſtices of the Peace, ſhall oblige ſuch Pariſh or Place to receive and provide for him and his Family whenever they ſhall become chargeable to the Pariſh or Place to which ſuch Certificate was given; and then, and not before, he and his Children, not having otherwiſe acquired a legal Settlement there, may be removed to the Place from whence ſuch Certificate was brought.* [See 3 G. 2. *ch.* 29.] But,

By 9 & 10 W. 3. ch. 11. *No Perſon, who ſhall come into a Pariſh by a Certificate, ſhall by any Act whatſoever gain a Settlement in ſuch Pariſh, unleſs he ſhall* bona fide *take a Leaſe of a Tenement of the Value of ten Pounds a Year*[a]; *or execute ſome annual Office in ſuch Pariſh, being*[b] *legally placed in ſuch Office.*

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[a] 1 Str. 502, 529.

[b] 2 Str. 849. 1199.

And by 12 Ann. St. 1. ch. 18. *Apprentices or hired Servants to Perſons coming into a Pariſh by Certificate, and not afterwards having gained a legal Settlement there, ſhall not gain Settlements by ſuch Apprenticeſhips or Services.*

The Overſeers having been informed what Sort of Poor are to be provided for, and what Things are requiſite to make ſuch Poor capable of Relief; It is,

2. The Duty of Overſeers to provide for the Poor by *ſetting them to Work*, by making *Rates* for that Purpoſe. For,

By 43 El. ch. 2. *Overſeers muſt ſet the Poor to* Work *by a Taxation, or by making a* Rate *upon every Inhabitant, Parſon, Vicar or other, and upon every Occupier of Lands, Houſes, Tithes, Coal-Mines, or ſaleable Underwood, within the Pariſh, to raiſe a convenient Stock of Flax, Hemp, Wool, Thread, Iron,* &c. *to ſet the Poor to Work; to relieve the Impotent and other Poor not able to work; to put out Children to be Apprentices,* &c.

In which Statute, the Manner of the Taxation, the Aſſeſſment of the Father, Grandfather, Mother, Grandmother, and Children of every poor Perſon, the Manner of levying the Tax, the Power of Juſtices of the Peace in Corporations, the Liberty of Appeal to the Quarter-Seſſions upon Grievance, the Power of erecting Cottages for the Poor that are aged and impotent, are ſet forth.

2 Ld. Ray. 1009.
Salk. 531. S.C.
2 Ld. Ray. 1280.
Salk. 452. S.C.

By 17 Geo. 2. ch. 3. *The Church-wardens and Overſeers of the Poor are to give publick Notice in the Church, of every Rate for the Relief of the Poor, allowed by the Juſtices, the next* Sunday *after the ſame ſhall be allowed, and no Rate ſhall be eſteemed valid, ſo as to collect the ſame, unleſs ſuch Notice be given. The Inhabitants may inſpect the Rates, and have Copies of them, paying Six-pence for every twenty-four Names. Penalty of twenty Pounds, for refuſing Inſpection or Copy.*

By 17 G. 2. ch. 38. *Succeeding Overſeers are to levy all Arrears, and thereout reimburſe their Predeceſſors. Perſons occupying any Houſe, out of which another has removed, or which at the Time of the Making the Rate was empty, the Perſon removing and the Perſon occupying ſhall pay in Proportion to the Time they reſpectively occupied; to be aſcertained by two Juſtices in caſe of Diſpute. Rates may be levied in any other County into which a Pariſhioner ſhall remove.*

By 5 G. 1. ch. 8. *Where any Wife, Child or Children are left by their Husbands, Fathers or Mothers, upon the Charge of the Pariſh, the Churchwardens or Overſeers of the Poor of ſuch Pariſh, by Warrant from any two Juſtices of the Peace, may ſeize ſo much of the Goods and Chattels, and ſo much of the annual Profits of the Lands and Tenements of ſuch Husband, Father or Mother, as ſuch two Juſtices ſhall direct, for the Diſcharge of the Pariſh, and for the Providing for ſuch Wife or Child. Which Warrant being confirmed at the next Quarter-Seſſions, the Juſtices there may make an Order for the Church-wardens or Overſeers to diſpoſe of ſo much of ſuch Goods and Chattels by Sale, and to receive ſo much of ſuch Rents and Profits, as ſuch Juſtices ſhall think fit.*

By 3 Car. 1. ch. 4. *The Church-wardens and Overſeers of the Poor, with the Conſent of two Juſtices of the Peace* (*one* Quorum) *within their reſpective Liberties may ſet up any* Trade *for ſetting the Poor to Work. Where there is no more than one Juſtice of the Peace, it may be done with the Aſſent of that one Juſtice.*

And by 9 G. 1. ch. 7. *Church-wardens and Overſeers may, with the Conſent of the major Part of the Pariſhioners aſſembled in Veſtry, purchaſe* *or hire any Houſe or Houſes in the Pariſh, and contract with any Perſon to lodge, maintain and employ the Poor, or contract with the Church-wardens or Overſeers of any other Pariſh for the Lodging, Maintenance and Employment of the Poor of ſuch other Pariſh; or two Pariſhes or Townſhips may, with the Approbation of one Juſtice, ſignified under his Hand and Seal, unite in Purchaſing or Hiring a Poor-Houſe, and there Lodging and Employing their Poor. And if any poor Perſons refuſe to be kept in ſuch Houſes, they are to be put out of the Pariſh Book, and not intitled to receive Relief.* [See 13 & 14 *Char.* 2. *ch.* 12. *ante.*]

For the further Maintenance of the Poor, there are *Fines* and *Forfeitures* payable to their Uſe in the *Statutes* concerning Ale-houſes, Ale-houſe-keepers, Tippling and Drunkenneſs, Clothiers, Exciſe, unlawful Games, taking and killing the Game, Sabbath-breaking, the Poor, profane Curſing and Swearing, Highways, Weights and Meaſures, Burying in Woollen, *&c.*

By 14 El. ch. 5. *and* 43 El. ch. 3. *A Tax is to be made for poor Soldiers and Mariners, Priſoners,* &c.

By 43 El. ch. 4. *Commiſſioners are authoriſed to inquire of Miſemployment of Lands or Goods given to Hoſpitals, or for Relief of poor People, Schools of Learning and other charitable Uſes.*

[See 4 *Ann. ch.* 14. *An Act for the better Collecting Charity-Money on* Briefs *by Letters Patents, and preventing Abuſes in Relation to ſuch Charities.*]

3. It is the Overſeer's Duty to paſs his *Accounts.*

By 43 El. ch. 2. *The Overſeers muſt within four Days after the End of their Year, and after other Overſeers nominated, make and yield up to two Juſtices of the Peace (one* Quorum) *an Account, and pay the Money in their Hands to their Succeſſors, in pain of twenty Shillings, and Commitment to Gaol.* [See 30 *Car.* 2. *ch.* 3. For their *Account* concerning Burials in Woollen, *&c.*] *When one Pariſh extends into ſeveral Counties or Liberties, the Overſeers ſhall render an* Account *to the Juſtices or head Officers of both Places.*

By 17 Geo. 2. ch. 38. *Churchwardens and Overſeers of the Poor, within fourteen Days after other Overſeers ſhall be appointed to ſucceed them, ſhall, upon pain of Commitment, deliver to the ſucceeding Overſeers a true Account ſigned by them of all Sums received, or rated and not received, and of all Goods and Materials in their Hands or in the Hands of the Poor, in order to be wrought, and of all Monies paid by them, and pay and deliver over all Sums, Goods and Things, in their Hands, to the ſucceeding Overſeers; the Account to be verified on Oath before a Juſtice. Pariſhioners paying Six-pence may inſpect the Account, and paying Six-pence for every three hundred Words may have Copies.*

By 3 W. & M. ch. 11. *The Evidence of Pariſhioners, except ſuch as receive Aims, ſhall be admitted on Actions for Money miſ-ſpent by Overſeers.*

Of Surveyors of the Highways. 1 Black. Com. 357 to 359. 2 Burn 348. tit. Highways per totum. & 1 Burn tit. Bridges, 249. per totum.

VIII. *Surveyors* of the *Highways* and *Bridges* are created by Statute, and are Officers of a Pariſh or Place appointed to repair and keep in Repair the Highways, *&c.* [a] There are three Kinds of Ways. *Iter,* a Footway only. *Actus* (from *Agendo* to drive) a Foot and a Horſe-way too. This is vulgarly called a Pack and Prime or Drift-way. *Via* or *Aditus,* a Foot-way, Horſe-way, and Cart-way. Now any one of the Ways before-mentioned may properly enough be called the *Highway,* if common to all the King's People. And ſo may a [b] River that is common to all Men; and a private Way that leadeth from Town to Town, and is a Thoroughfare: But not ſuch a private Way as leadeth to a Church, a private Houſe, or to the Fields, and terminates there, and is for the particular Benefit of the Inhabitants of ſuch a Pariſh, *&c.* Theſe ought to be repaired by the Village or Hamlet, or ſometimes by a particular Perſon. A common Street in a City is a Highway, and is to be repaired by the City in which it lies. See 1 *Geo.* 1. *ch.* 52. §. 9. But with regard to the Duty of Surveyors [a] thoſe Highways only that are Drift-ways or Cart-ways, that lead from Market to Market, that are Ways for all Travellers, and are great Roads, or do communicate with them, are under the Surveyor's Care. Highways depend much upon Reputation, ſo that nothing more particularly can be determined about them.

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[a] 1 Inſt. 56. a. See of Ways poſt B. 2. ch. 2.

The Freehold of Highways and Bridges is in him that hath the [b] Freehold of the Soil; either the Lord of the Manor as Part of his Waſte, or the Land-Owners on both Sides of the Way. For the Law perſumes, that the Way was at firſt taken out of the Lands of the Party, that hath other Lands adjoining to it. It is called the *King's* Highway, not that he hath any Property in the Soil, but becauſe of the Privilege which he hath of a free Paſſage for all his People. The Freehold of a High-Street is in the Lord of the Manor; and the People have nothing there but a Liberty of Paſſage.

The Freehold and Profits of a Way that leadeth into the Fields are in him that hath Land next adjoining.

[c] An ancient Highway cannot be changed without the King's Licence, upon a Writ of *Ad quod Damnum.* [See 8 & 9 *W.* 3. *ch.* 16.] But though I ſay that Drift-ways and Cart-ways are under the Surveyor's Care, it muſt be underſtood that he is not bound to repair them, [d] if any are obliged by *Preſcription* generally in reſpect of the *Tenure* of their Lands, or by *Encloſure* of Lands adjoining, to repair them or any Part of them. By *Encloſure*, the Subject is hindred from going upon the Land when the Ways are bad. For if there is a Highway, and the Way is miry and deep, the King's Subjects may go upon the Ends and Outlets of Lands adjoining (the Way lying in an open Field, without being encloſed) for theſe Out-lets are adjudged to be Parcel of the Highway. The King's Subjects muſt have a Paſſage, and are not forced to go upon the miry Track; from whence it follows, that if the Lands adjoining are ſown with Grain, the King's Subjects, in this Caſe may go upon the Corn.

Of Common Right, or by Common Law, the Occupiers of Lands in the Pariſh ought to repair the Highways; and no Agreement with any Perſon can take off this Charge, which the Law lays upon them.

The *Statutes* in Aid of the Common Law ſet forth the Manner of *Chuſing* Surveyors, and their *Qualifications*; their Duty in *Ripairing* Highways and Bridges; their Duty in gathering a *Rate* for that Purpoſe, and their Duty in paſſing their *Accounts*, &c. and are now reduced into one Statute, the 7 *Geo.* 3. *ch.* 42.

Note; That [a] Perſons in *Holy Orders* are adjudged to be within the Purview of theſe Statutes, by Virtue of the general Words, (*viz.*) every *Houſholder*, *Inhabitant*, *Pariſhioner*, he that keepeth a *Draught*, &c.

In the Statute of 43 *El.* concerning the *Rate* for the *Poor*, Tithes are expreſly mentioned, to which the 3 *W.* & *M.* *ch.* 12. concerning the Highways, does refer.

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[b] 2 Inſt. 38.

[a] 1 Vetr. 189.

[b] 2 Inſt. 705. 1 Roll. Abr. 392.

[c] 3 Cro. 266, 267.

[d] 1 Roll. Abr. 390. 1 Ventr. 90, 183, 189, 256.

[a] 1 Vent. 273. 2 Lev. 139.

Note, That as to *Bridges* in the Highways, and not belonging to the Highways, [b] the whole County (not the Pariſh) is to repair them by the *Common* Law. But Owners of Land may be charged, by reaſon of the *Tenure* of their Lands, or by *Preſcription*; but not otherwiſe. Perſons Spiritual or Temporal, Corporate or not Corporate, are bound to repair Bridges, by reaſon that they and thoſe, whoſe Eſtate they have in the Lands or Tenements, are bound in Reſpect thereof to repair the ſame. And as to *Preſcription*, Bodies Politick are bound by a general Preſcription only, becauſe they are local, and have a perpetual Succeſſion: But natural Perſons cannot be bound by the Act of the Anceſtor without Binding and Aſſets, or ſome ſpecial Reaſon. A Man cannot be charged by a general Preſcription to do what his Anceſtors have done [c]. So that a *private Perſon* may be obliged to repair a Bridge by reaſon of Tenure, but not by reaſon of Preſcription only; whereas a *Body Politick* may be bound either by reaſon of Tenure or Preſcription [d].

[b] 2 Inſt. 700 701, 702, 705. 3 Cro. 365, 366. 1 Danv. Abr. 743.

[c] See of Anceſtor and Heir, ch. 6. ante.

[d] See B. 2, ch 3. poſt.

If Part of a Bridge lies in a Franchiſe out of the County, thoſe of the Franchiſe muſt repair that Part, and the County the other Part. And ſo it is if it be in two Counties.

If a Man maketh a Bridge for the common Good, he is not bound to repair it; or if a Biſhop hath of Alms once or twice repaired a Bridge, it bindeth not; but it is Evidence againſt him that he ought to do it of Right, until he prove the contrary. But if Time out of Mind he and his Predeceſſors have repaired it of Alms; this ſhall bind him to it. [e] If one hath Toll (called *Pontage*) for Men and Cattle paſſing over a Bridge, he muſt have that Right by Preſcription or Statute; and in Lieu of the Toll, he ought to repair it. [f] None can be compelled to make a new Bridge, where there was never any before, but by Act of Parliament.

[e] 13 Rep. 33.

[f] 2 Inſt. 701.

Thus it is by the *Common* Law. But,

2 Inſt. 701, &c.

By 22 H. 8. ch. 5. *Four Juſtices* (*one* Quorum) *ſhall in Seſſions inquire, hear and determine the Annoyances of Bridges, and of Highways at the End of ſuch Bridges, and ſhall charge ſuch as ſhould repair them. And where it cannot be known what Hundred, City, Town or Pariſh, Perſon certain or Body Politick, ought to repair them, they ſhall be repaired by the County or Riding, City or Town Corporate, wherein they are ſituated. And if they are ſituated in two ſuch Precincts, the Inhabitants there ſhall repair the ſeveral Parts reſpectively. And the Juſtices may in this Caſe ſend Proceſs out of their Juriſdiction.*

No private Bridges are within that Statute, but only ſuch as are common in the Highways, and are not to be repaired in the ſame Manner as Highways.

As for *Bridges* belonging to the County.

In 22 *H*. 8. *ch*. 5. By the Word [a] *Inhabitants*, all Privileges of Exemption, tho' by Act of Parliament, from Contribution to the Repairs of decayed *Bridges*, are taken away. The *Clergy* therefore are charged in reſpect of their ſpiritual Poſſeſſions towards the Repair of Bridges to be repaired by the County, as well as toward the Repair of thoſe Bridges which are known to belong to Pariſhes.

[a] 2 Inſt 702, &c.

By 1 Ann. ch. 18. *The Manner of raiſing the Tax for* ſuch Bridges *is directed at large. And the Juſtices in Seſſions, upon Preſentment*, (where it cannot be known who ought to repair a Bridge) *may aſſeſs every Town, Pariſh or Place in Proportion, as uſually hath been aſſeſſed. And the Mo-*

ney aſſeſſed is to be levied by the Conſtable of each Pariſh, &c. *or by ſuch Perſon as is appointed Treaſurer.*

Officers neglecting their Duty, forfeit forty Shillings; and the Treaſurer five Pounds, to be applied to the Repair of the Bridge.

No Fine for not Repairing ſuch Bridges, and the Highways at the End thereof, ſhall be returned into the Exchequer, *but ſhall be paid to the Treaſurer, and applied by the Juſtices towards the Rebuilding and Repairing ſuch Bridges and Highways at the Ends thereof.*

By 12 Geo. 2. ch. 29. *No Part of the County Rates ſhall be applied to the Repairs of any Bridges, until Preſentment of a Grand Jury of the Want of Repairs; and then the Juſtices may contract with any Perſon for the Rebuilding, and Repairing ſuch Bridge for any Term of Years not exceeding ſeven, at a certain annual Sum. The Contractor to give Security for the Performance; and the Juſtices to give publick Notice of their Intention to contract.*

By 1 Ann. ch. 18. *The Money received for Repair of* Bridges [intended by the Act] *is to be* accounted *for according to the Order of the Juſtices in Seſſions.*

Juſtices may allow Perſons concerned in the Execution of this Act, Threepence in the Pound.

But now ſee the grand Act of Parliament touching the publick Highways, made in the 7th Year of his preſent Majeſty King *George* the 3d. *Chap.* 42. intitled, An Act to explain, amend, and reduce into one Act of Parliament, the ſeveral Statutes in being for the Amendment and Preſervation of the public Highways of this Kingdom; and for other Purpoſes therein mentioned; which is here abſtracted or abbreviated, being too long to be inſerted at large in a Work of this Nature. The Statute runs thus:

Sect. 1. "Whereas the ſeveral Statutes now in being for the Amendment and Preſervation of the Highways of this Kingdom are very numerous, and, in ſome Reſpects ineffectual: And whereas the good Purpoſes thereby intended, might be better effected, if the ſaid Statutes were entirely repealed, and reduced into one Act, be it enacted, *&c.* That annual Liſts be made out in *September* yearly of a certain Number of Perſons qualified to ſerve as Surveyors of the Highways, the Liſts to be returned to the Juſtices at their ſpecial Seſſions in *October*, and Notice to be given to the Perſons named therein to attend."

"The Juſtices are to give timely Notice of holding the ſaid Seſſions; and are to nominate ſuch a Number to be Surveyors as they ſhall judge neceſſary; and the Conſtables are to notify ſuch Nomination accordingly. The Office of Surveyor to be for one Year; and the Juſtices are to give them a Charge; where the Perſons nominated neglect or refuſe to ſerve, they forfeit 5*l.* and Others are to be appointed; and they neglecting or refuſing forfeit 5 *l.* likewiſe. If no Liſt be returned, or the Perſons refuſe to ſerve or die in their Office, the Juſtices are to appoint ſuch as they think proper. Forty Shillings Penalty on not making or returning ſuch Liſts, or giving due Notice, &c. to the Parties."

Sect. 2. "Where a Choice ſhall be made of a Perſon of Skill and Experience to ſerve with a Salary ſettled for his Trouble, and he be returned together with the Liſt; the Juſtices, if they think proper, may appoint ſuch Perſon, and allow ſuch Salary; the ſame to be paid out of the Penalties, *&c.*"

Sect. 3. "No Tree or Buſh to be allowed to grow or ſtand within 15 Feet of the Centre of the Highway, on Forfeitnre of 10*s.* by the Owner."

Sect. 4. "Regulations to be obſerved by the Poſſeſſors of Land next adjoining to any Highway, with reſpect to keeping their Hedges, Ditches, Drains, Water-courſes, Trunks, Tunnels, Platts or Bridges, in proper Order; and by the Occupiers of adjoining Grounds; Penalty on Default 10*s.*"

Sect. 5. "No Stone or other Matter to be laid in the Highway or Soil of Ditches; to the Obſtruction or Prejudice thereof, on Penalty of 10*s.*"

Sect. 6. "And where any Thing not hereby tolerated ſhall be ſo laid within 15 Feet of the Centre, the Owner of the adjacent Lands may remove and diſpoſe of the ſame to his own Uſe."

Sect. 7. "Penalty of cauſing any Obſtruction, in the Highways by Carriages or Implements of Huſbandry, 10*s.*"

Sect. 8. "Surveyor's Duty on taking a View of the State and Condition of the Roads and Highways, within his Diſtrict in reſpect of Nuſances, Incroachments, Obſtructions or Annoyances; wherein he is to give Notice to the Parties to remove the ſame, and if they neglect, he is to employ Men to do it; in which Caſe the Defaulters forfeit 1 *d.* per Foot, over and above the Charges to be reimburſed to the Surveyor; and if not paid on Demand, to be levied by Warrant of a Juſtice."

Sect. 9. "Times of cutting Hedges, and of felling Timber Trees, Aſh, and Elm, *&c.* growing in the Hedges or Highways."

Sect. 10. "Surveyor is to make new Ditches, Drains, Gutters or Water-courſes, where the Old are inſufficient, and to keep the ſame ſcoured, cleanſed and opened; with proper Trunks, Tunnels, Platts, Bridges or Arches over the ſame; making Satisfaction to the Owner, *&c.* of the Lands."

Sect. 11. "He is to make the Cartways leading to Market Towns twenty Feet wide at leaſt, and the Horſe Cauſeways 3 Feet and by

Sect. 12. "Two or more Juſtices may order narrow Roads to be widened to a ſufficient Breadth. The Surveyor in ſuch Caſes, under the Direction and with the Approbation of the ſaid Juſtices is to make Agreement with the Owners of the Soil, for the Recompence; and for making new Ditches and Fences; and if he cannot agree, the Damage and Recompence is to be aſſeſſed by a Jury; and upon Payment or Tender of the Money aſſeſſed, *&c.* the Parties are deemed diveſted of their Intereſts (except with regard to certain Particulars,) and the Ground from thenceforth is to be deemed a public Highway. Where there is not Money ſufficient for the above Purpoſes, in the Surveyor's Hands, it is to be raiſed by Aſſeſſments by Order of the ſaid Juſtices, or the Quarter Seſſions."

Sect. 13. "If the Recompence aſſeſſed by the Jury, be greater than *that* offered by the Surveyor, the Expence of the Proceedings is to be paid by the Surveyor out of the Monies in his Hands; if otherwiſe, the Parties refuſing are to pay the ſame."

Sect. 14. "Surveyor is to make a Report of ſuch defective Highways, Bridges, *&c.* as ought to be repaired by particular Perſons. Meaſures to be taken by the Juſtices thereupon."

Sect. 15. "Juſtices of Aſſize, and Juſtices of the Peace impowered to make Preſentments to the Aſſizes, or General Quarter Seſſions of any defective Highways, Cauſeways or Bridges; or of any other Defaults or Offenders againſt this Act; and to aſſeſs thereupon ſuch Fines as they ſhall think meet, ſaving to the Perſons affected their lawful Traverſe to ſuch Preſentments."

Sect. 16. "Juſtices at their ſpecial Seſſions may order thoſe Roads to be firſt repaired that moſt want it."

Sect. 17. "Complaint of Neglect of Duty, *&c.* of Surveyors may be enquired into by two Juſtices, who may make ſuch Order thereupon as ſhall be neceſſary."

Sect. 18. "Juſtices impowered to order proper Direction Poſts to be ſet up, where ſeveral Highways meet, and at the Approaches of ſuch Parts as are ſubject to deep or dangerous Floods, and where neceſſary for guiding Travellers in the beſt and ſafeſt Track; Surveyor neglecting his Duty therein forfeits 20 *s.*"

Sect. 19. "Surveyor impowered to take Materials for Repair of the Highways from any neighbouring Quarries, Commons, Waſte Grounds, Rivers, or Brooks;"

Sect. 20. "And where ſufficient cannot be had in ſuch Places, then from private Grounds; making ſuch Satisfaction to the Owners as ſhall be agreed upon, or otherwiſe as the Juſtices ſhall direct."

Sect. 21. "The Expences incurred by Surveyors in effecting the Purpoſes aforeſaid, are to be reimburſed by a Rate of the Inhabitants of the Place, according to the Rules preſcribed in the *Stat.* 43 *Eliz.* intituled an Act for the Relief of the Poor."

Sect. 22. "Rules to be obſerved by Surveyors and Others with reſpect to the fencing, filling up, and ſtopping Holes made in digging for, or getting Materials for Repairs of the Roads. Forfeiture for every Neglect or Default therein 10 *s.* And for any Default after Notice, a Sum not leſs than 40 *s.* and not more than 10 *l.* to be applied to the above Purpoſes."

Sect. 23. "Regulation with regard to Statute Work in general; how every Perſon is to be rated; the Number of Days Work he is to perform; and the Number of Hours in each Day; Power to change Carriages for the Men where thought needful by the Surveyor; or a certain Sum to be paid in lieu thereof; ſuch Men to furniſh their own Tools."

Sect. 24. "Duty of Surveyors in giving timely Notice to the Perſons liable to perform Statute Work. Defaulters after ſuch Notice forfeit 10 *s. per diem*, for each Carriage and Man not ſent to Work; and Labourers 1 *s.* 6 *d. per diem.* Duty and Labour to be fairly and equally demanded, and the Penalties and Forfeitures within 21 Days after Default."

Sect. 25. "Terms on which the ſeveral Perſons liable to perform Statute Work, may be admitted to compound for the ſame."

Sect. 26. "The Duty of Surveyors in reſpect of giving Notice of the Time and Place of admitting Perſons to compound; the Compoſition Money to be duly paid. Regulations with reſpect to Changes of Occupation of Lands, *&c.* or new Inhabitants."

Sect. 27. "Perſons occupying Lands, *&c.* not above 50 *l.* per Annum are not obliged to find or compound for more than one Carriage, Team or Plough, kept for Part of the Year in one Pariſh and for Part in another; the Duty to be performed where the Perſon uſually reſides."

Sect. 28. " Where Compoſition ſhall be made for Statute Duty, a Proportion thereof is to be paid to the Turnpike Surveyor, if Part of ſuch Duty is to be performed on the Turnpike Roads."

Sect. 29. " Where the General or Quarter Seſſions ſhall be ſatiſfied, upon the Application of the Surveyor, that the Duty and Money have been faithfully applied; or that the Highways, Bridges, Cauſeways, Streets, or Pavements, cannot be ſufficiently provided for, by the Means before preſcribed; Notice is to be given thereof, and Aſſeſſments are to be made accordingly for thoſe Purpoſes; to be levied by Diſtreſs and Sale."

Sect. 30. " But ſuch Aſſeſſments are not to exceed 6 *d.* in the Pound in any Year."

Sect. 31. " No Fine or Penalty, *&c.* for not repairing the Highways, or not appearing to Indictments, or Preſentments for the ſame to be returned into the Exchequer; but to be levied as the Court directs where the Road lies, and applied thereto. The Method of Relief with reſpect to reimburſing ſuch of the Inhabitants on whom any ſuch Fine, *&c.* ſhall be levied."

Sect. 32. " Surveyor to collect all Rates, Forfeitures, Penalties and Compoſitions; and keep his Accounts according to the Method here preſcribed, and is to produce the ſame to the Juſtices and verify them upon Oath; and afterwards deliver them over, with the Balance and other Articles, to his Succeſſor, who is to collect the Arrears; and not conforming to the above Regulations, he forfeits 5 *l.* and making Default in paying over the Money in his Hands forfeits double the Sum."

Sect. 33. " Regulations with reſpect to Lands given for the Maintenance of Cauſeways, Pavements, Highways, and Bridges."

Sect. 34. " Penalty of pulling up, removing or deſtroying, &c. the Poſts, Blocks, Banks, *&c.* ſet up for the Security of Horſe and Foot Cauſeways; or the Parapets or Battlements of Bridges, Mile Stones, or Direction Poſts, is a Sum not exceeding 5 *l.* nor leſs than 10 *s.* or being committed to hard Labour, and whipt."

Sect. 35. Penalty on Surveyor's Neglect of Duty, in Inſtances not otherwiſe provided for in this Act.

Sect. 36. Juſtices of the Peace impowered to put in Execution every Part of this Act."

Sect. 37. " No Fee to be taken of Surveyor accounting, on Penalty of 10 *l.*"

Sect. 38. " Regulations with reſpect to the Number of Horſes which Broad or Narrow Wheeled Waggons and Carts are allowed to be drawn with on the Highways; All ſupernumerary Horſes are to be forfeited together with their Gears, *&c.*"

Sect. 39. " Waggons ſhod with Narrow Tire, or ſet with Roſeheaded Nails, not to be drawn by more than three Horſes, on Forfeiture of the Super-Horſes, *&c.*"

Sect. 40. " Carriages excepted out of the above Regulations."

Sect. 41. " Rules to be obſerved with reſpect to Seizures or Diſtreſſes made for Forfeitures or Penalties incurred."

Sect. 42. " All Waggons, Wains, and Carts, to have the Owner's real Name and Place of Abode, painted on ſome conſpicuous Part thereof, in large Letters, on Penalty of 20 *s.*

Sect. 43. The Driver of any Cart or Dray riding thereon in any Street or Highway, without having ſome Perſon on Foot or on Horſe-back to guide the ſame, (Exception) and the Driver of any Carriage who by Negligence or Miſbehaviour ſhall damage or obſtruct Perſons or Carriages in paſſing; or who ſhall not make Way for loaded Carriages, forfeits, if not the Owner, any Sum not exceeding 10 *s.* and if the Owner, any Sum not exceeding 20 *s.* or may be committed; and any Perſon may apprehend him, and deliver him over to a Conſtable, to be dealt with according to Law."

Sect. 44. "Juſtices at their General Quarter Seſſions, may appoint Scavengers for any City or Market Town for which no legal Proviſion is already made; and make Order for repairing the Streets; and making Aſſeſſments for defraying the Charges thereof, to be collected, employed and accounted for, as they direct, and to be levied by their Warrant."

Sect. 45. "Juſtices may hold a ſpecial Seſſions, whenever they think proper, for the Purpoſes of this Act."

Sect. 46. "Perſons forcibly oppoſing the Execution of this Act, or obſtructing the making a Seizure or Diſtreſs, or reſcuing Cattle or other Goods; and Conſtables not duly executing the Warrant or Precept of any Juſtice; forfeit not exceeding 10 *l.* nor leſs than 40 *s.* and on Nonpayment may be committed for three Months."

Sect. 47. "All Penalties and Forfeitures, and all Coſts and Charges, where not otherwiſe directed, are to be levied by Diſtreſs and Sale, by Warrant of a Juſtice; one Half to the Uſe of the Informer, and the other Half to the Roads; and for want of Diſtreſs, the Party is to be committed; and where he ſhall live out of the Juriſdiction of the Juſtice authorized to grant ſuch Warrant; the Juſtice of the Place, upon Application and Copy of the Conviction or Order produced, ſhall iſſue his Warrant accordingly, *&c.*"

Sect. 48. "Penalties or Forfeitures may be ſued for in any of the King's Courts by the Proſecutor or Informer, either in Manner before directed, or by Action of Debt, where the Penalty is a pecuniary one; or by Action of Trover where the Penalty or Forfeiture is a Horſe or other Goods; and recovering is intitled to double Coſts."

Sect. 49. "No Conviction to be had, but upon Confeſſion of the Party or Oath of a Witneſs. Inhabitants deemed competent Witneſſes."

Sect. 50. "Juſtices impowered to adminiſter Oaths in all Caſes relative to the Execution of this Act."

Sect. 51. "Diſtreſs for Money not deemed unlawful, *&c.* for Default of Form in the Proceedings; nor the Party making it, a Treſpaſſer *ab initio*, on account of any ſubſequent Irregularity."

Sect. 52. "Plaintiff in any Action for Irregularity, *&c.* not to recover where Tender of Amends has been made before Action brought. Defendant allowed to pay Money into Court before Iſſue joined."

Sect. 53. "Perſons aggrieved, where no other Method of Relief is appointed or injured by the incloſing any common Highway, may appeal to the General Quarter Seſſions; giving Notice of ſuch Intention. Proceedings had before any Juſtice, relating to the Matter of ſuch Appeal, to be returned to the General Quarter Seſſions, on Penalty of 5 *l.* Court to proceed in a Summary way, and award proper Coſts; and their Determination to be Final."

Sect. 54. "Where Appeal is made againſt the Conviction for the Forfeiture of any Horſe, *&c.* Notice of Appeal is to be given at the Time of Conviction, and Recognizance with Sureties entered into, and the Horſe to be thereupon returned."

Sect. 55. "Limitation of Actions under this Act to three Calendar Months, and General Iſſue may be pleaded, and the ſpecial Matter given in Evidence, and Defendant ſhall have treble Coſts."

Sect. 56. "The Act commences on 21ſt *September* next, (*i. e.*) 1766.

Sect. 57. "And to the Intent that there may be only one Law ſubſiſting for the ſeveral Purpoſes aforeſaid, it is enacted, That from and after the 21ſt Day of *September* next, the following Statutes ſhall be repealed in the Whole or in Part, *viz.* The Act 13 *Ed.* 3. 14 & 15 *Hen.* 8. 26 *Hen.* 8. 2 & 3 *Phil.* & *Mary.* 5 *Eliz.* 18 *Eliz.* 27 *Eliz.* 39 *Eliz.* And ſo much of 22 *Car.* 2. as relates to Highways. And ſo much of 2 *W.* & *M.* as relates to the Power of making Aſſeſſments for repairing Highways. And ſo much of 3 *W.* & *M.* as relates to Highways; the Acts of 7 & 8 *Will.* 3. 8 & 9 *Will.* 3. 6 *Ann.* 9 *Ann.* 1 *Geo.* 1. 5 *Geo.* 1. 7 *Geo.* 2; and ſo much of Act 9 *Geo.* 2. as extends to the Clauſe of 1 *Geo.* 1. to Market-towns. And ſo much of Act of 14 *Geo.* 2. as relates to the Highways, not being Turnpike Roads. Act 15 *Geo.* 2. 16 *Geo.* 2. 26 *Geo.* 2. And ſo much of Act 30 *Geo.* 2. as relates to the publick Streets or common Highways not within *London* or *Weſtminſter*, or Limits of the weekly Bills. See *Stat.* 5 *Geo.* 3. *ch.* 38. and 6. *Geo.* 3. *ch.* 43."

So much concerning the Duty of Surveyors, as to *Repairs*, *Rates*, and their *Accounts*.

2 Str. 900. *By* 1 Ann. St. 1. ch. 18. *All Matters concerning the Repairing of ſuch Bridges* (as are intended by the Act) *ſhall be determined in the County, and not be removed by* Certiorari.

Perſons authorized by this Act may plead the General Iſſue, and give this Act and 22 H. 8. ch. 5. *in Evidence; and if Judgment be for them, they ſhall have double Coſts.*

Note, That the *Statutes* which concern *Highways* and *Bridges* in *particular* Places, muſt be exactly purſued, as being different from the Statutes made for the Repair of Highways and Bridges in *general.*

Of the Clerk of the Market. b 2 Inſt. 543. 4 Black. Com. 272. 4 Burn. Juſt. 337. tit. Weights & Meaſures. c 4 Inſt. 273. See poſt, B. 4. ch. 1.

IX. The *Clerk of the Market* is an Officer that hath Cognizance of Weights and Meaſures. [b] The King's Clerk of the Market executes his Office only within the Verge. Head Officers of Corporations, Lords of Liberties, or their Deputies, execute this Office in other Places by Grant or Preſcription. He doth keep a [c] Court, and inquireth of Weights and Meaſures, whether they are according to the Standard or no. His Fees for Sealing are ſettled in 8 *H.* 6. *ch.* 5. and 11 *H.* 7. *ch.* 4.

[See 16 *Car.* 1. *ch.* 19. 22 *Car.* 2. *ch.* 8. 22 & 23 *Car.* 2. *ch.* 12. For Regulation of his Office, for Reformation of Weights and Meaſures, and for limiting his exceſſive Fees.]

[See alſo 31 *G.* 2. *ch.* 29. (which repeals the former Statutes relating to Bread) To regulate the Price and Aſſize of Bread; See alſo 3 *Geo.* 3. *ch.* 11. for explaining and amending the 31 *Geo.* 2. And ſee 1 *Burn*, *title* Bread. 7 *Ed.* 6. *ch.* 7. 43 *El.* *ch.* 14. 9 *Ann.* *ch.* 15. and 10 *Ann.* *ch.* 6. Concerning the Aſſize of Fuel, Billet, *&c.* and 31 *G.* 2. as to the Weight and Soundneſs of Truſſes of Straw and Hay within *London* and thirty Miles thereof.]

a 4 Inſt. 275. The Clerk of the Market cannot ſet a [a] Price upon any Thing ſaleable in the Market; for that does not belong to Weights and Meaſures. He cannot take any Fee for [b] View and Examination only of Weights and Meaſures; for the Statutes allow a Fee only for Sealing. If they are falſe Weights and Meaſures, they ought to be burnt. But if they are true and ſealed, they ought not to be charged again.

[b] 4 Inſt. 274. Dalt. ch. 112. p. 251.

By 22 & 23 Car. 2. ch. 12. *Where there is no Clerk of the Market, he that hath the Profits of the Market ſhall ſeal Meaſures duly gauged.*

[c] There is now no great Need of the Clerk of the Market; for the Juſtices of Aſſiſe, *Oyer* and *Terminer*, and of the Peace, Sheriffs in their Torns, and Lords of Leets, may and do enquire of falſe Weights and Meaſures [d].

[c] 4 Inſt. 273.

[d] See 3. B. poſt. ch. 2. poſt.

X. *Governors* of Houſes of *Correction* are to ſet Rogues and other idle Perſons to Work. This Officer and his Priſon does not belong to the Sheriff. His *Nomination*, *Duty* and *Allowance* are ſettled by Statutes. For,

Of Maſters or Governors of Houſes of Correction.

By 39 El. ch. 5. *Houſes of Correction may be founded and endowed by private Perſons, and be incorporated* [See 43 *El. ch.* 4.]

2 Burn. tit. Houſes of Correction 430 to 433. 4 Black. Com. 370. 2 Inſt. 728, &c.

By 7 Ja. 1. ch. 4. [the 39 *El. ch.* 4. being repealed] *There is to be a Houſe of Correction in every Shire to ſet Rogues and other idle Perſons at Work. And the Juſtices in Seſſions ſhall appoint a* Governor *for the ſaid Houſe who hath* Power *to ſet Rogues and idle People at Work, to puniſh them with moderate Whipping,* to fetter *them if they are unruly.* [See *Weſt.* 2. *ch.* 11.] *They are to have no other Allowance than what they ſhall deſerve by their Labour. And for this Trouble, the Juſtices ſhall at Seſſions appoint the Governor a yearly Sum, to be paid quarterly before-hand by the Treaſurers of the County; the Governor giving Security for his Continuance in the ſaid Office. And if the Governor ſhall not every Quarter-Seſſions yield to the Juſtices, a true Account of all ſuch Perſons as ſhall be committed to his Cuſtody, or if he ſuffer them to eſcape, the Juſtices may fine him.*

And by 17 G. 2. ch. 5. *On Preſentment of the Grand Jury the Juſtices in Seſſions have Power to build or enlarge Houſes of Correction, or to buy or hire Houſes for that Purpoſe; and the Juſtices in Seſſions are to take care that Houſes of Correction be properly fitted up and ſupplied with Furniture and Materials for Keeping, Employing and Correcting all Perſons ſent thither; and ſhall make Orders for the better Government of ſuch Houſes, and Employing and Puniſhing the Perſons therein; and two Juſtices ſhall viſit the ſame twice a Year, and report the State thereof to the Seſſions. And if the Governors do not ſet to Work or puniſh Perſons committed, according to the Directions of the Warrant, or otherwiſe miſbehave themſelves, the Juſtices may fine or remove them; and upon Removal, if they do not quit Poſſeſſion within ten Days after Notice from the Clerk of the Peace, two Juſtices may by Warrant direct the Sheriff to remove them, and clear the Poſſeſſion.* See alſo 14 *G.* 2. *ch.* 33. and 15 *G.* 2. *ch.* 24.

By 5 Ann. ch. 6. *The Keeper of a Houſe of Correction or Workhouſe neglecting to give due Correction to any Perſon convict of Theft or Larceny, and committed thither, any Judge of Aſſize or Gaol Delivery, upon Proof may remove the Keeper from his Office.*

Tho' one have lawful Means to live by, yet if he is an [a] *idle* or *diſorderly* Perſon, (for thoſe are the Words in the Disjunctive in one Part of the Statute of *Ja.* 1.) the Juſtices of the Peace may ſafely commit him to the Houſe of Correction, by Virtue of the Statute: *Qu.* A general and large Power without Exception of any Perſon.

[a] 2 Inſt. 730. 2 Str. 1103, Contra.

The Perſons following may by *Statutes* be ſent to the Houſe of Correction, *viz.* An Alehouſe-keeper ſelling Ale without Licence after a former Conviction, ſturdy Beggars, Carters in *London* riding upon their Carts, Corn-ſpoilers, Deſtroyers of the Game for want of Diſtreſs, Hedge-breakers, idle or diſorderly Perſons, Labourers under thirty Years of Age refuſing to work, Mother of a Baſtard-Child, Imbezillers of Naval Stores, under twenty Shillings, Robbers of Orchards, Parents of poor Children enticing them from their Maſters, poor Children refuſing to be Apprentices, poor Perſons refuſing to wear a Badge, Perſons burnt in the Hand for Larceny, Perſons running away, or threatning to run away and leave their Families upon the Pariſh, Players of Interludes [See 10 *G.* 2. *ch.* 28.] Seamen Quarreling and Fighting in his Majeſty's Yards, upon Non-payment of their Fines, Servants running away, common Treſpaſſers, Vagabonds and thoſe whoſe Place of Birth or laſt Dwelling for a Year cannot be known, or who refuſe to tell the Place of their Settlement, Spoilers of Trees and Wood-cutters, *&c.* But if the Way of Conviction is not appointed by the Statute in any of theſe Caſes, then the Juſtices in *Seſſions* only have Power to ſend ſuch Offenders to the Houſe of Correction. In the mean Time, one Juſtice may require Sureties for their Appearance at the Seſſions.

CHAP. VIII.

Of Corporations *or* Bodies Politick.

Of Corporations or Bodies Politick.
1 Black. Com. ch. 18. Of Corporations per totum.
2 Black Com. 430.
[a] 1 Inſt. 250. a.
[b] 10 Rep. 33.
2 Inſt. 68, 724.
1 R. Ab. 514.

IN Treating of Corporations or Bodies Politick, theſe Queſtions may ariſe, (*viz.*) What is a *Corporation* or Body Politick? How many *Kinds* of them? How are they *made*? What things are *eſſential* to them? What is the *Power* of a Corporation? How are they *diſſolved*?

1. *What* is a *Corporation* or Body Politick? A *Corporation* is a Perſon in a Political Capacity created by the Law, and is a Body Politick framed by Policy or Fiction of Law to [a] endure in perpetual Succeſſion with Capacity to take and grant, to ſue and to be ſued. [b] He who gives the firſt Poſſeſſions is the Founder of it, tho' they are but of ſmall Value. So that a common Perſon may be Founder, tho' the King ſhall afterwards endow it with great Poſſeſſions. It differs from a Franchiſe or Liberty, becauſe they are Eſtates of Inheritance, and may be granted over from one to another.

[a] 10 Rep. 29.
1 Inſt. 250. a.
[b] 1 Inſt. 2. a. 66, b.

2. How many *Kinds* of them? Corporations are either [a] *Sole* or *Aggregate*. *Sole*, or in one ſingle Perſon; as the King, a Biſhop, a Dean of ſome Chapters, an Archdeacon, a Prebendary, Parſon, Vicar, the Chamberlain of *London*, Heads of ſome Hoſpitals, *Aggregate* of many Perſons together (in the *Civil* Law called *Univerſities* or *Colleges*); as Mayor and Commonalty, Dean and Chapter, Maſter and Fellows of a College, Maſter and Brethren of an Hoſpital, [b] and there, all Perſons may be capable, or one Perſon only. The Bodies natural of ſuch a Corporation may be ſeen, yet the Body Politick or Corporate itſelf cannot be ſeen, nor do any Act but by Attorney. A City or Borough may be in-

corporated, or Part of the City or Borough; as the Freemen of the City, or Burgeſſes of the Borough, or Men of ſuch a Trade in the City, or Borough; [c] Hence there may be many Corporations in one City or Borough, and one Corporation may be made out of another Corporation. Laſtly, There may be a Corporation without a [d] Head. But where there is a Head, and he [e] dies, nothing can be done during the Vacancy.

[c] 10 Rep. 31.
[d] 10 Rep. 30.
[e] 1 Inſt. 263. b. 264. a.

Every Corporation alſo is either *Spiritual*, *Temporal*, or *Mix'd*. *Spiritual*; as Biſhops, Deans of ſome Chapters, Dean and Chapter, Archdeacons, Prebendaries, Parſons, Vicars [f]; which in the Manner of their Conſtitution may be either Elective, Preſentative, or Donative. *Temporal* or *Lay*; as Mayor and Commonalty, Bailiff and Burgeſſes. *Mix'd*; or conſiſting both of Spiritual and Temporal Perſons; as many Colleges and Hoſpitals.

[f] 3 Rep. 73. 1 Inſt. 250. a.

3. How are they *made?* A Corporation or Body Politick may commence or [g] be made by *Common Law*, By the *King's Charter* or Letters Patent, By *Act of Parliament*, By *Preſcription*.

[g] 10 Rep. 29. 1 Inſt. 250. a.

1. By *Common Law*; as the King, the Parliament, Biſhops, ſome Deans, Archdeacons, Prebendaries, Parſons, Vicars, Church-wardens to ſome Purpoſes. 2. By the *King's Charter*, or Letters Patent, or by the King's Authority communicated to others. All ſuch Charters muſt have a favourable Interpretation, and ſhall be taken ſtrongly againſt the King to advance the Work intended. 3. By Authority of *Parliament*; ſo the College of Phyſicians [h] in *London* was made a Corporation.

By 39 El. ch. 5. *Any Perſon ſeiſed of an Eſtate in Fee-ſimple may erect an Hoſpital or Houſe of Correction, and the ſame ſhall be* incorporated, *and the Founder may appoint Viſitors.*

[h] Bonham's Caſes 8 Rep. 2 Inſt. 720.

By 6 Geo. 1. ch. 23. *All Security for Tranſportation of Offenders ſhall be by Bond in the Name of the Clerk of the Peace, who ſhall proſecute the ſame in his own Name; to which Purpoſe he ſhall be deemed a* Body Corporate.

4. By *Preſcription*; as that which hath been and continued a Corporation Time out of Mind. Tho' the Members cannot ſhew any Charter for it, it is ſuppoſed there was a Charter at firſt. [i] *London* is a Corporation by Preſcription; and the *Chamberlain* of *London* to ſome Purpoſes. A Corporation by Preſcription may be confirmed by the King's Letters Patent, and yet be a Corporation by Preſcription ſtill.

[i] 2 Inſt. 330. 1 Sid. 291. 1 R. Ab. 512. 1 Ld. Ray. 32.

4. What Things are *Eſſential* to them? Several Things are *Eſſential* to the making of a Corporation. I ſpeak chiefly of Aggregate Corporations. [a] There muſt be, 1. Lawful *Authority*. 2. Proper *Perſons* to be incorporated, (*viz.*) Perſons natural, or Bodies already incorporate. 3. A *Name* by which they are incorporated. A Miſnomer in any Subſtantial Part is dangerous in Deeds or Pleading. [b] If the Name of a Corporation is changed, yet it ſhall have all the Previleges that it had before. 4. [c] A *Place*, for without a Place no Incorporation can be made. 5. [d] *Words* ſufficient in Law to make a Corporation. But there is no Neceſſity of any certain Form of Words.

[a] 10 Rep. 29, 57, 122, &c. 11 Rep. 18.
[b] 3 Rep. 73. 4 Rep. 88. 10 Rep. 124. 125.
3 Lev. 238. 1 R. Ab. 512.
[c] 10 Rep. 29. 32, 123.

When a Corporation is duly created, [e] all other *Incidents* are tacitly annexed to it; as to purchaſe and grant; to buy and to ſell; to ſue and to be ſued; to have a Seal; that the Survivors ſhall be the Corporation; that if the Revenues increaſe, the ſame ſhall be employed to increaſe the Revenue or Number of the Poor; that if erected for private Charity, and not for publick Government, they ſhall be viſited by the Founder and

1 Black. Com. 477.
[c] 10 Rep. 30. 1 Roll. Abr. 513.
[e] 10 Rep. 30, 31, &c. 8 Rep. 131. 1 Ld. Ray. 7, &c.

and his Heirs, if no Viſitor is appointed by the Founder; that they make Ordinances and By-Laws; that they ſhall be exempted from the Ordinary (if it is a Lay Corporation he cannot viſit it: But the Clauſe of Exemption is neceſſary if it is a ſpiritual Corporation;) to purchaſe in *Mortmain*; for without Revenues, the Members of it cannot live. A Licence to purchaſe is not of the Eſſence of a Corporation, for it is perfect without it.

If theſe Things are expreſly granted in Charters, they are but Declaratory or Explanatory, and might have been left out; tho' it is the ſafeſt Way to grant them by expreſs Words.

There are uſually granted in Charters of Corporations divers Franchiſes; as Felons Goods, Waifs, Eſtrays, Treaſure Trove, Deodands, Courts and Cognizance of Pleas, Return of Writs, Fairs, Markets, Exemptions from Serving in Offices, or on any Jury, Exemptions from Payment of Toll, the Aſſize of Bread and Beer, a Pillory and Tumbrel, the Office of a Juſtice of Peace, Coroner, Clerk of the Market; which are not incident to a Corporation; and therefore muſt be granted by ſpecial and expreſs Words.

5. As to the *Power* of a Sole or Aggregate Corporation.

[f] 4 Rep. 65. 1 Inſt. 8. b. 9. a. 46. b. 94. b. 90. a. 4 Inſt. 249. Hob. 64.

A [f] *Sole* Corporation regularly cannot take in *Succeſſion* Goods and Chattels, either in *Action*, as Bonds, or Recognizances; or in *Poſſeſſion*, as Leaſes for Years; for the Executors or Adminiſtrators ſhall have them. A Leaſe for a hundred Years made to a Parſon and his *Succeſſors*, and a Releaſe made to him and his Succeſſors, was adjudged only an Eſtate for Life. And this is true, except in the Caſe of the ancient Jewels of the Crown [g], which go to the Succeſſor; and of the Chamberlain of *London* [h], whoſe Succeſſor by *Cuſtom* may have Execution of a Bond or Recognizance, acknowledged to his Predeceſſor or Orphanage Money; and perhaps the Ornaments of a Chapel of the Predeceſſor belong to the ſucceeding Biſhop.

[g] 3 Cro. 344.
[h] 1 Cro. 464. 682.

[i] See B. 2. ch. 1. poſt. See of Frankalmoign, B. 2. ch. 2. poſt.

A Sole Corporation may take a Fee-ſimple [i] in Succeſſion, but not without the Word *Succeſſors*.

An *Aggregate* Corporation may take Goods and Chattels in *Action* or *Poſſeſſion*, and they ſhall go in Succeſſion. They may alſo have a Fee-ſimple without the Word *Succeſſors*; for the Body never dies.

1 Black. Com. 476.
[a] 10 Rep. 32. 1 Rep. 127. 1 Inſt. 134. a.
[b] 1 Roll. Abr. 915, Contra.
[c] See B. 4. ch. 4. poſt.
[d] 11 Rep. 98.

They cannot ſue or appear in Perſon, but by Attorney. They cannot ſue without their Head, or in Time of Vacation of the Headſhip. They cannot commit [a] Treaſon; or be outlawed or excommunicated; or be Executors or Adminiſtrators, [b] *Qu.* for they cannot take an Oath. They cannot be Jointenants to take by Survivorſhip; but they may be Tenants in common. They cannot be ſeiſed to the Uſe of another. The Members cannot regularly be Witneſſes [c] for the Corporation, eſpecially if they teſtify for any conſiderable Advantage or Profit of the Body. [d] For every Member hath a Right and Freehold for his Life as to his Freedom, and all the Members together have an Inheritance in the Lands, and an Intereſt in the Goods.

See P. 30. 31. ante; and of Leaſes poſt. B. 2. ch. 3. 4 Black. Com. 57, 432.
[e] Lit. 443. 1 Inſt. 264. a.

Grants of a Corporation Sole and Aggregate, muſt be by Deed under their Seal; tho' they are good without Delivery. [e] But a Grant made to or by a Body Politick during the Vacation of the Headſhip, is void; as they cannot ſue till they have a Head. Yet if a Leaſe for Life is made with a Remainder to the Mayor and Commonalty of *B.* there being no Mayor at the Time; it will be Good, if a Mayor is choſen during the particular Eſtate.

A Corporation Aggregate cannot make a Grant to the Head of the Corporation; thus, a Dean and Chapter cannot make a Grant to the Dean, nor a Mayor and Commonalty to the Mayor; but they may make Grants to one of the Chapter, or of the Commonalty reſpectively.

2 Ld. Ray. 778.

They may retain a neceſſary Servant without Seal. But generally all Contracts and Grants of Offices by them ought to be under Seal by Deed.

1 Ventr. 47, 48.
1 Mod. 18.
3 Lev. 107.

I ſaid before that an Aggregate Corporation might make *By-Laws*; it being impoſſible for the general Law to provide fit Diſcipline for every particular Society. But ſome Powers concerning By-Laws are often inſerted in Charters that are *void*. As to make By-Laws upon pain of [f] *Impriſonment* of the Offender. For ſuch an Ordinance is againſt *Magna Charta, ch.* 29. A Reaſonable Penalty might have been impoſed and levied by Diſtreſs, or recovered by action of Debt.

[f] 5 Rep. 64.
2 Inſt. 54.

Thus a By-Law to *Forfeit* Goods upon Diſobedience is not valid; for no Forfeiture can grow by Charter or Letters Patent; tho' [g] it may be good by *Cuſtom*. A By-law to reſtrain [h] Trade is void in a Charter, as to hinder Apprentices to ſet up their Trades [i]; or to have the ſole making of Cards, *&c.* for it is againſt the Liberty and Freedom of the Subject. But Preſcription or *Cuſtom* to reſtrain a Man to exerciſe his Trade in a particular Place is good, tho' void in a *Charter*. I ſay it is good by Cuſtom, or it may be made good by Act of Parliament. For all By-Laws and Ordinances contrary or repugnant to the Laws and Statutes of the Kingdom are void and of no Effect; and the King's Charter alone cannot uphold them. Corporations may make By-Laws or Ordinances without Cuſtom, or the King's Charter, where it is for the Good of the Common-wealth; as to repair the Church or Highway, *&c.* but not where it is for their own [k] private Profit. And if they make By-Laws only for the good Government and [a] Order of the Body incorporate, the King's Charter will ſupport them in it; and thoſe By-Laws ſhall oblige even Strangers, and ſubject them to Penalties, to be levied by Diſtreſs, or recovered by Action of Debt.

[g] 8 Rep. 125, 127.
2 Inſt. 47.
Hob. 210.
2 Ventr. 182, 183.
[h] 11 Rep. 55, 85.
[i] See P. 51. ante.
1 Ld. Ray. 496.
[k] 2 Inſt. 47.
1 Roll. Abr. 364.
[a] 4 Rep. 77, 78.
5 Rep. 62.
1 Roll. Abr. 365.

But thoſe Laws muſt be [b] ſubject to the general Law of the Kingdom, and ſubordinate to it, if they are not made good by Act of Parliament, as the Cuſtoms of *London* are.

Contra, 2 Vent. 33.
[b] 4 Inſt. 249.

By 19 H. 7. ch. 7. *No Maſter, Wardens or Fellowſhip, ſhall make any By-Laws in Diminution of the Prerogative of the King or others, or againſt the common Profit of the People; but the ſame By-Laws ſhall be examined and approved by the Chancellor, Treaſurer and Chief Juſtices of either Bench, or three of them, or by both the Juſtices of Aſſize, on Penalty of forty Pounds.*

Hob. 211.

But the Approbation of the Chancellor, *&c.* doth not ſtrengthen any By-Laws, but leaveth them to be affirmed as good, or diſaffirmed as unlawful; and only ſaves the Makers of them from the Penalty of forty Pounds, if they are not good.

An Aggregate Corporation may have *Power* by Charter or Preſcription to [c] *diſfranchiſe* or diſcharge a Member of his Freedom, if he doth any Act to the Prejudice of the Body, and againſt his Oath. But if they have no ſuch Authority, he ought to be convicted by the Courſe of Law, before he can be diſfranchiſed, or ouſted of his Freedom. [This hath been held not to be Law; and it hath been determined that the Power of Amotion is *neceſſarily incident* to a Corporation [d]; and that there are three Sorts of Offences for which a Member may be diſcharged: 1. Such as

[c] 11 Rep. 98.
[d] Rex. *v.* Richardſon, K.B. Eaſt. 31 G. 2. 2 Str. 819.

don't particularly relate to the Corporation, but make him unworthy of any Office of Truſt; and of ſuch an Offence he muſt be previouſly convicted at Law, whether the Corporation have an *expreſs* Power or not, for this is the only Mode of Trial. 2. Such as are merely and ſolely againſt his Oath of Office, and relate immediately to the Corporation: And 3. Mixed Offences, conſiſting of an Injury to the Corporation, and a crime againſt the Publick, ſuch as defacing the Records of the Corporation and the like.] If one is wrongfully removed or unduly disfranchiſed, his Remedy is by *Mandamus* in the *King's Bench.* [See 9 *Ann. ch.* 20. Concerning the Writ of *Mandamus.*]

1 Black. Com. 485. 2 Inſt. 495, &c. 1 Ld. Ray. 499. [e] 4 Inſt. 250, 253. 6. How are they *diſſolved?* An *Aggregate* Corporation may be *diſſolved*, 1. By the *Death* of all the Members. 2. By *Forfeiture* of their Charter, as by Uſurpation, Miſuſer, *&c.* upon the Writ *Quo Warranto.* [But ſee 7 *Ri.* 2 [e]. (not printed) 2 *W.& M. Seſſ.* 1. *ch.* 8. Concerning the Charter of the City of *London*, and 9 *Ann. ch.* 20.] 3. By *Surrender.* 4. By *Act of Parliament.* A *Sole* Corporation can be diſſolved only by *Surrender* or *Act* of Parliament.

[f] 1 Inſt. 13. b. 1 Roll. Abr. 816. Upon [f] *Diſſolution* of a Corporate Body, their Lands ſhall not eſcheat, but revert to the Donor. For the Law annexes ſuch a Condition in every Grant to a Body Politick.

But their Grants ſtand good, which were made while they were a [g] 1 Lev. 237. Corporation. If they bind themſelves in a [g] Bond, and are afterwards diſſolved, they ſhall not be charged in their natural Capacities.

By 33 H. 8. ch. 27. *Every Leaſe, Election or Grant of any Hoſpital, College or other Corporation, ſhall be good by the Grant of the* Governor, *with the Aſſent of the* greater *Part; all private Statutes to the contrary notwithſtanding.*

By 31 El. ch. 6. *If any Elector into any Church, College, School, Hoſpital, Hall, or other Society ſhall take any Reward directly or indirectly for his Vote, his Place ſhall be void. And if any Perſon in ſuch Societies take any Reward directly or indirectly for reſigning his Place, he ſhall forfeit the double Value of ſuch Reward, and the party giving it ſhall be in-* [a] 2 Inſt. 169. *capable of ſuch Place.* [See 3 *Ed.* 1. *ch.* 5. [a]]

2 Inſt. 710. *By* 43 El. ch. 4. *The Miſimployment of lands and Goods given to* Hoſpitals *and certain publick and charitable Uſes, are to be redreſſed by awarding Commiſſions to enquire of all Gifts and Miſimployments thereof, with Power to make Orders and Decrees accordingly. This Act not to extend to Colleges and Halls* &c. *or to any Cathedral or Collegiate Church, nor to any City or Town Corporate, or where there are ſpecial Viſitors appointed.*

[See 13 *Car.* 2. *St.* 2. *ch.* 1. *An Act* for the well Governing and regulating Corporations; and 5 *Geo.* 1. *ch.* 6. An Act for Quieting and Eſtabliſhing Corporations; which hath altered 13 *Car.* 2. and ſee of *Offices, B.* 2. *ch.* 2.]

[See 6 *Ann. ch.* 21. For avoiding Doubts touching the Statutes of ſome Cathedral and Collegiate Churches. 10 *Ann. ch.* 11. Concerning the Rectors of the fifty new Churches in *London, Weſtminſter*, and the Suburbs thereof. 1 *Geo.* 1. *ch.* 10. Concerning the Augmentation of the Maintenance of the poor Clergy, where the Miniſters nominated ſhall be eſteemed Bodies Politick.]

Thus far of *Perſons* in their *natural* and *civil* Capacities, the *firſt Object* of the Laws of *England.*

The End of the Firſt Book.

BOOK

BOOK II.

Of ESTATES.

CHAP. I.

Of *Eſtates* in *Lands*, *Tenements* and *Hereditaments*. And therein of the *Firſt Diviſion* of *Eſtates in Lands*, &c. *(viz.)* Into *Fee-ſimple*, *Fee-Tail*, In *Tail after Poſſibility of Iſſue extinct*, *By Curteſy*, In *Dower*, For *Term of Life*, For *Term of Years*, At *Will*, At *Sufferance*, By *Copy* of *Court-Roll*, In *Ancient Demeſne*, Eſtates *upon Condition*, By *Statute Merchant*, By *Statute-Staple*, By *Elegit*, Eſtates *in Lands deviſed to Executors*, Eſtates *in Coparcenary*, *Jointenancy*, *Tenancy in Common*, In *Remainder*, In *Reverſion*.

E*STATES* are the *ſecond* Object of our Laws; and in common Signification are all Manner of Property in *Lands* and Tenements, *Goods* and Chattels. For all Eſtates may be reduced to *Inheritance*, *Freehold*, or *Chattels*. In treating therefore of Eſtates, I ſhall ſpeak of Eſtates in *Lands*, *Tenements*, or *Hereditaments* in the firſt four Chapters of this Book; and then in the three laſt Chapters, of Eſtates in *Goods* and *Chattels* Perſonal.

While I ſpeak of Eſtates in *Lands*, *Tenements*, or *Hereditaments*, I intend to ſhew, 1. What is an *Eſtate in Lands*, *Tenements*, or *Hereditaments*. 2. How Eſtates in Lands, *&c.* are *divided*. 3. How Lands, Tenements, and Hereditaments, may be *purchaſed* or *conveyed* from one to another. 4. How Eſtates in Lands, *&c.* may be *loſt*.

Of an Eſtate in Lands, &c.

I. The Words *Eſtate*, *Right*, *Title*, and *Intereſt*, are to be explained.

[a] 1 Inſt. 265 a. 345. a. & b. 347. b. 369 a. 8 Rep. 153. 2 Black. Com. 103.

[a] An *Eſtate* in *Lands*, *Tenements*, or *Hereditaments*, ſignifies ſuch *Inheritance*, *Freehold*, or *Term* for Years, as any Man hath in the ſaid Lands, *&c.* For if a Man Grants all his *Eſtate*, in *D.* to *A.* and his Heirs, every Thing in *D.* that he can poſſibly Grant ſhall paſs thereby. *Co. Litt.* 345. a.

Co. Litt. 345. a. b.

A *Right*, in Writs and Pleadings is properly in one, when he is ouſted of Poſſeſſion of his Eſtate by Diſſeiſin or Wrong, and hath Remedy by Entry or Action. But Right doth alſo include an Eſtate *in Eſſe* in Conveyances. Therefore if Tenant in Fee-ſimple makes a Leaſe for

Years, and releaſes all his Right in the Land to the Leſſee and his Heirs, the whole Eſtate in Fee-ſimple paſſes.

See of Remitter, B. 4 ch. 3. poſt. 2 Black. Com. ch. 13. per tot.

A *Title* is properly when a Man hath a lawful Cauſe of *Entry* into Lands whereof another is ſeiſed, for which he can have no Action; as a Title by Condition, Forfeiture, Act of Parliament. But this Word *Title* includeth a Right alſo. For every Right is a Title, though every Title is not ſuch a Right for which an Action lieth. It ſignifies alſo the * *Means* whereby a Man cometh to Lands, as by Feoffment, Fine, laſt Will and Teſtament, *&c.*

2 Black. Com. 134.

Intereſt, (*Intereſſe*) is vulgarly taken for a Chattel real, as a Leaſe for Years, and more particularly for a future Term; in which Caſe it is ſaid in pleading that one is poſſeſſed *De Intereſſe Termini*. But in legal Underſtanding too, an *Intereſt* extendeth to *Eſtates*, *Rights* and *Titles* that a Man hath *of*, *in*, *to*, or *out* of Lands; ſo that by Grant of his whole *Intereſt* in ſuch Lands, Reverſions as well as Poſſeſſions in Fee-ſimple ſhall paſs.

Let us ſee now what are *Lands*, *Tenements*, or *Hereditaments*.

[a] 1 Inſt. 4. a. & b. 19. b. 11 Rep. 82. 2 Black. Com. 16, 17.

[a] *Lands* ſignify not only Gardens, Arable Grounds, Meadows, Paſtures, Moors, Waters, Rivers, Marſhes, Furzes, Heath; but alſo Meſſuages, (*i. e.* Houſes) Tofts (Places where Houſes once ſtood,) Mills, Caſtles, *&c.* for in Conveying of the *Land*, the Buildings paſs with it. Land built upon is more worthy than other Land. But as to Land only, the Common Law gives [b] arable Land the Preheminence before all other Ground whatſoever. [c] *Land* hath in Law an Extent upwards; but one may build over my Land by Agreement with me. A Grant only of the *Herbage* of Land, or of the *Veſture*, (*i. e.* of the Corn, *&c.*) is a Grant only of a particular Right, by which the Soil doth not paſs. But by a Grant of the *Profits* of the Land, the whole Land itſelf doth paſs; for what is the Land but the Profits thereof? So if one grants all his *Woods*, the Land ſhall paſs. *Water* is not demandable by that Name; but ſo many Acres of Land covered with Water. [d] An *Hide* or Plough-Land, a Yard-Land, or an Ox-gang of Land do not contain any certain Number of Acres. But a Plough-land, in Reſpect of the Repairing of the Highways is ſettled at fifty Pounds a Year by 7 & 8 *W.* 3. *ch.* 29.

[b] 4 Rep. 39. 1 Inſt. 85. b. [c] 1 Inſt. 4. a. & b. 5 Rep. 11. 11 Rep. 46, &c. 2 Cro. 487. Contra, 1 Ventr. 393.

[d] 1 Inſt. 69. a. 2 Inſt 596. 9 Rep. 124.

See P. 105. ante. [e] 1 Inſt. 6. a. 19. b. 20. a b. 154. a. Comyns, 265. 2 Black. Com. 16, 17.

The Word [e] *Tenement* † comprehends not only a Houſe or Home-ſtall, but all corporeal Inheritances which are *holden* of another; and all Inheritances iſſuing out of thoſe Inheritances, or exerciſeable within the ſame, tho' they lie not in Tenure; as Rents or Commons, granted out of Land, or Uſes, Offices, Dignities which concern Lands or certain Places.

[f] 1 Inſt. 6. a. 16. a. & b. 3 Inſt. 19, 126. 2 Black. Com. 17.

[f] *Hereditament*, is the largeſt Word of all, and ſignifies whatſoever may be inherited, or may come to an Heir, be it corporeal or incorporeal, real, perſonal or mixed; and tho' it is not holden, or lieth not in Tenure. The Word *Inheritance* is not only intended where one hath Lands or Tenements by *Deſcent*, but of every Fee-ſimple or Tail which one hath by *Purchaſe*; becauſe his Heirs may inherit it. Alſo one may

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* *Titulus eſt juſta cauſa poſſidendi quod noſtrum eſt.* 1 Inſt. 345. b.

[a] *Appellatione fundi omne ædificium et omnis ager continetur.* 4 Rep. 87. 10 Rep. 33.

[c] *Cujus eſt ſolum, ejus eſt uſq; ad cœlum.* 1 Inſt. 4. a. 9 Rep. 54.

† *Note*, And Ejectment will not lie for a *Tenement*, becauſe the Word *Tenement* is ſo uncertain that the Sheriff cannot tell, of what ſort of *Tenement* he ſhall give Poſſeſſion. Adjudged in Arreſt after a Verdict, in *Goodright* on the Demiſe of Welch v. *Flood* in *C. B. Mich. Term.* 10 *Geo.* 3. ex relatione *Wilſon* Serjeant.

have an Inheritance by *Creation*; as when the King creates one a Peer by Letters Patent, or by Writ.

See P. 43. ante.

If one holdeth in Fee-ſimple, Fee-tail, or for Term of his Life, he hath *Liberum Tenementum*, or a *Freehold*. It cannot commence *in futuro*, but muſt take Effect preſently either in Poſſeſſion, Reverſion, or Remainder. Other Eſtates are not Freeholds. One is ſaid to be *ſeiſed* of a Freehold, but to be *poſſeſſed* of other Eſtates; as of Leaſes for Years, Copyhold Lands, Goods and Chattels.

2 Black. Com. 104.

[a] A Freehold may be in *Deed* or in *Law*. A Freehold in *Deed* is actual Seiſin of Lands or Tenements in Fee-ſimple, Fee-tail, or for Life. A Freehold in *Law* is a Right to ſuch Lands or Tenements before Entry or Seiſin. So there is a *Seiſin* in Deed, and a *Seiſin* in Law. [b] A Seiſin in *Deed* is when a corporal Poſſeſſion is taken. A Seiſin in *Law* is where Lands deſcend, and one hath not actually entered on them, or when ſomething is done which amounteth in Law to an actual Seiſin, as an Inrollment [c], Seiſin of Rent for all other Services.

[a] Lit. 448.
[b] 1 Inſt. 31. a.
1 Inſt. 266 b.
[c] 4 Rep. 8, 9.

Of theſe Eſtates ſome may be *Appendant* or *Appurtenant*. [d] *Appendant* is an Inheritance belonging to another Inheritance, which is ſuperior or more worthy. Appendants are ever by Preſcription, and are as the Acceſſory to the principal Thing: In the Civil Law it is called *Adjunctum*. *Appurtenant* is almoſt of the ſame Nature, except that Appurtenants may be created in ſome Caſes at this Day. They paſs by Virtue of the Words, *Cum pertinentiis, with the Appurtenances thereunto belonging*; as Advowſons, Commons with a Manor-Houſe or Lands, and as Lands with an Office.

[d] 1 Inſt. 121. b 122 a.
2 Black. Com. 22, 33.

But by theſe Words *Cum Pertinentiis* neither Freehold nor Copyhold Lands ſhall paſs with a Houſe or Meſſuage; but only the Orchard, Garden and Yard. When one hath a Houſe or Mill to which Things are Appendant or Appurtenant, and it is burnt down or blown down by the Act of God, or deſtroyed by the Default of the Owner; if the Owner builds it in the ſame Place and Manner as before, he ſhall have the ancient Appendants and Appurtenances.

2 Cro. 528.
4 Rep. 86, &c.

[e] *Note*, That Things incorporeal muſt be *appendant* to Things corporeal, and corporeal to incorporeal. And the principal Thing muſt be of perpetual Continuance to carry any Thing that is properly appendant or appurtenant.

[e] 4 Rep. 37, 38.
1 Inſt. 121. b. 122. a.

[f] An *Incident* is a Thing dependant on another, either neceſſarily and inſeparably, as a Court-Baron is ſo incident to a real Manor, that it cannot be ſevered by Grant; or ſeparably, as Rents incident to Reverſions.

[f] 1 Inſt. 93. a. 151. b. 2.
2 Black. Com. 91.

So that now we ſee what is an *Eſtate* in *Lands*, *Tenements*, and *Hereditaments*, and a *Freehold*; and what are Eſtates *Appendant*, *Appurtenant* and *Incident*.

II. Eſtates in Lands, *&c.* are *divided*, 1. Into *Fee-ſimple*, *Fee-tail*, &c. 2. Into Eſtates *corporeal* and *Incorporeal*. Of theſe two Diviſions in this and the following Chapter.

The firſt Diviſion of Eſtates in Lands, &c.

The *firſt* Diviſion of Eſtates is into *Fee-ſimple*; *Fee-tail*; in *Tail after Poſſibility of Iſſue extinct*; Eſtates by *Curteſy*; in *Dower*; for *Term* of *Life*; for *Term* of *Years*; at *Will*; at *Sufferance*; by *Cuſtom* or *Copy of Court-Roll*; in *Ancient Demeſne*; Eſtates *upon Condition*; by *Statute-Merchant*; by *Statute-Staple*; by *Elegit*; *Eſtates* in Lands *deviſed* to *Executors*; Eſtates by *Coparcenary*, *Jointenancy*, *Tenancy* in *Common*, in *Remainder*, in *Reverſion*.

Of an Eſtate in Fee-ſimple. Lit. 11. 2 Black. Com. 104. Wright's Tenures, 147.

[a] 1 Inſt. 1. b.

[b] 1 Inſt. 17. a. & b.

I. An Eſtate in *Fee-ſimple* (*Feodum ſimplex*) is where one hath Lands or Tenements to hold to him and his *Heirs*, and he cannot have a greater Eſtate. To have a *Fee* is to have an Inheritance; [a] to have *Fee-ſimple* implies that it is without Limitation to what Heirs; but to Heirs generally. In this Senſe the King may be ſaid to be ſeiſed in Fee. *Fee* is taken alſo for the Inheritance that is *holden* of another by ſome Service; but that belongeth only to a Subject. If he is ſeiſed of Lands or Tenements which may be manually occupied or received, he is ſeiſed in his [b] *Demeſne*, (or *Domaine*, *de Domo*) *as of Fee* (*viz.*) For the Service of his *Houſe*. But of Things which do not lie in ſuch manual Occupation, (as an Advowſon of a Church) he is ſeiſed *as of Fee*, not in his *Demeſne as of Fee*,

[c] Lit. 647, 648.

All other Eſtates and Intereſts are derived out of a Fee-ſimple; and therefore there muſt be a Fee-ſimple at laſt in ſome Body; otherwiſe the Lands are in [c] *Abeyance*, (*i. e.*) In Conſideration and Cuſtody of the Law only.

[d] Lit. 1. See P. 67. ante. 2 Black. Com. 201.

[e] 1 Inſt. 9. b. 10. a. Show. 348.

[f] See P. 42. ante.

Theſe Words [d] *his Heirs*, make the Eſtate of Inheritance. To hold to him for *ever*, or *to him and his Aſſigns for ever*, makes but an Eſtate for Life for Want of theſe Words *his Heirs*: But the Word *Heirs* is not neceſſary in ſome Caſes; [e] as in *Wills*, an Eſtate of Inheritance may paſs without theſe Words *his Heirs*; for it is good if it is given to one and his Aſſigns *for ever*, or by any other Words that expreſs the Teſtator's Intent to paſs a Fee. A Deviſe to one for Life and after to her Iſſue, and if ſhe has no Iſſue, Power to diſpoſe thereof at her Will and Pleaſure, ſhe never had Iſſue, ſo took a Fee-ſimple, 2 *Wilſon* 6. In a *Will*, to his *Blood* makes a Fee-ſimple; to his *Seed* an Eſtate in Tail. If in a Will one gives in theſe Words *All the reſt of my Eſtate*, they carry a Fee-ſimple, if the Deviſor had a Fee-ſimple therein: A Deviſe to one and his Succeſſors is a Fee-ſimple. The Word *Heirs* alſo is not neceſſary in a *Fine Sur Conuſans de droit Come ceo*, &c. in *Releaſes* that work by Extinguiſhment, in a *Recovery*, nor to a Creation of *Nobility* [f] by *Writ*, nor if Lands are given to the *King* by Deed *inroll'd*, nor in Feoffments that take Effect by * *Reference*, (as if *A.* enfeoffs *B.* and his Heirs, and then *B.* enfeoffs *A.* as fully as *A.* enfeoffed him) nor in Gifts in *Frank-marriage*, nor in a Grant of a Rent to a Parcener to make *Partition Equal*, nor in a Grant of an Aſſart by the King at a Juſtice-Seat by the *Foreſt-Law*.

[g] 1 Inſt. 8. b. 9. a. Contra, 1 Roll. Abr. 832.

[h] 2 Str. 1172.

A Grant to one and his [g] *Heir* in the ſingular Number [*Qu.*] to one *or* his Heirs, to *two* and Heirs omitting *his*, is but an Eſtate for Life. But to *one* and Heirs, (omitting *his*) is good; for there is no Incertainty. [h] A Gift to one and his *Children* and their *Heirs*, the Father and all his Children in Being at the Time of the Gift, do take a Fee-ſimple jointly; but if he had no Child at the Time of the Feoffment, a Child born after ſhall not take. A Gift of Lands to one and his Heirs Male is a Fee-ſimple, for Want of the Word *Body*; but in a Will it gives an Eſtate-tail only.

See P. 110. ante.

The Definition of an Eſtate in Fee-ſimple is to be underſtood of Purchaſes by *Natural* Perſons, or by *Bodies* Politick or Corporate. In a Feoffment to a *Sole* Corporation in *Frankalmoign* or Free Alms, a Fee-ſimple doth paſs without the Word *Succeſſors*, tho' it cannot in other

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* *Verba relata hoc maxime operantur per referentiam, ut ineſſe videntur.* 1 Inſt. 9. b.

Caſes. So that a Fee-ſimple is an Eſtate to *one and his Heirs*, or in Caſe of a *Sole* Corporation (as Biſhop or Parſon) to him and his *Succeſſors*.

But *Note*, that in all Feoffments and Grants (generally ſpeaking) Exchanges, Releaſes and Confirmations enlarging Eſtates, Warranties, Bargains and Sales by Deed indented and inrolled, the Word *Heirs* or *Succeſſors* is neceſſary.

[a] 1 Inſt. 16. a. See P. 22. ante.

[a] If the *King* purchaſeth Lands to *him* and *his Heirs*, he is ſeiſed thereof *Jure Coronæ*; and ſo when he purchaſes Lands to him, his Heirs and Succeſſors.

[b] 1 Inſt. 1. b. 18. a. 19. a. 10 Rep. 97.

[b] A Fee-ſimple, or rather a *Fee* or an Inheritance, is *divided* into *ſimple* or *abſolute*, *conditional*, and *qualified*. We have hitherto been ſpeaking of a Fee-*ſimple* or Fee *abſolute*. *Conditional*, is that which is defeated when the *Condition* is broke or not performed; but till then it is as it were abſolute. *Qualified* or *Baſe* is that which may be defeated by a *Limitation*, as when a Grant is made to *A.* and his Heirs Tenants of the Manor of *Dale*; who have an abſolute Eſtate only ſo long as they continue Tenants of that Manor. So a [c] Parſon has a Fee-ſimple qualified to many Purpoſes, as to have an Action of Waſte; tho' in other Caſes he has in Effect but an Eſtate for Life; becauſe the entire Fee or Right is not in him. But a Fee conditional or qualified is not in Strictneſs Fee-ſimple. [d] Again a Fee-ſimple (or rather *Fee*) may be divided into *Real*, *Perſonal*, and *Mix'd*. *Real*, as the common Eſtates are. *Perſonal*, as when an Annuity is granted to one and his Heirs. *Mix'd*, as when an Earl is created of ſuch a County, which is a Dignity Perſonal relating to *Lands*.

[c] 1 Inſt. 67. a. 300. b. 301. a.

[d] 1 Inſt. 1 b. 2. a.

[e] 1 Inſt. 4. a. 343. b.

Laſtly, [e] A Fee-ſimple in Lands may be either Certain and *Immoveable*, or Incertain and *Moveable*, (*i. e.*) at ſeveral Times it may be moveable, ſometimes in one *Perſon*, ſometimes in another; or ſometimes in one *Place*, and ſometimes in another.

[f] 1 Inſt. 303. b. 2 Salk. 562. & S. P. adjudged in C. B. Eaſter 10 Geo. 3. in Johns v. Whitney.

Note, [f] That in Pleading, Eſtates in Fee-ſimple may be generally alledged; but the Commencement of Eſtates-tail and other particular Eſtates regularly muſt be ſhew'd.

After this *Deſcription* and *Diviſion* of Fee-ſimple it muſt be allowed, that tho' it is the moſt ample Eſtate of Inheritance, it is ſubject to many Incumbrances. Therefore Care muſt be taken in the Purchaſe of a Fee-ſimple, that it be not incumbred with Judgments, Statutes Merchant or of the Staple, Recognizances, Mortgages, Wills, Feoffments, Fines, Bargains and Sales, Amerciaments, Dowers, Jointures, *&c.*

Of an Eſtate in Fee-tail. 2 Black. Com. 112. Wright's Tenures 186, 187.

II. Of *Fee-tail*. 1. How *defined*. 2. How *divided*. 3. What *Eſtates* may be *entailed*.

[g] Lit. 18.

1. An Eſtate in [g] *Fee-tail* (from *tailer* to cut or limit) is, That Inheritance whereof one is ſeiſed to him and the *Heirs* of his *Body* begotten or to be begotten. He that giveth Lands in Fee-tail is the *Donor*, and he to whom the Gift is made is the *Donee*.

[a] 1 Inſt. 20. a. 26. a.

[b] Lit. 31. 1 Inſt. 20. b. 27. b.

[c] Lit. 31. 1 Inſt. 13. a.

[d] Noy's Max. 101. 1 Inſt. 27. a.

[e] 1 Inſt. 26 b.

In Gifts in Tail, theſe Words [a] *the Heirs*, or *his Heirs* are as neceſſary as in a Fee-ſimple: And this Word [b] *Body* (or his *Fleſh* or *Heirs begotten by him*, or other Words that amount to it) make the Tail; and may be reſtrained to Males or Females of the *Body*. But a Gift to one and his Heirs [c] Male or Heirs Female is a Fee-ſimple; the Law rejecting the Words *Males* or *Females*, becauſe it is not limited to what *Body*. It is good without the Word *Body* in a [d] Deviſe or laſt Will to make an Entail. But if the King grants to Heirs Male, his Grant is void; for the King is deceived. [e] *Begotten* ſhall be neceſſarily intended by the *Donee*. Hence a Corporation cannot be ſeiſed in Tail.

Of an Eſtate in Fee-ſimple. Lit. 11. 2 Black. Com. 104. Wright's Tenures, 147. [a] 1 Inſt. 1. b.

I. An Eſtate in *Fee-ſimple* (*Feodum ſimplex*) is where one hath Lands or Tenements to hold to him and his *Heirs*, and he cannot have a greater Eſtate. To have a *Fee* is to have an Inheritance; [a] to have *Fee-ſimple* implies that it is without Limitation to what Heirs; but to Heirs generally. In this Senſe the King may be ſaid to be ſeiſed in Fee. *Fee* is taken alſo for the Inheritance that is *holden* of another by ſome Service; but that belongeth only to a Subject. If he is ſeiſed of Lands or Tenements which may be manually occupied or received, he is ſeiſed in his [b] *Demeſne*, (or *Domaine*, *de Domo*) *as of Fee* (*viz.*) For the Service of his *Houſe*. But of Things which do not lie in ſuch manual Occupation, (as an Advowſon of a Church) he is ſeiſed *as of Fee*, not in his *Demeſne as of Fee*,

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[c] Lit. 647, 648.

Theſe Words [d] *his Heirs*, make the Eſtate of Inheritance. To hold to him for *ever*, or *to him and his Aſſigns for ever*, makes but an Eſtate for Life for Want of theſe Words *his Heirs*: But the Word *Heirs* is not neceſſary in ſome Caſes; [e] as in *Wills*, an Eſtate of Inheritance may paſs without theſe Words *his Heirs*; for it is good if it is given to one and his Aſſigns *for ever*, or by any other Words that expreſs the Teſtator's Intent to paſs a Fee. A Deviſe to one for Life and after to her Iſſue, and if ſhe has no Iſſue, Power to diſpoſe thereof at her Will and Pleaſure, ſhe never had Iſſue, ſo took a Fee-ſimple, 2 *Wilſon* 6. In a *Will*, to his *Blood* makes a Fee-ſimple; to his *Seed* an Eſtate in Tail. If in a Will one gives in theſe Words *All the reſt of my Eſtate*, they carry a Fee-ſimple, if the Deviſor had a Fee-ſimple therein: A Deviſe to one and his Succeſſors is a Fee-ſimple. The Word *Heirs* alſo is not neceſſary in a *Fine Sur Conuſans de droit Come ceo*, &c. in *Releaſes* that work by Extinguiſhment, in a *Recovery*, nor to a Creation of *Nobility* [f] by *Writ*, nor if Lands are given to the *King* by Deed *inroll'd*, nor in Feoffments that take Effect by * *Reference*, (as if *A.* enfeoffs *B.* and his Heirs, and then *B.* enfeoffs *A.* as fully as *A.* enfeoffed him) nor in Gifts in *Frank-marriage*, nor in a Grant of a Rent to a Parcener to make *Partition Equal*, nor in a Grant of an Aſſart by the King at a Juſtice-Seat by the *Foreſt-Law*.

[d] Lit. 1. See P. 67. ante. 2 Black. Com. 201. [e] 1 Inſt. 9. b. 10. a. Show. 348. [f] See P. 42. ante.

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But *Note*, that in all Feoffments and Grants (generally ſpeaking) Exchanges, Releaſes and Confirmations enlarging Eſtates, Warranties, Bargains and Sales by Deed indented and inrolled, the Word *Heirs* or *Succeſſors* is neceſſary.

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[a] 1 Inſt. 16. a.
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[b] A Fee-ſimple, or rather a *Fee* or an Inheritance, is *divided* into *ſimple* or *abſolute*, *conditional*, and *qualified*. We have hitherto been ſpeaking of a Fee-*ſimple* or Fee *abſolute*. *Conditional*, is that which is defeated when the *Condition* is broke or not performed; but till then it is as it were abſolute. *Qualified* or *Baſe* is that which may be defeated by a *Limitation*, as when a Grant is made to *A.* and his Heirs Tenants of the Manor of *Dale*; who have an abſolute Eſtate only ſo long as they continue Tenants of that Manor. So a [c] Parſon has a Fee-ſimple qualified to many Purpoſes, as to have an Action of Waſte; tho' in other Caſes he has in Effect but an Eſtate for Life; becauſe the entire Fee or Right is not in him. But a Fee conditional or qualified is not in Strictneſs Fee-ſimple. [d] Again a Fee-ſimple (or rather *Fee*) may be divided into *Real*, *Perſonal*, and *Mix'd*. *Real*, as the common Eſtates are. *Perſonal*, as when an Annuity is granted to one and his Heirs. *Mix'd*, as when an Earl is created of ſuch a County, which is a Dignity Perſonal relating to *Lands*.

[b] 1 Inſt. 1. b. 18. a. 19. a. 10 Rep. 97.
[c] 1 Inſt. 67. a. 300. b. 301 a.
[d] 1 Inſt. 1 b. 2. a.

Laſtly, [e] A Fee-ſimple in Lands may be either Certain and *Immoveable*, or Incertain and *Moveable*, (*i. e.*) at ſeveral Times it may be moveable, ſometimes in one *Perſon*, ſometimes in another; or ſometimes in one *Place*, and ſometimes in another.

[e] 1 Inſt 4. a. 343. b.

Note, [f] That in Pleading, Eſtates in Fee-ſimple may be generally alledged; but the Commencement of Eſtates-tail and other particular Eſtates regularly muſt be ſhew'd.

[f] 1 Inſt. 303. b. 2 Salk. 562. & S. P. adjudged in C. B. Eaſter 10 Geo. 3. in Johns v. Whitney.

After this *Deſcription* and *Diviſion* of Fee-ſimple it muſt be allowed, that tho' it is the moſt ample Eſtate of Inheritance, it is ſubject to many Incumbrances. Therefore Care muſt be taken in the Purchaſe of a Fee-ſimple, that it be not incumbred with Judgments, Statutes Merchant or of the Staple, Recognizances, Mortgages, Wills, Feoffments, Fines, Bargains and Sales, Amerciaments, Dowers, Jointures, &c.

Of an Eſtate in Fee-tail.
2 Black. Com. 112. Wright's Tenures 186, 187.

II. Of *Fee-tail*. 1. How *defined*. 2. How *divided*. 3. What *Eſtates* may be *entailed*.

1. An Eſtate in [g] *Fee-tail* (from *tailer* to cut or limit) is, That Inheritance whereof one is ſeiſed to him and the *Heirs* of his *Body* begotten or to be begotten. He that giveth Lands in Fee-tail is the *Donor*, and he to whom the Gift is made is the *Donee*.

[g] Lit. 18.

In Gifts in Tail, theſe Words [a] *the Heirs*, or *his Heirs* are as neceſſary as in a Fee-ſimple: And this Word [b] *Body* (or his *Fleſh* or *Heirs begotten by him*, or other Words that amount to it) make the Tail; and may be reſtrained to Males or Females of the *Body*. But a Gift to one and his Heirs [c] Male or Heirs Female is a Fee-ſimple; the Law rejecting the Words *Males* or *Females*, becauſe it is not limited to what *Body*. It is good without the Word *Body* in a [d] Deviſe or laſt Will to make an Entail. But if the King grants to Heirs Male, his Grant is void; for the King is deceived. [e] *Begotten* ſhall be neceſſarily intended by the *Donee*. Hence a Corporation cannot be ſeiſed in Tail.

[a] 1 Inſt. 20. a. 26. a.
[b] Lit. 31. 1 Inſt. 20. b. 27. b.
[c] Lit. 31. 1 Inſt. 13. a.
[d] Noy's Max. 101. 1 Inſt. 27. a.
1 Inſt. 26. b.

[f] Lit. 17.

Lands given by one Man to another with a Wife (which is Daughter or Couſin to the Donor or Giver) in [f] *Frank Marriage*, (freely in Marriage) amounts by Implication to a Gift to the Huſband and Wife, and to the Heirs of their two Bodies. So that in Frank Marriage, a Fee-tail may be created without the Words *Heirs* or *Body*. But theſe Gifts in Frank Marriage are out of Uſe.

[g] 1 Inſt. 20. b.

If one *gives* Lands to one and his [g] *Seed*, or to his *Iſſue* or *Children* of his Body, he hath but an Eſtate for Life; for there wants the Words *his Heirs* to convey the Inheritance. And tho' the Intent of the Donor may be to convey the Inheritance by the Words, *Seed*, *Iſſue*, *Children*, yet this is not ſufficient; becauſe his Intent does not agree with the Rules of Law. But ſuch Words are good enough to convey the Inheritance in a *Will*; becauſe Men uſually defer making their Wills to their laſt Hours, when they have not Time to conſult with learned Counſel, and therefore the Law makes greater Allowance to laſt Wills.

2 Wilſon, 322.

[h] 1 Inſt. 224. a. 10 Rep. 38, 39, 41.
1 Inſt. 223. b.

By the *Common* Law it is [h] incident to an Eſtate in Tail to be diſpuniſhable of *Waſte*; that the Wife of the Donee ſhall be *endowed*; that the Huſband of a Feme Donee ſhall be *Tenant* by the *Courteſy* after Iſſue; that the Tenant in Tail may ſuffer a common *Recovery*; that *collateral Warranty* with Aſſets, [See 4 *Ann. ch.* 16.] or *Lineal* with Aſſets may bar it; and therefore Conditions to reſtrain either of theſe ſhall be void.

Ca. temp. Talb. 12, 16.
2 Vern. 733.

And the Chancery cannot reſtrain Tenant in Tail from committing any Kind of Waſte. But Tenant in Tail after Poſſibility, will be reſtrained from committing Waſte in Houſes, or defacing a Seat.

1 Inſt. 223. b. contra.

By *Statute* it is incident to an Eſtate-tail to make Leaſes according to 32 *H.* 8. *ch.* 28. and to levy a Fine by 4 *H.* 7. *ch.* 24. and 32 *H.* 8. *ch.* 36. to bar Iſſues. And none of theſe Incidents by Act of Parliament may be reſtrained by Condition.

Laſtly by *Cuſtom* it is incident to an Eſtate-tail in a Manor to grant Lands by Copy, at the Will of the Lord, according to the Cuſtom of the Manor; which likewiſe cannot be reſtrained by Condition.

This is the Definition and Deſcription of an Eſtate in Tail.

2 Black. Com. 113.
[i] Lit. 14, 15.

2. As to its *Diviſion*, a Fee-tail is either *General* or *Special*. [i] *General*, is where Lands and Tenements are given to a Man and the Heirs of his Body begotten; or to a Woman and the Heirs of her Body begotten. In this Caſe it is called a *general* Tail, becauſe whatever Woman the Man taketh to Wife, the Iſſue may inherit the Lands; and whatſoever Man the Woman taketh to Huſband, the Iſſue by any Huſband may inherit; or if ſhe has divers Huſbands, and hath Iſſue by every one, they may inherit one after another as Heir of her Body.

[a] Lit. 16.

[a] *Special*, is where Lands and Tenements are given to a Man and his Wife, and to the Heirs of their *two* Bodies begotten. In this Caſe, none ſhall inherit but thoſe that are begotten by him on that particular Wife.

[b] Lit. 26.
[c] Lit. 28.

If Lands and Tenements are given to a Man and his Wife, and to the Heirs of the Body of the Man, [b] the Huſband hath an Eſtate in general Tail, and the Wife an Eſtate for Life; becauſe the Word *Heirs* relates generally to the Body of the Huſband. And if the Eſtate is made to the [c] Huſband and Wife, and to the Heirs of the Body of the Wife by the Huſband begotten, there the Wife hath an Eſtate in ſpecial Tail, and the Huſband for Term of Life, becauſe the Word *Heirs* relates to the Body of the Wife, and is confined to Heirs begotten by that particular Huſband. But if Lands are given to the Huſband and Wife, and to the Heirs of their two Bodies, both of them have an Eſtate in ſpecial Tail, as hath been ſaid; becauſe the Word Heirs, or the Inheritance, is not limited to one more than to the other. Therefore by obſerving to whom the Word *Heirs* relates, whether to both or one of them, you may ſee where the Inheritance is lodged.

Theſe Eſtates of *general* and *ſpecial* Tail are only mentioned in the Statute of *Weſt.* 2. *ch.* 1. But there are[d] other Eſtates-tail within the Equity of the ſaid Statute. As if Lands are given to a Man and his Heirs, Male or Female, of his Body begotten, the Iſſue Male or Female ſhall only inherit according to the Limitation and the Will of the Donor. By Virtue of the [e] Statute the Daughter may be Heir by *Deſcent*, tho' there is a Son, where the Limitation is to *A.* and the Heirs Female of his Body. But in Caſe of a † *Purchaſe*, or Limitation by Way of Remainder to the Heirs Female of the Body of *A.* the Eſtate will go to the Son, who is the right Heir in Law. Here there cannot be an Heir Female, where there is a Son. And there are many other Eſtates in Tail, by the Equity of the ſaid Statute.

[d] Lit. 21, 22.
2 Black. Com. 114.
[e] 1 Inſt. 24. b. 164. a.
† Whoever will take as Heir Male by Purchaſe, muſt be both *Heir* and *Male*. Hob. 31.

If Tenant in Tail *general* or *ſpecial* dieth without any Iſſue, the Donor or his Heirs may enter as in their Reverſion. For in every Gift in Tail, the [f] Reverſion of the Fee-ſimple is in the Donor.

3. All Lands of [g] *Inheritance*, and all Inheritances ſavouring of the Realty, *may* be *entailed*, as all Advantages and Profits whatſoever granted *out* of Lands, or which *concern* Lands or certain Places. Therefore Rents, Eſtovers, Commons, Uſes, Offices, Dignities, which concern certain Lands or Places, may be entailed.

[f] Lit. 18, 19.
[g] 1 Inſt. 19. b. 20 a.
7 Rep. 33, 34.

If the Thing granted be merely *Perſonal*, or to be exerciſed with *Chattels*, it cannot be entailed. So a Grant of an *Annuity* or of a[h] *Leaſe* for *Years* to a Man and the Heirs of his Body is void, as to the Limitation to the Heirs of his Body; for a Chattel cannot be turned into an Inheritance. [i] Yet it is commonly aſſigned in Truſt, that the Truſtees ſhould permit the Iſſue in Tail to receive the Profits, which is an Entail in Effect. [a] But tho', if a Leaſe for Years is limited in Tail, the Law allows not a *preſent* Remainder to be limited thereon, it will allow a future Eſtate ariſing upon a Contingency, which muſt (if ever) happen in a ſhort Time. [b] *Copyholds* cannot be entailed by the Statute. Yet Cuſtom co-operating with the Statute, will make an Eſtate-tail, if not Cuſtom only. For the Cuſtom might have been before the Statute. It is not ſufficient Proof of ſuch Cuſtom, that Lands have been granted to many and the Heirs of their Bodies; for that may be a Fee Conditional as it was at Common Law. But if a Remainder hath been limited and enjoyed, or if the Iſſues in Tail have avoided the Alienation of the Anceſtor, ſuch are good Proofs of an Eſtate-tail. As Copyholds by Cuſtom may be intail'd, they may by like Cuſtom be cut off by Surrender[c].

[h] 10 Rep. 87.
4 Inſt. 87.
[i] Ca. temp. Talbot 250.
See § 18. poſt.
[a] Duke of Norfolk's Caſe, Fol. 27.
[b] 1 Inſt. 60. a. & b.
Coke's Compl. Cop. § 47, 48, 53.
3 Rep. 8.
Contra, 3 Cro. 42.
2 Saund. 422.
3 Lev. 327.
2 Burr. 979, 980. 2 Vez. 604. 1 Wilſon 26.
[c] See of a Recovery, ch. 3. poſt.

d A Fee-ſimple may be limited by Act of Parliament.

All Inheritances were [e] Fee-ſimple at Common Law,* before the Statute of *Weſt.* 2. *ch.* 1. For if Lands were given to a Man and the Heirs of

[d] 4 Inſt. 206.
[e] Lit. 13.
1 Inſt. 19. a. 327. a. & b.
2 Inſt. 333, 334.

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* [*Before the Stat. of* Weſtm. 2. *c.* 1.] Before this Statute a Fee Tail, was, at Common Law known by the Name of a *Fee Conditional*, ſo called from the *Condition* expreſſed or implied in the Gift or Conſtitution of the *Fee*; that, in Caſe the *Donee* died without ſuch particular Heirs, the Land or *Fee* ſhould revert to the *Donor*; but notwith-

ſtanding

of his Body, it was interpreted to be a Fee-ſimple preſently by the Gift, *upon Condition that he had Iſſue*. And ſo if he had Iſſue, the Condition was ſuppoſed to be perform'd for three Purpoſes, (*viz.*) To *Alien* and diſinherit the Iſſue, and by the Alienation to bar the Donor or his Heirs of all Poſſibility of the Reverſion; To *Forfeit* for Treaſon or Felony; To *Charge* with Rent, Common, *&c.* and thereby to have bound the Iſſue. But,

2 Inſt. 333, &c. *By that Statute the Intention of the Donor is to be obſerved; as that the Tenant in Tail muſt not alien, forfeit, or charge it longer than for his own Life. Fines, hereafter to be levied, to be void.*

But daily Experience ſhewed, that much Contention and Miſchief [f] 1 Inſt. 19. b. had crept into the Law by entail'd Inheritances; [f] as Frauds to Farmers, Creditors, *&c.* Sons became diſobedient, when they found they could not be diſinherited. [Therefore by 4 *H.* 7. *ch.* 24. and 32 *H.* 8. *ch.* 36. the [g] See ch. 3. poſt. Iſſue in Tail were made barrable by a Fine [g].] Subjects alſo that were Owners of entail'd Lands, were leſs fearful to commit Treaſon. [Therefore by 26 *H.* 8. *ch.* 13. ſuch Lands are forfeitable [h] for Treaſon.] [h] See of Forfeiture, B. 4. ch. 5. poſt. Men that had entail'd Lands could not make Improvements; for when the Owner had only an Eſtate for Life, none would give a Fine of any Value for a Leaſe of it, nor lay any great Stock upon the Land, that it might yield an improv'd Rent. [Therefore by 32 *H.* 8. *ch.* 28. Te- [i] See of Leaſes, ch. 5. poſt. nants in Tail are enabled to grant Leaſes [i].]

[See 33 *H.* 8. *ch.* 39. 13 *El.* *ch.* 4. Concerning Lands of Tenants in Tail, as liable to the King's Debts; or ſaleable for the Arrears of the King's Officers.]

But notwithſtanding the many Miſchiefs and Inconveniencies of entail'd Eſtates, and the *Statutes* before-mentioned, and *Fines* and *Recoveries* to Dock Entails; there are Methods found out in Settlements to limit Eſtates, that no Law or Statute can reach or alter them, except a particular Act of Parliament is made for that Purpoſe.

Hitherto I have ſaid ſomewhat of Eſtates of *Inheritance*; next are Eſtates of *Freehold* only, or for Term of *Life*.

ſtanding ſuch Limitation, or Reſtriction was agreeable to the Nature of *Feuds*, and the *Condition* itſelf no other than (whether expreſſed or not) was implied in every ſuch Gift; yet our Anceſtors were, after Heir or Iſſue had, ſuffered at Common Law, to alien ſuch *Fee*, and to defeat the *Donor* as well as the *Heir*, upon a Suppoſition, that the *Condition* was, for this Purpoſe, ſatisfied or performed by the *Donee*'s having Iſſue: This Notion, and the conſequent Practice, being manifeſtly contrary to the Form and Intent of the Gift, was therefore reformed by this Statute of *Weſtm.* 2. *ch.* 1. (commonly called the Statute *de Donis*) which required that from thenceforth, the Will and Intent of the *Donor* ſhould be obſerved, and that a *Fee* ſo given, ſhould, in all Events go to the Iſſue, and, for want of Iſſue, revert to the *Donor*: So that though *Littleton* ſays that a *Fee-Tail* is by Force of this Statute, for that, before, all Inheritances were Fees Simple, *Abſolute* or *Conditional*; yet it is certain, that this Statatue did not create any new Fee, *aut re aut nomine*, but that it only ſevered and diſtinguiſhed the *Limitation* from the *Condition*, and reſtored the effect of each, that is to ſay, the Effect of the *Limitation* to the Iſſue; and the *Reverſion*, as the proper Effect of the Condition, to the *Donor*, according to the plain Import and manifeſt Intent of the Gift: And yet, as by Means of this Statute the *Limitation* was raiſed above the *Condition*, the *Fee* might thenceforth be denominated from the *Limitation*, which, as now eſtabliſhed, was become the Subſtance, as it was in Truth, *before*, the immediate End of the Gift. *Wright*'s *Tenures*, 187, 188, 189, 190.

III. [a] An Eſtate in *Tail, after Poſſibility of Iſſue extinct*, is where Lands and Tenements are given to a Man and his Wife in ſpecial Tail, and the Survivor hath an *Eſtate in Tail* when there is no Poſſibility of Iſſue. If they have Iſſue, and the Iſſue dies without Iſſue, ſo that there is not any Iſſue alive which may inherit by Force of the Entail, the Survivor of the Donees hath an Eſtate in Tail after Poſſibility, *&c.* [b] None can have this Eſtate but one of the Donees, or the Donee in *ſpecial* Tail; for a Donee in *general* Tail may by Poſſibility have Iſſue. And the Eſtate of this Tenant muſt be created by the Act of God, (*viz.*) by Death of either Party without Iſſue, and not by Limitation of the Party, or by his own Act.

Of an Eſtate in Tail after Poſſibility, &c.
2 Black. Com. 124.
[a] Lit. 32.
1 Inſt. 27. b.
[b] Lit. 34.
1 Inſt. 28. a.
11 Rep. 80.

IV. [c] An Eſtate by *Curteſy* of *England* is where a Man taketh a Wife ſeiſed in Fee-ſimple, or in Fee-tail General, or ſeiſed as Heireſs in ſpecial Tail, and hath Iſſue by her, Male or Female born alive, (not rip'd out of the Mother's Womb after her Death) evidenced by Motion, Crying, *&c.* which by any Poſſibility may inherit, and the Wife dies, and the Huſband holdeth the Land during his Life. This is by the Law and *Curteſy* of *England*. One may be Tenant by the Curteſy of a Caſtle for the Defence of the Realm, of a common *Sans* Number, *&c.*

Of an Eſtate by Curteſy, &c.
2 Black. Com. 126.
[c] Lit. 35, 52.
1 Inſt. 29. b. 30. b.
8 Rep. 34.

[d] A Man ſhall not be Tenant by the *Curteſy* of a bare Right or Title, or of a Reverſion or Remainder expectant upon an Eſtate of Freehold, unleſs the particular Eſtate is determin'd during the Coverture; nor of a Seiſin in *Law*; but of an equitable Truſt he ſhall [e], and Equity will relieve him againſt a Term attendant on the Inheritance. But if a Wife dies before a *Rent* in Fee becomes due; or in the caſe of an *Advowſon*, before the Church becomes void, the Man ſhall be Tenant by the *Curteſy*, though the Wife had only a Seiſin in Law; becauſe he could by no Induſtry attain unto any other Seiſin. A Seiſin in *Deed* is required in other Caſes.

[d] F N. B 149.
1 Inſt. 29. a. 30. b. 40. a.
[e] 1 Wms 108
2 Vern. 324, 536.
3 Wms. 234.
1 Atkyns. 603, 606, 607, 609.
2 Atkyns. 47.
3 Atkyns. 436, 469, 471, 716.

[f] Four Things muſt concur to give an Eſtate by Curteſy, (*viz.*) *Marriage*, *Seiſin* of the Wife, *Iſſue*, and *Death* of the Wife.

[f] 1 Inſt. 30. a.

V. Of an Eſtate in *Dower*. 1. Its *Definition* and *Diviſion*. 2. *Who* may be endowed? 3. Of *what* and *how*? 4. Of *Jointures*, which ſupply the Place of Dower.

Of an Eſtate in Dower.
2 Black. Com 129.

1. An Eſtate in [g] *Dower* is where a Man is ſeiſed of Lands or Tenements in Fee-ſimple, Fee-tail general, or as Heir in ſpecial Tail, and marries a Wife and dies, and the Wife, by the Common Law after the Death of her Huſband, hath, during her Life, the third Part of ſuch Lands and Tenements as were her Huſband's at any Time during the Coverture, whether ſhe hath Iſſue by her Huſband or not; ſo that ſhe be above nine Years of Age at the Time of the Death of her Huſband. [h] *Dos*, or Dower, ſignifying in a vulgar Senſe, the Eſtate which the Woman brings in Marriage, (or her Marriage Portion,) is of another Nature.

[g] Lit. 36.
1 Inſt. 30. b.
4 Rep. 22.
[h] 1 Inſt. 31. a.

Three Things do entitle to Dower, as appears by this Definition, (*viz.*) [i] *Marriage*, *Seiſin*, and the *Death* of the Huſband. The Bond of Marriage muſt continue, and there muſt be no Divorce *à Vinculo Matrimonii*. A Separation *à Menſa & Thoro* only, doth not deſtroy the Bond of Marriage [k]. A Wife *de Facto* may be endowed, if the Huſband dies before the Divorce. Concerning the *Seiſin*; the Wife ſhall be endowed of a

[i] 1 Inſt. 32. a & b. 33. a. & b.
Vid. Pr. Ch. 111.
[k] See P. 63. ante.

Seiſin in [a] *Law*, or where the Huſband had only a Right, as well as where he had a Seiſin in *Deed*. For it lieth not in the Power of the Wife to bring it to an actual Seiſin, as a Huſband, when he is to be Tenant by the Curteſy, may in moſt Caſes. It is not neceſſary that the Seiſin ſhould [b] *continue* during the *Coverture*; for if the Huſband aliens the Lands, yet the Woman ſhall be endowed. But the Huſband, muſt be [c] *Sole* ſeiſed, and not as Jointenant at the Time of his *Death*; for then Survivorſhip will take Place. If there are two Jointenants in Fee, and one maketh a Feoffment in Fee, his Wife ſhall not be endowed: Of a Seiſin for an *Inſtant* a Wife ſhall not be endowed; as of a Seiſin of a Conuſee of a Fine that grants and renders to the Conuſor, the Wife of the Conuſee ſhall not be endowed: Neither ſhall ſhe be endowed of an Eſtate which is in Truſtees, and in which the Huſband hath only an equitable Intereſt: But ſhe ſhall be endowed of an Equity of Redemption, whether of a Mortgage for Years or in Fee; and ſhe may redeem the Mortgage, and hold over till ſatisfied [d]. Or keeping down a Third of the Intereſt, intitles her to Dower of the Equity of Redemption [e]. And it ſeems that Equity will ſet aſide a Term for Years attendant on the Inheritance in Favour of a Widow as againſt an Heir at Law [f], or Deviſee; but not againſt a Purchaſer [g].

[a] 1 Inſt. 31. a. & b.
[b] 1 Inſt. 32. a.
[c] Lit. 44. 45. 1 Inſt. 31. b.
Ca. Temp. Talb. 138. Pr. Ch. 336. 3 Wms. 229. Shower's Parl. Caſes 69. 1 Wms. 121.
[d] Pr. Ch. 137.
[e] 2 Wms. 632.
[f] Pr. Ch. 241. 1 Eq. Ab. 219. 2 Black. Com. 132, 133. 1 Wms. 137. 2 Wms. 640.
[g] Sh. P. Ca. 69.

Littleton reckons up [h] *five* Kinds of Dower, (*viz.*) Dower by *Common Law*; by *Cuſtom*; Dower *ad Oſtium Eccleſiæ*; Dower *ex Aſſenſu Patris*; and Dower *de la pluis Beale*, (*i. e.*) Of the moſt fair of the Tenements. But the two firſt are only in Uſe.

[h] Lit. 37, &c. 1 Inſt. 33. b. 2 Inſt. 81.

2. [i] The Wife of an Idiot, *Non Compos Mentis*, of one outlaw'd or attainted of Felony, Treſpaſs, Hereſy, *Præmunire*, may be endowed. But a Wife of one attainted of High Treaſon, or Petit Treaſon, cannot be endowed; [See 5 & 6 *Ed.* 6. *ch.* 11.] nor the Wife of an Alien[k], nor an Alien Wife, except in Caſe of the King.

[i] 1 Inſt. 31. a. & b. 37. a. 392. b.
[k] See P. 24. ante.

By Weſt. 2. ch. 34. *If the Wife* Elopes *from her Huſband* (i. e.) *If the Wife willingly leaveth the Huſband, and tarrieth with the Adulterer, ſhe ſhall loſe her Dower, unleſs the Huſband willingly without Eccleſiaſtical Coercion be reconciled to her, and permit her to cohabit with him.*

2 Inſt. 435.

3. Now I come to ſhew *of* * *what*, and how a Wife may be endowed.

A [l] Wife may be endowed of the principal Meſſuage, (not of a Caſtle for Defence of the Realm) Lands and Tenements, and of a Reverſion upon a Leaſe for Years made before Marriage, and of the Rent, where the Eſtate is diviſible by Metes and Bounds: but not of a Reverſion on a Leaſe for Life, made before Marriage; for of that the Huſband has neither Seiſin in Deed or Law. Where no Diviſion can be made, a Woman muſt be endowed of the Thing in a ſpecial Manner, as of the third Preſentation to an Advowſon, the third Toll-Diſh of a Mill, or of the Mill for every third Month; of the third Part of the Profit for Stallage, and of the third Part of a Fair; of the third Part of the Profits of an Office, of the third Part of a Gaol, a Park, a Dove-houſe, a Piſcary; of the third Part of the Profits of Courts; the third Part of Fines,

[l] 1 Inſt. 31. b. 32. a. 35. a. & b. Finch 125. 1 Roll Abr. 675, &c. Lit. 53. 3 Cro. 190.

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* Of what Eſtate of the Huſband, with reſpect to the Nature and Quality thereof ſhall a Woman be endowed. See 1 Atkyns. 442. 2 Atkyns. 526, 427. 3 Atkyns. 130, 131.

Heriots, Rents, Tithes, (as of the third Sheaf) of the third Part of Common certain; but not of Common without Number in Groſs; for then the Land would be doubly charged; nor of an Annuity that doth not iſſue out of Lands or Tenements.

Dowers of [a] *Copyholds* are warranted by ſpecial Cuſtom only.

[b] By Cuſtom the Wife may have half; or the whole of the Eſtate.

There muſt be an [c] *Aſſignment* of Dower at the Common Law, either by the Sheriff, by Virtue of the King's *Writ*, or elſe by the *Heir* or other Tenant of the Freehold, by Conſent or Agreement amongſt themſelves. The Wife cannot *enter* into her Dower, but muſt recover the ſame by Writ of Dower.

This Claim by Dower at Common Law ſeldom happens, eſpecially upon great Eſtates, by reaſon of Jointures. [See *Mag. Char. ch.* 7. 20 *H.* 3. *ch.* 1. 3 *Ed.* 1. *ch.* 49. 13 *Ed.* 1. *ch.* 4. 27 *H.* 8. *ch.* 10. 1 *Ed.* 6. *ch.* 12. 5 & 6 *Ed.* 6. *ch.* 12.]

[a] 4 Rep. 22, 30.
[b] Lit. 37.
1 Inſt. 33. b. 111. a.
[c] 1 Inſt. 34. b. 35. a.
1 Rol. Abr. 682, &c.
2 Black. Com. 135.
3 Black. Com. 183.

Theſe two laſt Eſtates (*viz.* by *Curteſy* and *Dower*) are *ſpecial* Eſtates for Life, and do ariſe after the Death of one that hath an Inheritance joined with a Freehold.

*4. A [d] *Jointure* is a competent Livelihood of Freehold Lands or Tenements for the Wife, to take Effect preſently in Poſſeſſion or Profit after the natural Death of the Huſband, for the Life of that Wife at leaſt, if ſhe herſelf is not the Cauſe of the Determination or Forfeiture of it; [e] as where the Eſtate is ſettled *Durante Viduitate*, and ſhe marries. This Definition of a Jointure is made with reſpect to the Statute of 27 *H.* 8. *ch.* 10.

[d] 1 Inſt 36. b. 4 Rep. 2.
2 Black. Com. 137, 180.
[e] 4 Rep. 3.

Which enacts that where an Eſtate is made in Poſſeſſion or Uſe to Huſband and Wife, and his Heirs, or to the Heirs of their two Bodies, or of one of their Bodies, or to them for their Lives, or for the Wife's Life for her Jointure; ſhe ſhall not have Dower. Howbeit, upon a lawful Eviction of that Jointure, ſhe ſhall be endowed of as much of the Reſidue of her Huſband's Lands, whereof ſhe was dowable at the Common Law, as the Lands from which ſhe is ſo evicted ſhall amount unto. But ſuch Jointure being made after Marriage, the Wife (after the Huſband's Death) may refuſe it, and betake herſelf to her Dower; unleſs ſuch Jointure be made by Act of Parliament.

2 Black. Com. 136.

Now to the making of a perfect Jointure within this Statute, and to bar a claim of Dower, [f] *Six* Things are to be obſerved.

1. Her Jointure by the firſt Limitation is to take Effect for her Life in Poſſeſſion or Profit, preſently after the Deceaſe of her Huſband. 2. It muſt be for the Term of her own Life, or a greater Eſtate. But it may be limited to continue no longer than ſhe remains a Widow, or while ſhe forbears to do any Act in her own Power. 3. It muſt be made to herſelf, and to no other in Truſt for her. 4. It muſt be made in Satisfaction of her whole Dower, and not a Part of it. 5. It muſt be expreſſed to be in Satisfaction of her Dower in the Deed or Deviſe. 6. It may be made either before or after Marriage. If made before, the Wife cannot waive it, and claim her Dower at the Common Law; otherwiſe, if it is made after Marriage.

[f] 1 Inſt. 36. b. 4 Rep. 1, &c.

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* What ſhall or ſhall not be a good Satisfaction, or good bar of Dower, and how far a Dowereſs ſhall be favoured in Equity. See 1 Atkyns. 439. 2 Atkyns. 209. 3 Atkyns. 8. 436. & See 1 Vezey. 230, 262.

This Statute does not extend to [g] Copyholds; becauſe Dowers of Copyholds are warranted by ſpecial Cuſtom only; as hath been ſaid: But [h] in Equity, if the Wiſe hath a Compenſation for Dower, it is alſo deemed a Satisfaction for her Free Bench in Copyhold Land, which is in the Nature of Cuſtomary Dower.

All other Settlements in Lieu of Jointure, are Jointures at the Common Law, and are no Bars to a Claim of Dower. A Jointure was no Bar of Dower before this Statute. [a] For a Right or Title to a Freehold cannot be barred by Acceptance of a collateral Satisfaction. But Dower may be releaſed.

If a Jointure is made of Lands, according to the Statute, before the Coverture, and after the Huſband and Wife alien them by Fine, ſhe ſhall not be endowed of any other Lands of her Huſband; otherwiſe, if the Jointure was made after Marriage.

The Wife may [b] enter into her Jointure after the Death of her Huſband, and is not driven to a real Action, as ſhe is to recover Dower at the Common Law. Neither ſhall her Jointure be forfeited by the Treaſon of her Huſband, as in the Caſe of Dower.

Notwithſtanding her *Dower* or *Jointure*, the Wife ſhall have all *her* [c] Chattels real and Bonds again, unleſs her Huſband altered the Property in his Life-time. Alſo her Proportion of his Chattels real and perſonal, upon an Adminiſtration and Diſtribution, if the Huſband dies Inteſtate; and likewiſe all convenient Apparel ſuitable to her Character.

Of an Eſtate for Life.

VI. An Eſtate for [d] *Life* is when one hath Lands and Tenements for Term of his own Life, or the Life of another, or for the Term both of his own and another Man's Life. But an Eſtate for a Man's own Life is higher than for another's Life. An Eſtate made to One and his Heirs, during the Life of Another, is but an Eſtate for Life: Tho' the Heir of the Grantee ſhall take as ſpecial Occupant.

He that hath an [e] Eſtate for Term of his own Life, or the Life of another, hath a *Freehold*, and no other of a *leſs* Eſtate hath a Freehold; but they of a *greater* Eſtate have a Freehold, as Tenant in Fee-ſimple, or Fee-tail. Eſtates by Statute-Merchant, Staple or *Elegit*, are but [f] Chattels.

But now by Force of the Statute of Frauds and Perjuries, 29 *Ch.* 2. *ch.* 3. and 14 *Geo.* 2. *ch.* 20. *ſ.* 9. An Eſtate *pur autre Vie* is deviſeable by Will atteſted by three Witneſſes; and if granted to *A. B.* or to *A. B.* and his Executors and Adminiſtrators, is perſonal Aſſets, and ſubject to ſimple Contract Debts, and if not diſpoſed of by Will, is diſtributable among the next of Kin; but if granted to one and his Heirs, it is a Freehold, and is real Aſſets, and liable only to ſuch Debts as bind the Heir [g].

Every Leſſee for Life may take upon the Land demiſed reaſonable [h] *Eſtovers*; unleſs he is reſtrained by ſpecial Covenant or Agreement.

If a Man grants an Eſtate to another, *Quam diu ſe bene geſſerit*, or ſo long as he ſhall dwell in ſuch a Houſe, or to a Woman *Dum ſola fuerit*, or *Durante Viduitate*, or for any like [i] uncertain Time, in all theſe Caſes the Leſſee hath an Eſtate for Life determinable.

A Grant of Lands, *&c.* without expreſſing any Eſtate, is a Grant for the Life of the [k] Leſſee. So a Grant from Tenant in Fee-ſimple for Term of Life generally, without mentioning for whoſe Life, ſhall be conſtrued to be for the Life of the Leſſee; for the Grant ſhall be taken moſt ſtrongly againſt the Leſſor. Otherwiſe if ſuch a Grant is made by Tenant in Tail, or for Life, for then it ſhall be taken for the Life of the Leſſor, to prevent Injury and Wrong.

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[g] Coke's Compl Copyh. ſ. 54.

[h] Walker and Walker in Chan. 17. Nov. 1747. Ward and Ward, in Chan. 26. Feb. 1756.

[a] 1 Inſt. 36. b. 4 Rep. 1, &c. 1 Inſt. 36. b.

[b] 1 Inſt. 36. b. & 37. a.

[c] 1 Inſt. 46. b. 351. a. & b.

See p. 64. ante.

2 Black. Com. 120.

[d] Lit. 56. 1 Inſt. 41. b. 1 Rep. 140. 3 Wms. 368.

[e] Lit. 57.

[f] 1 Inſt. 43. b.

2 Wms. 381. 3 Wms. 102, 264. See ch. 3 ſ. 1 & ch. 6. ſ. 5. poſt.

[g] 3 Wms. 166.

[h] 1 Inſt. 41. b. 2 Black. Com. 35. See of Eſtovers, ch. 2. and of Waſte, ch. 4. poſt

[i] 1 Inſt. 42. a. 2 Inſt. 301.

[k] 1 Inſt. 42. a. 183. a. & b.

A Leaſe for any Number of Years, determinable upon a Life or Lives, is not a Leaſe for Life or Lives, or a Freehold, but is a Leaſe for Years, or a Chattel determinable upon Life or Lives.

If Tenant for his own Life, or the Life of another, [a] ſows the Land, and he dies, or *Ceſtuy que vie* (he for whoſe Life he holdeth) dieth before the Grain is reaped, his Executor ſhall have the *Emblements*, (*i. e.*) the Profits of the Land; for his Eſtate was *Uncertain* and determined by the Act of God. But he ſhall not have the Graſs, or other Fruits, which are the *natural* Profits of the Earth, if they are not ſevered, becauſe they are Parcel of the Inheritance. And ſo it is where any one hath an *Uncertain* Eſtate; as Tenant in Tail after Poſſibility of Iſſue extinct, Tenant by Curteſy, or in Dower; for theſe are uncertain Eſtates for Term of Life. Here the Law gives to the Party, whoſe Right it is, free Ingreſs, Egreſs and Regreſs to enter, cut down and carry away the Corn. But if a Woman that holdeth Lands during her Widowhood, ſoweth the Ground, and taketh Huſband, the Leſſor ſhall have the Profits; becauſe the Eſtate was determined by her [b] own Act; and ſo it is if ſhe had granted a Leaſe thereof for Years, and her undertenant had ſown the Land, for he ſhall not be, as againſt the original Leſſor, in a better Caſe, than her under whom he immediately holdeth. And ſo if any other Tenant determines his Eſtate by his own Act, (as by Forfeiture) he that entereth for the Forfeiture ſhall have the Corn. But if a Leaſe be made to *Baron* and *Feme*, (Huſband and Wife) during the Coverture, and the Baron ſows the Land, and after they are divorced *à Vinculo Matrimonii*, the Baron ſhall have the Corn, becauſe the Judgment is the Act of the Law. Or if the Leſſor of Tenant at Will be outlawed, whereby the Will is determined, yet the Tenant at Will ſhall have the Emblements. So note the Diverſity where the Eſtate is determined by one's *own* Act, the Act of the *Law*, and the Act of a *Stranger*.

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By 28 H. 8. ch. 11. ſ. 6. *If an Archdeacon, Dean, Prebendary, Parſon, Vicar, Maſter of an Hoſpital, or other Perſon admitted to any Benefice, Dignity*, &c. *(Chauntries only excepted) hath cauſed any of his Glebe Lands to be manured and ſown at his proper Coſts and Charges with any Corn or Grain, the ſaid Incumbents may make and declare their Teſtament of all the Profits of the Corn growing upon the ſaid Glebe Lands ſo manured and ſown.*

This Act does not extend to Glebe Lands in the Poſſeſſion of a Tenant, manured and ſown by him.

See of Rent, ch. 2. poſt.

[See 14 *El. ch.* 8. *An Act* for avoiding Recoveries ſuffered by Colluſion of Tenant for Life.]

By 19 Car. 2. ch. 6. *If a Perſon for whoſe Life an Eſtate hath been or ſhall be granted ſhall remain beyond Sea, or abſent himſelf in this Realm for ſeven Years together, and no ſufficient Proof is made of the Life of ſuch Perſon, in any Action commenced for the Recovery of the Lands held for*

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A Leaſe for Life is not ſaleable by the Sheriff upon Execution for Debt, but he may extend the yearly Profits to pay the Debt. [c] And if Tenant for Life forfeits Iſſues, and dies, they ſhall be levied upon the Reverſioner; Becauſe ſerving upon Juries being a Charge upon landed Men for the Sevice of the Publick, the whole Fee is charged with it. [*How an Eſtate for Life may be forfeited*, ſee *Forfeiture* by *Waſte*, *ch.* 4. *poſt*, *how ſurrendered*, See *Surrender*, *ch.* 3. *poſt.*]

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This Act does not extend to Glebe Lands in the Poſſeſſion of a Tenant, manured and ſown by him.

See of Rent, ch. 2. poſt.

[See 14 *El. ch.* 8. *An Act* for avoiding Recoveries ſuffered by Colluſion of Tenant for Life.]

By 19 Car. 2. ch. 6. *If a Perſon for whoſe Life an Eſtate hath been or ſhall be granted ſhall remain beyond Sea, or abſent himſelf in this Realm for ſeven Years together, and no ſufficient Proof is made of the Life of ſuch Perſon, in any Action commenced for the Recovery of the Lands held for the*

the Life of ſuch Perſon, then ſuch Perſon for whoſe Life the Lands were holden, ſhall be accounted as naturally dead.

And by 6. Ann. ch. 18. *Any Perſon claiming in Remainder after the Death of any Tenant for Life, may yearly, upon Affidavit that he hath Cauſe to believe ſuch Tenant for Life to be dead, and that his Death is concealed, apply to the Lord Chancellor, who ſhall order the Perſon ſuſpected to conceal ſuch Tenant for Life to produce him, and if not produced he ſhall be taken to be dead, and the Remainder-Man may enter upon the Land.*

By 8. Ann. ch. 14. *An Action of Debt may be brought for Rent upon a Leaſe for* Life, *as well as upon a Leaſe for Years.*

Now follow Eſtates leſs than a Freehold.

Of an Eſtate for Years.
2 Black. Com. 140.
[a] Lit. 58.
[b] Lit. 67.
1 Inſt. 54. b.
[c] Lit. 66.
1 Inſt. 46. b.
See of Leaſes and Surrenders ch. 3. poſt.

VII. An Eſtate for [a] *Years*, or (Tenancy for Years) is where a Man letteth Lands or Tenements to another for a certain Term of Years. A Tenant for [b] Half a Year, or a Quarter of a Year is ſaid to be a Tenant for Years. The Tenant (or his Executors or Adminiſtrators, if he dies) may preſently [c] enter by Force of the Leaſe, tho' the Leſſor dies; and then he is *poſſeſſed* (not ſeiſed) of a Term for Years. 'Till Entry, he cannot take a Releaſe to increaſe his Eſtate, except upon the Statute of Uſes, 27 *H.* 8. *ch.* 10. But before Entry, he may grant his Intereſt to another; but not ſurrender it, or have an Action of Treſpaſs.

[d] 1 Rep. 154.
1 Inſt. 45 b.
2 Black. Com. 143.

A [d] *Term* (*Terminus*) doth not only ſignify the Limitation of Time, but alſo the Eſtate that paſſeth for that Time. Thus if a Man makes a Leaſe for Twenty-one Years, and afterwards maketh a Leaſe to begin after the Expiration of the ſaid *Term* of Twenty-one Years; if the firſt Leaſe is ſurrendered, the ſecond ſhall begin preſently; not if the Words had been *After the Expiration of the ſaid Twenty-one Years*, without mentioning the *Term*, which ſignifieth the Eſtate or Intereſt. So that there is a Difference betwixt *Terminus Annorum* and *Tempus Annorum*. But a Diſpoſition of [e] Part of the Term is not the Diſpoſition of the whole.

[e] 1 Inſt. 46 b.

See p. 110. ante.

Tenant for Years hath but a Chattel real. Therefore it is not inheritable, but goes to the Executors or Adminiſtrators. Neither can it go in Succeſſion, in caſe of a ſole Corporation, as *to a Biſhop and his Succeſſors.*

An Eſtate for ten Thouſand Years is not a Freehold, or of ſo high a Nature as an Eſtate for Life. It is but a Chattle, and cannot be entailed [f].

[f] See of Fee-tail ante. 119.
[g] Lit. 68.

If a Tenant for a Term of Years [g] ſows the Land, and his Term ends before the Corn is ripe, the Landlord ſhall have it; unleſs it is covenanted betwixt them, that the Tenant ſhall have his Way-going Crop. It was his Folly to ſow the Ground with Corn, when he knew that his Term would expire before the Corn was ripe. But where the Leaſe for Years depends upon an [h] *Incertainty*, as upon the Death of a Tenant for Life who made it, or of a Huſband ſeiſed in Right of his Wife, there the Tenant for Years ſhall have the Crop. Yet if there is Leſſee for Years upon [i] Condition, that if he doth Waſte, his Eſtate ſhall ceaſe; if he ſows the Land, and after does Waſte, the Leſſor ſhall have the Corn.

[h] 1 Inſt. 56. a.
[i] 5 Rep 116.
1 Inſt. 55. b.

[a] 1 Inſt. 41. b.
See of Eſtover. ch. 2. and of Waſte, ch. 4. poſt.

Every Tenant for Years, as well as a Tenant for Life, hath Incident to his Eſtate three Kinds of [a] *Eſtovers*.

The Sheriff may ſell a Term for Years for Debt, by Writ of Execution * upon a Judgment in the Life-time of the Owner, or when it is in the Hands of Executors or Adminiſtrators.

*See B. 4 ch. 4. ſ. 10. poſt.

VIII. An Eſtate[b] *at Will*, (or a Tenancy at Will) is where Lands or Tenements are let by one Man to another, to have and to hold to him at the Will of the Leſſor. By Force of this Leaſe the Tenant is in Poſſeſſion, but he hath no certain or ſure Eſtate, tho' a Chattle real; ſo that the Leſſor or Landlord may put him out at what Time he pleaſeth; except that by the Cuſtom of [c] *London*, a Tenant at Will under the yearly Rent of forty Shillings, ſhall have a Quarter's Warning; and paying above forty Shillings, ſhall have Half a Year's Warning. But it is regularly true, that every Eſtate at Will muſt be at the Will of [d] both Parties, (Landlord and Tenant) tho' one Party is only named. Yet if the Tenant at Will [e] ſoweth the Land, and the Landlord before the Corn is ripe, or when it is ripe, putteth him out, the Tenant notwithſtanding ſhall have the Corn, and ſhall have free Entry, Egreſs and Regreſs, to cut and carry it away; and ſhall not be forced to bring his Action for this, becauſe he knew not at what Time the Landlord would enter upon him. So it is if the Tenant at Will ſets or ſows any other [f] *Annual* Profit. But if the Tenant plants Trees, or ſows the Ground with Acorns, there the Landlord may put him out; becauſe they will yield no preſent annual Profit. And ſo it is, tho' he improves the Graſs by Compoſting, or ſowing Hay-ſeed, becauſe Graſs is the natural Profit of the Earth. And all this is proper to every particular Tenant that hath an incertain Eſtate. But if the Tenant at Will ſows the Ground with Corn, and after he *himſelf* determines his Will, and refuſeth to occupy the Ground, the Landlord ſhall have the Corn,

Of an Eſtate at Will.
2 Black. Com. 145, 146, 147.
[b] 1 Lit. 68.
[c] 2 Sid. 20.
[d] 1 Inſt. 55. a.
[e] Lit. 68. 1 Inſt. 56. a.
[f] 5 Rep. 116. 1 Inſt. 55. b. 2 Inſt. 81.

Alſo if Tenant at Will of a [g] *Houſe* is put out, he ſhall have free Entry, Egreſs and Regreſs, and *reaſonable Time* to remove his Goods. And when a Tenant at Will leaves a Houſe, he is not bound to leave it in [h] Repair as Tenant for Years is.

[g] Lit 69.
[h] Lit. 71.

The Landlord may reſerve a yearly [i] Rent upon a Leaſe at Will, and diſtrain for the Rent behind of Common Right; or he may have an Action of Debt at his own Election.

[i] Lit. 72. 1 Inſt 57 b. 5 Rep. 13.

If Tenant at Will commits voluntary Waſte, it amounteth to a *Determination* of his Will, or that he will hold the Eſtate no longer. For when Tenant at Will taketh upon himſelf to do ſuch Things, which none can do but the Owner of the Land, This amounts to a Determination of the Will and Poſſeſſion. But if an Eſtate is let at Will upon Rent payable at a certain Day, the Leſſee at Will cannot determine the Leaſe before the Day of Payment to the Prejudice of the Leſſor and on the other Hand, if the Leſſor determines it before the Day of Payment, he loſes his Rent. [See 29 *Car*. 2. *ch*. 3. What Eſtates in Lands, *&c.* not put in Writing ſhall be accounted only Eſtates at *Will*.]

See of Leaſes ch. 3. and of Waſte, B. 4. ch. 4. poſt.

IX. An *Eſtate* at [a] *Sufferance* is when one comes on an Eſtate, or enters by a lawful Leaſe, and keepeth his Poſſeſſion after his Leaſe is expired, and ſo holdeth over by Wrong; as a Tenant for Term of Years holding over his Term; Tenant at Will is always by Right; Tenant at Sufferance always by Wrong.

Of an Eſtate at Sufferance.
2 Black. Com. 150.
[a] 1 Inſt. 57. b.

By 6 Ann. ch. 18. *Perſons, who as Guardians or Truſtees for Infants, or ſeiſed in the Right of their Wives only, and every other Perſon having any Eſtate determinable upon Life or Lives, who after the Determination of ſuch particular Eſtate, without the expreſs Conſent of the Perſon next intitled, ſhall hold over and continue in Poſſeſſion, ſhall be adjudged Treſpaſſers; and the Perſon next entitled, his Executors and Adminiſtrators, may recover againſt ſuch Perſon holding over, his Executors or Adminiſtrators, the Value of the Profits received.*

By 4 Geo. 2. ch. 28. *All Perſons holding over after the Expiration of any Term for Life, Lives or Years, and after Demand and Notice in Writing to quit Poſſeſſion, ſhall pay double the yearly Value, for ſo long as they ſhall ſo hold over.*]

See 8. Ann. ch. 14. *Concerning Diſtreſſes for Rent.*

Of an Eſtate by Copy of Court-Roll. 2 Black. Com. 147, 95, 97. 100, 149. 4 Black. Com. 432. 3 Black. Com. 419.

X. Of an *Eſtate* by *Copy* of *Court-Roll.*

For the right Underſtanding of an *Eſtate* by *Copy* of *Court-Roll*, it will be neceſſary to ſhew, 1. The Nature of a *Manor*. 2. The Nature of the *Eſtate* held by *Copy* of *Court-Roll*, which doth depend upon the Manor. 3. The Method of *granting* Copyhold Eſtates. 4. Of *Fines* upon Copyholds. 5. Of Copyhold *Cuſtoms*. 6. How Copyhold Eſtates may be *extinguiſhed*.

1. Of the Nature of a *Manor*.

[b] Coke's Compl. Copyh. ſ. 31. Kennet paroch. Antiq. *v.* Manerium. Gloſs. 2 Black. Com. 90. 4 Rep. 26. 1 Cro. 19, 38, 39. [c] 1 Inſt. 58. a. [d] 1 Inſt. 108. a. 2 Inſt. 67. 2 Roll. Abr. 72. [e] 4 Rep. 26, 27. 11 Rep. 17. 18. 1 Inſt. 58. b. 2 Cro. 327. 260. f 4 Rep. 26. 6 Rep. 64, 65. Coke's Compl. Cop. ſ. 31.

A [b]Manor (*à Manendo*), becauſe the Lord did uſually dwell in the Manor-Houſe; or, *à Manurio*, from manuring the Land; or *à Meſner*, from Guiding and Governing) is an ancient Royalty or Lordſhip, (of old called a Barony) conſiſting of *Demeſnes* and *Services*, and of a Court Baron as incident to it. It cannot be a real Manor, or Manor in Law, if it wanteth Freeholders; nor can it be a cuſtomary Manor without Copyholders. It muſt be Time out of Mind; for a Manor cannot be made at this Day. A Manor may conſiſt of one or more [c] Villages and Hamlets adjacent, or only of ſeveral Houſes in a Village. If it is a Capital Manor, it may contain other Manors under it, and then it is called an [d] *Honour*; on which other inferior Manors do depend by Performance of Cuſtoms and Services to him that is Lord over them. This originally belonged to the King, tho' afterwards it was given in Fee to a Subject. There may be a [e] *Cuſtomary* Manor granted by Copy of Court-Roll, and held of another Manor. And ſuch cuſtomary Lords may keep Courts, and grant Copies; and the Cuſtomary Manor itſelf may paſs by Surrender and Admittance.

A Manor then is either [f] *Real* or *Nominal*. A *Real* and perfect Manor is ſuch as is before deſcribed. A *Nominal* Manor is a Manor by Reputation only; as when a Lord of a Manor transfers over to a Stranger the Services of all his Tenants, and reſerves unto himſelf the Demeſnes, only; or when he paſſes away the Demeſnes, and reſerves the Services. In both theſe Caſes the Lord hath not a Manor really, but nominally, and in Reputation only. Some call this a Manor in *Groſs*; as a Man may have a Court-Baron with the Perquiſites thereunto belonging, and another may have the Scite and every Foot of Land in ſuch a Manor.

[a] See B. 4. ch. 1. ſ. 17. poſt. 2 Black. Com. 90. d 1 Inſt. 17. a. Coke's Comp. Cop. ſ. 11, 12, 13, 14. Terms of the Law, v. Demeſnes, 1 Ventr. 395

The Parts of a *Real* Manor are the *Demeſnes* and Services with a *Court-Baron* incident to it. A Court Baron [a] is the chief Supporter of a real Manor, and one cannot be without the other.

1. The [b] *Demeſnes* are the Lands that are manually occupied and poſſeſſed by the Lord for the Maintenance of himſelf and Family. Theſe in the Poſſeſſion of a Subject are called *Demeſnes* in a different Senſe from the *Demeſne* Lands of the *Crown*.

The Waſte is Part of theſe *Demeſne* Lands. The Lord reſerves to himſelf one Part of theſe *Demeſnes*; Part is diſtributed amongſt the Tenants; and what is left is the Lord's Waſte, which was neglected by the Lord upon Creation of the Manor; becauſe he had before taken as much of the Demeſnes as he had need of and diſtributed as much as was convenient amongſt his Tenants.

2. The [c] *Services* are thoſe Duties which the Tenants are bound to perform to the Lord, by Reaſon of their Eſtates which they hold of him; as *Fealty*, *Wardſhip*, *Heriot*, *Relief*, *Amerciament*, *Forfeiture*, *Eſcheat*. 1. [d] *Fealty* (*Feaultè*, *Fides*) is an Oath taken at the Admittance of every Tenant to be true to the Lord. 2. *Wardſhip* was the Cuſtody or [e] Guardianſhip of the Heir of the Tenant within Age. [But this is aboliſhed by 12 *Car.* 2. *ch.* 24.] 3. *Heriot*, ([f] *Heregate* from *Herus* Lord, and *Gate* beſt) is a Render made at the Death of the Tenant to the Lord of the beſt Beaſt or other thing. This Service is moſt eſteemed. It is either a Heriot *Service*, or Heriot *Cuſtom*. Heriot *Service* is never due without ſpecial Reſervation in the Grant; and is ſeldom reſerved upon a leſs Eſtate than an Inheritance. For Heriot [g] *Service*, the Lord may *diſtrain* or *ſeize*. Diſtreſs may be of any Beaſt on the Land. But Seizure may be of any Beaſt belonging to the Tenant. Heriot *Cuſtom* is what is challenged by ſome particular Cuſtom; and is uſually paid upon an Eſtate for Life or Years, as well as upon an Eſtate of Inheritance. For Heriot *Cuſtom*, the Lord muſt ſeize, not diſtrain. Here the Lord may ſeize for Heriot the beſt Beaſt, tho' it is [h] out of the Manor, or in the Highway, that being no Diſtreſs; for it is his own proper Goods by the Death of the Tenant; and therefore he may ſeize it where he finds it. Where many purchaſe Lands [i] jointly, an Heriot ſhall not be paid till after the Death of the Survivor. If a Tenant *deviſeth* away all his Goods, and dieth, yet the Lord ſhall have his Heriot, for the Law preferreth the Cuſtom before the Gift by Teſtament. It hath been antiently ſaid, That a Heriot ſhall be paid before a Mortuary. It is payable by Copyholders as well as Freeholders. 4. [k] *Relief* (*quia Hæreditas jacens Relevatur in Manus Hæredis*) is a certain Sum of Money which every Freeholder, being at full Age, payeth unto his Lord at the Death of his Anceſtor, when he taketh Poſſeſſion of the Inheritance. [l] It is either Relief *Service*, or Relief *Cuſtom*. Relief *Service* is that which is paid upon the Death of any Freeholder. Relief *Cuſtom* is that which is paid upon the *Death* or *Alienation* of any Freeholder according to the Cuſtom of the Place. In many Places, it is Half a Year's Profit; in ſome, double the Rent of that Year. It is paid by Freeholders only. For this the Lord may diſtrain, but cannot have an Action of Debt. His Executors or Adminiſtrators may have an Action of Debt, and cannot diſtrain. 5. [a] *Amerciament* (in *Mercy* of the Lord) is a pecuniary Puniſhment for any Offence committed againſt the Lord; or a certain Sum of Money impoſed upon the Tenant by the Steward, upon Preſentment of the Homage or Jury for the Breach of any By-Law, for not doing Suit or Service, or for other Miſdemeanors puniſhable in a Court-Baron. It differeth from a Fine impoſed for an Offence in divers Reſpects. 6. [b] *Forfeiture* (*Forefaict*) is a Penalty for an Offence committed againſt a penal Law or Cuſtom, by Loſs of *Freehold* or *Copyhold* Lands, or of *Goods*. If a *Freeholder* alieneth his Lands in *Mortmain*, or ceaſes for two whole Years to perform his Services, or pay his Rents, and hath not upon his Lands ſufficient

[c] 1 Inſt. 65 a. Coke's Compl. Cop. ſ. 18. &c. 2 Black. Com. 54, 422, 45, 53, 67, 86. 1 Black Com. 367. 4 Black. Com. 411, 413, 414.

[d] Lit 91. See ch. 2. ſ. 4. poſt.

[e] Lit. 103. Coke's Compl. Cop. ſ. 22.

[f] 1 Inſt. 185. b. Coke's Compl. Cop. ſ. 24. 2 Black. Com. 97, 422. 3 Black. Com. 15. Kitch. 267, &c.

[g] Coke's Compl. Cop. ſ. 31. 2 Wilſon, 28.

[h] Kitch. 270. 1 Inſt. 185. b. 2 Inſt. 132.

[i] 8 Rep. 105. 1 Inſt. 185. b. 2 Ld. Raym. 1002.

[k] 1 Inſt. 76. a. 2 Black Com. 56, 65, 87. Coke's Compl. Cop. ſ. 25.

[l] Coke's Compl. Cop. ſ. 25. 1 Inſt. 83 a. & b.

[a] 1 Inſt. 127. a. Coke's Compl. Cop. §. 26. See B 4 ch. 1. §. 16, 17. poſt. 1 Black. Com. 299. 2 Black. Com. 153, 267, 284, 420 4 Black. Com. 245, 370, 374. 379, 416, 417.

[b] Coke's Compl. Cop. §. 27, 57, 58, 59. 1 Inſt. 59. a. 3 Inſt. 227. 1 Roll. Abr. 506, 507, 508.

Goods or Chattels to be diſtrained, he forfeiteth his Freehold, and the Lord may make a Grant of it. A *Copyholder* may forfeit his Lands by *ſpecial Cuſtom*, when upon the Deſcent of any Copyhold of Inheritance, the Heir of full Age, not being beyond Sea, faileth to come in to be admitted to his Copyhold, after three Proclamations made at three ſeveral Courts for him; when a Copyholder refuſeth to appear upon Warning, and perform Suit and Service; or refuſeth to be ſworn on the Homage or Jury; or being ſworn, refuſes to preſent according to his Oath; If upon Admittance he does not pay his Fine, if certain[c]; or denieth to pay his Rent upon Demand; or committeth Waſte voluntary or permiſſive, when there is no Cuſtom for his ſo doing; (for the Cuſtom of the Manor muſt direct what is Waſte in Houſes, Trees, *&c.*) If he leaſeth his Copyhold above the accuſtomed Term without Licence by Deed; if he leaſeth his Copyhold for one Year, and ſo from Year to Year during the Life of the Leſſor, reſerving one Day; for this is a Leaſe for two Years at leaſt, and the Reſerving a Day in every Year is Fraud. All theſe are Forfeitures *ipſo facto*. [d] By the general Cuſtom of *England*, a Copyholder may make a Leaſe for one Year without Licence of the Lord. If a Copyholder commits Treaſon or Felony, or is a Popiſh Recuſant, or does alien by Deed, theſe are no Forfeitures till Preſentment by the Homage. An Idiot, Lunatick, an Infant under the Age of fourteen Years, or a Feme Covert, cannot forfeit. But if a Feme Covert does any Act by the Conſent of her Huſband, which amounteth to a Forfeiture, this is a Forfeiture of her Eſtate. If the Huſband commits Waſte, this is a Forfeiture of the Wife's Copyhold. Where the Lord enters for a Forfeiture, he ſhall have the [e] Corn then growing. However, in all theſe Caſes, if the Lord doth any Thing whereby he doth acknowledge him his Tenant after Forfeiture, and after the Lord hath Notice thereof, this [f] Acknowledgment amounteth to a Confirmation. If there be Tenant for Life of a Copyhold[g], the Remainder for Life, and Tenant for Life commits a Forfeiture, the Lord ſhall enter, and not he in the Remainder. *Goods* are forfeited to the Lord by Waifs, Strays, Wrecks, Deodands[h], which accrue to the Lord not merely from the Tenants, but moſt commonly from Strangers. They are not incident to every Manor, nor do they add any Perfection to it. They are gain'd by Seiſure only. 7. [i] *Eſcheats* are when Lands fall to the Lord for want of Heir general or ſpecial to inherit them. But before the Lord enters, there ought to be a Preſentment of the Homage, and Proclamations to come in and claim. Beſides this ordinary Sort of Eſcheats, there is another; as where any Freeholder committeth Felony, and is attainted. For then after the King hath had his Year, Day and Waſte, the Land ſhall come to the Lord as an *Eſcheat* *.

Sometimes where Services are [a] *Entire*, and cannot be divided, as Fealty, Heriot, Payment of a Horſe or Hawk yearly, upon *Alienation* of Parcel of the Lands by the Tenant, the Services ſhall be multiplied; and every Alienee ſhall render the entire Service; and yet by *Purchaſe* of Parcel by the Lord, the whole is extinct, except in Caſe of Fealty and Heriot-Cuſtom. Such Perſonal Services as are to be done to the Perſon of the Lord, as Fealty, ſhall multiply: And here if the Lord

[c] 4 Rep. 27, 28. 2 Mod. 229. 3 Lev. 308. 1 Cro. 779. Hob. 135.

[d] 4 Rep. 26. 9 Rep. 75. Coke's Compl. Cop. ſect. 33. Contra, 2 Cro. 301. 3 Cro. 233, 234. Coke's Cop. §. 59.

[e] 4 Rep. 21.

[f] Coke's Compl. Cop. ſect. 61.

[g] 2 Ld. Ray. 1000.

[h] See ch. 2. poſt.

[i] Coke's Compl, Cop. ſ. 28. 1 Black Com. 302. 2 Black. Com. 11. 72, 89, 244. 4 Black. Com. 406, 411. 3 Black. Com. 194.

* See ch. 3. 4. poſt.

[a] 6 Rep. 1, 2. 8 Rep. 105, 106. 1 Inſt. 149. a. & b. 2 Inſt, 119. 503, 700. Lit. 222.

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[a] *Quod in partes dividi nequeunt, ſolida a ſingulis præſtantur.* 6 Rep. 1. 1 Inſt. 149. b.

purchaſes Part, they ſhall remain for the Reſidue. If entire Services are for the Advancement of Religion, Charity, Juſtice, or for the Benefit of the Commonwealth, they ſhall remain, tho' the Lord purchaſes Part. But Perſonal Services that are for the private Benefit of the Lord, as to feaſt the Lord and his Family once in the Year, or to exerciſe a Perſonal Office under him, tho' they ſhall not be multiplied by *Alienation* of Part, yet a *Purchaſe* of Parcel of the Tenancy by the Lord extinguiſhes all *ſuch* Perſonal Services. If Parcel of the Land holden by entire Service comes to the Lord by *Deſcent*, in ſome Caſes it ſhall be extinct for the whole, as Suit-Service. But if the Service is to render yearly a Horſe, and Part of the Land is aliened by the Tenant, and afterwards deſcends to the Lord, the Tenant is ſtill liable to the Service, for it was multiplied before the Lord took his Part. [See 52 *H.* 3. *ch.* 9. 18 *Ed.* 1. *ch.* 2.]

There are many other Services beſides thoſe above-mentioned; but then thoſe are due upon ſpecial Reſervation and Agreement to do or pay ſomething for the Lord's Profit or Advantage. And there are many collateral Powers appropriated to Lords of Manors; as to erect Dove-houſes; to prove the Wills of their Tenants deceaſed, in many Places; to incloſe Common, leaving ſufficient for other Commoners; but it is enough to hint at them.

See B. 4. ch. 1. ſ. 17. poſt.

In every Manor there is the *Lord*, the *Steward*, the Lord's *Tenants*, and the *Bailiff*.

A Manor is [b] *loſt*, if all the Freeholds but one eſcheat; or if the Lord purchaſe all the Freeholds; or if there is but one or no Suitors in a Court-Baron. So a cuſtomary Manor is *loſt* when there are no cuſtomary Tenants or Copyholders, or but one Copyholder.

[b] 1 Inſt. 58 a. 2 Roll. Abr. 121, 122.

2. An [c] *Eſtate* held by *Copy* of *Court-Roll* (which depends upon a Manor) is an Eſtate in Lands and Tenements, which by Cuſtom of the ſaid Manor the Tenants within the ſaid Manor have, Time out of Mind, held to them and their Heirs in Fee-ſimple, Fee-tail, or for Term of Life or Years, at the Will of the Lord, according to the Cuſtom of the Manor. Copies of Court-Rolls for Lives are moſt in Uſe at this Day.

[c] Lit. 73.

Tenant by [a] *Copy* of Court-Roll, (not Tenant by Court-Roll) or a Copyholder, is the only Tenant in Law, who holdeth by Copy of any Record, Deed, &c. his Eſtate is entered in the Roll, and the Steward delivers him a Copy of it. Copyholders, tho' in the Eye of the Law they are but Tenants at the Will of the Lord, their Lands being Parcel of the Lord's Demeſnes, [b] yet ſtand upon a ſure Foundation, if they perform thoſe Duties and Services which their Tenure doth require. For if the Lord pretends to expel them, they may either ſue a *Subpœna* out of Chancery to be relieved, or have an Action of Treſpaſs againſt the Lord. For altho' they are Tenants *at Will* of the Lord, yet they are Tenants at *Will* [c] *according to the Cuſtom of the Manor*, which the Lord cannot break.

[a] Lit. 75. 9 Rep. 76.

[b] Lit. 77. 1 Inſt. 60. b. 61. a.

[c] 4 Rep. 21, 22.

By *particular* Cuſtom, the Wife may be Tenant in Dower, the Huſband Tenant by Curteſy.

9 Rep. 76.

Copyholds of Inheritance are not [d] Freeholds, yet are created by the ſame Words as an Inheritance at Common Law; and [e] Deſcents and Surrenders of Copyholds of Inheritance muſt be governed by the ſame Rules as Deſcents and Conveyances at the Common Law. But they have not other collateral Qualities which other Inheritances have; for Copyhold Inheritances ſhall not be *Aſſets* to bind the Heir.

[d] Lit. 81.

[e] 4 Rep. 22, Coke's Compl. Cop. ſ. 49, 50. 1 Wms. 16, 75. 2 Ld. Ray. 1145. Vide Occupancy, lib. 2. c. 3. ſ. 1.

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[f] 4 Rep. 24, 31. 1 Inſt. 58. b 2 Wilſ. 125.

The [f] Pillars of a Copyhold Eſtate are, that it hath been *demiſed* or *demiſable* Time out of Mind by Copy of Court-Roll; That the Tenements be *Parcel* of the Manor, or within the Manor. So that Parcel of the Manor and Preſcription are two Incidents to every Copyhold.

3. As to the Method of *Granting* Copyhold Eſtates.

[g] 4 Rep. 30, 31. 1 Inſt. 58. b. Coke's Compl. Cop. ſ. 42. 1 Cro. 413.

[g] A cuſtomary Manor, Lands and Tenements may be *granted* by Copy, and whatever concerneth Lands or Tenements, as Underwoods, Tithes, *&c.* But Things that lie not in Tenure are not grantable by Copy; as Rents, Common in Groſs, an Advowſon in Groſs, Stewardſhips; for theſe cannot be held by any Manner of Service. A Common or Advowſon appendent may paſs by Copy, and ſo may a Fair appendent to a Manor, by Reaſon of the principal Thing to which they are appendent.

Now in paſſing a Copyhold, there is the *Grantor*, the *Grantee*, and the *Grant* itſelf to be conſidered.

The Grant by the Lord to his Wife immediately is void. 2 Wilſon 254. [h] 4 Rep. 26.

The *Grantor* is ſometimes the *Lord* himſelf, ſometimes a *Copyholder*. The *Lord* when he is abſolute Owner, as when the Lands come to him by Purchaſe, Forfeiture, Eſcheat. His Grant is called a *voluntary* Grant; and the Grant by the Lord himſelf may be at any Place [h] out of the Manor. The *Copyholder* grants by *Surrender*, as ſhall be ſhewed by and by. So that the Lord is only an Inſtrument of the Conveyance upon a Surrender, not a Conveyor, as in a voluntary Grant.

[i] Coke's Compl. Cop. ſ. 35.

[k] 4 Rep. 29.

[a] 9 Rep. 76.

[b] 1 Lev. 135. 2 Roll. Abr. 415, 416. See p. 13. ante.

The *Grantees* are thoſe that are capable of a Grant by Copy, and to whom the Grant is made. [i] All ſuch may be Grantees of a Copyhold Eſtate, as are capable of a Grant by Common Law. The Lord himſelf may take a Copyhold to his own Uſe by a Surrender generally into the Hands of the Lord, or to the Uſe of the Lord. A Feme Covert may receive a Copyhold Eſtate from her Huſband, becauſe ſhe cometh in by the Admittance of the Lord [k]. And all theſe Grantees may be admitted by Attorney, if the Lord conſents [a]. If the Grantee is not born, or not capable of taking, at the Time of the Surrender, yet if born and capable at the Time of Admittance, that is ſufficient [b]. But ſuch a Grant by the Common Law is void.

The *Grant* of Copyhold Eſtates regularly paſſeth by Surrender and Admittance. And if the Surrender is out of Court, there muſt be a Preſentment. Therefore three Things are to be conſidered, the *Surrender*, the *Preſentment*, and the *Admittance*.

Lit. § 74. 2 Black. Com. 365, 368. [c] See ch. 3. poſt.

[d] Coke's Compl. Cop. §. 36, 39. 4 Rep. 25. 1 Inſt. 58. b. 59. a. 60. a.

[e] 2 Wms. 258, 261. 2 Atk. 37.

* Pr. Ch. 475. 2 Vezey 164, 582. 1 Vez. 64, 228. 1 Atk. 385.

1. A *Surrender* (*Surſum-Redditio*) is the Yielding up of the Land by the Tenant to the Lord according to the Cuſtom of the Manor, to the Uſe of him that is to have the Eſtate. It is different from a Surrender [c] at Common Law. *Surrender* is a Word ſo neceſſary, that no Words can ſupply its Place. Neither can a Copyholder transfer his Intereſt to a Stranger, otherwiſe than by Surrender. So that if one would [d] *exchange* a Copyhold, with another, both muſt ſurrender to each other's Uſe, and the Lord admit accordingly. If one would *deviſe* a Copyhold he cannot do it by his laſt Will; but he muſt ſurrender to the Uſe of his laſt Will and Teſtament, and in his Will declare his Intent; and ſuch Will need not be atteſted according to the [e] Statute. * But the Chancery will ſupply the Defect or Want of ſuch a Surrender in the Behalf of a Wife or younger Child unprovided for, (not of a Baſtard, nor of a Brother,) againſt an Heir at Law; and alſo in favour of Grandchildren;

3 Atk. 583. Ca. Temp. Talb. 35, 78. 1 Eq. Ab. Tit. Copyhold. 1 Wms. 61. 2 Wms. 490. 3 Wms. 283.

and for the Relief of Creditors, where a Copyhold Eſtate is charged with the Payment of Debts. If I am ouſted of my Copyhold by another, a *Releaſe* to him is void, if he is not admitted; otherwiſe it is good, if admitted. [f] A Copyholder may ſurrender to the Uſe of another, reſerving Rent, with a Condition of Re-entry for Non-payment, and upon Non-payment enter.

It is the general Cuſtom of the Kingdom, that every Copyholder may ſurrender [g] in Court; and he need not alledge any particular Cuſtom for it. And ſo without Cuſtom he may ſurrender *out* of Court to the Lord himſelf. But if he ſurrender out of Court into the Hands of the Lord by the Hands of Cuſtomary Tenants, or any other, this muſt be by Cuſtom, and muſt be particularly pleaded. He may ſurrender alſo to the Steward of the [h] *Manor* in any Place without Cuſtom, not to the Steward of the *Court* without Cuſtom, his Buſineſs being only to keep the *Court:* But this Diſtinction ſeems to be laid aſide. A Tenant out of Court cannot take a Surrender of a Feme-Covert, unleſs by ſpecial Cuſtom; becauſe ſhe is to be ſecretly examined by the Steward, whether ſhe doth it willingly, or without Force of her Huſband? [i] A Copyholder being a Jointenant may ſurrender out of Court his Part, according to the Cuſtom, to the Uſe of his Will; and if he dies, and this is preſented at the next Court, his Deviſee ſhall be admitted; for by the Surrender the Jointenancy was ſevered.

All Surrenders may be made by [k] *Attorney*; yet the Lord may refuſe to *admit* by Attorney him to whoſe Uſe a Surrender is made; becauſe he ought to do Fealty. The Lord or the Steward of the Manor [l] may appoint a ſpecial Steward or Deputy to go to a Priſon, or to a ſick Perſon, and take a Surrender.

In ſome Manors, a Copyholder ſurrenders his Copyhold by holding a little [m] Rod in his Hand; which he delivereth to the Steward to deliver it to the Party to whoſe Uſe the Surrender is made in the Name of Seiſin; and theſe are call'd Tenants by the *Verge* (*à Virgâ*) taking their Name from that Ceremony of the *Rod*. And in ſome Manors a *Straw* is uſed, in ſome a *Glove*.

Tho' there is a Surrender, yet the Grantor [a] continues Tenant till the *Admittance* of another. But he that has ſurrender'd cannot paſs away the Land to any other, or make it ſubject to any other Incumbrance than it was ſubject to at the Time of the Surrender. And if he ſurrenders afterwards to the Uſe of another, the Surrender is void; * and a ſubſequent Admittance cannot make that good which was void from the Beginning. And tho' the Surrender is made out of Court, the Grantor cannot diſpoſe of the Lands otherwiſe, or countermand his Surrender made upon valuable Conſideration. Perhaps a Copyholder may revoke a Surrender made out of Court before Preſentment, if the Conſideration is only natural Love and Affection.

A Surrender to be in Force at a Day to come is void, as well as Livery and Seiſin to take Effect *in futuro*.

If a Copyholder will ſurrender to the Uſe of the Lord, no Admittance is neceſſary; and if the Lord makes a voluntary Grant of a Copyhold, no Surrender is requiſite. A Surrender of Copyhold Lands, and a Conveyance of Freehold Lands ought to have the ſame Conſtruction [b].

[f] 4 Rep 21.

[g] 1 Inſt. 59 a. & b. 2 Vez. 302. 9 Rep. 75. 1 Rol. Abr. 500. Contra, 1 Cro 443.

[h] 4 Rep. 30. 1 Leon. 227. 2 Cro 526, 527. Kitch. 165. 1 Ld Ray. 76.

[i] 1 Inſt. 59. b. 2 Cro. 100.

[k] 9 Rep. 76, 77. 1 Roll. Abr. 500, 501. Mitchel *v.* Neal in Chan. 8 Nov. 1755.

[l] 1 Ld. Ray. 658.

[m] Lit. 78. Coke's Compl. Cop. ſect. 39.

[a] Coke's Compl. Cop. § 39.

[b] 2 Ld Ray. 1145. 2 Black. Com. 369.

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* *Quod ab initio non valuit, tractu temporis non poteſt convaleſcere.* 2 Rep. 55. 8 Rep. 135. 10 Rep. 62.

2. The *Preſentment* is an Information in Court to acquaint the Lord, or his Steward, with the Surrender out of Court: And this Surrender is not effectual till preſented in Court. [c] By the general Cuſtom of Manors, the Preſentment is to be made at the next Court immediately after the Surrender, or elſe the Surrender is void. But by ſpecial Cuſtom, it may be at the ſecond or third Court. And this Surrender is to be made in Court by the ſame Perſons that took the Surrender out of Court, in all Points material, according to the Tenor of the Surrender. And therefore if the Surrender is [d] conditional, and the Preſentment abſolute, all is void. If the [e] Steward omitteth the Condition in his Entry on the Roll, upon Proof in Court, the Roll may be amended. [f] If one ſurrenders out of Court, and dies before Preſentment, if Preſentment is made after his Death it is good. So if he to whoſe Uſe the Surrender is made, dieth before Preſentment, yet upon Preſentment made after his Death, his Heirs ſhall be admitted. The ſame Law is, if thoſe into whoſe Hands the Surrender was made, die before Preſentment, upon Proof in Court, that ſuch a Surrender was made, the Lord ſhall be compelled to admit accordingly. And if they into whoſe Hands the Surrender was made refuſe to preſent, upon a Petition exhibited in the Lord's Court, the Party grieved ſhall have Remedy. And if the Lord will not do him Right, he may ſue the Lord and them that took the Surrender in *Chancery* for Relief.

[c] Coke's Compl. Cop. § 40, 41.

[d] Idem. §. 40, 41. 4 Rep. 28, 29. 1 Inſt. 59. b.

[e] Coke's Compl. Cop. § 40. 4 Rep. 25.

[f] 4 Rep. 29. 1 Inſt. 52. b. 62. a. Coke's Compl. Cop. § 40.

3. An *Admittance* is the giving Poſſeſſion of a Copyhold Eſtate, and is like Induction to a Benefice. A Court of Equity will force a Lord to admit a Copyholder, or if the Lord or Steward refuſe to admit a Surrendree, he may enter [g]. Admittances are Three-fold. Upon *voluntary Grants*; upon *Surrenders*; upon *Deſcents*. 1. An *Admittance* upon a [a] *voluntary* Grant is made by the Lord, where the Lord is Proprietor and Owner, and yet an Inſtrument; for here tho' it is in his Power to keep the Land in his own Hands, yet if he does diſpoſe of it, he is bound to grant the uſual Eſtate, and reſerve the uſual Rent, and payable as before; the Copyholder that comes in by the voluntary Grant not being ſubject to the [b] Incumbrances of the Lord before the Grant. 2. An *Admittance* upon *Surrender* is where the Lord is not Proprietor; but only a neceſſary [c] Inſtrument of Conveyance; the Party claiming his Eſtate under him that made the Surrender. But till the Admiſſion, the Tenant hath no Eſtate; and therefore cannot ſurrender it again to any Stranger before Admittance. Yet any Act implying the Conſent of the Lord to the Surrender after Notice of it, as accepting the Rent out Court, is an Admittance in Law before any Preſentment; for the Lord has now ſatisfied his Duties. The Admiſſion of Tenant for Life or Years is an Admiſſion of him who has the Remainder, but not ſo as to prejudice the Lord of his Fine where due by ſpecial Cuſtom [d]. A Copyhold Eſtate cannot be *ſurrendered* by Attorney without Deed; but one may be *admitted* to it by Attorney without Deed. For there is a Difference betwixt paſſing an Eſtate by an Attorney, and the Receiving of an Eſtate by him. 3. An *Admittance* upon [e] *Deſcent* is where an Heir is Tenant by Copy immediately upon the Death of his Anceſtor, eſpecially as to Strangers. The Lord is here a mere Inſtrument; for the Heir may enter upon the Land, take the Profits, bring Actions of Treſpaſs, and ſurrender to whoſe Uſe he pleaſeth before Admittance; tho' he cannot be ſworn of the Homage or Jury before Admittance, or maintain a Plaint in the Nature of an Aſſiſe in the Lord's Court, before he is complete Tenant. If the Heir dies, his Heir may enter, take

the

2 Black. Com. 370.

[g] Yelv. 16. Hob. 181.

[a] Coke's Compl. Cop. ſ. 41.

[b] 8 Rep. 63.

[c] 4 Rep. 22, 23. 1 Inſt. 59 b. Coke's Compl. Cop. ſ. 41. 1 Roll. Abr. 502, 505.

[d] 1 Mod. 102, 120. 3 Lev. 308. 1 Cro. 504.

[e] 4 Rep. 22, 23. 27. Coke's Compl. Cop. ſ. 41. 2 Cro. 36.

the Profits, *&c.* And Admittance is not neceſſary to ſtrengthen the Heir's Title, but to give the Lord his Fine. But yet if the Heir is of full Age, and will not come in to be admitted, and take up his Copyhold in Court, if the Death of the Anceſtor is preſented, and Proclamations made for him to that Purpoſe, he may forfeit his Eſtate as beforementioned, or incur a Penalty, as the Cuſtom of the Court directs.

[f] She who hath a Widow's Eſtate, by the Cuſtom of the Manor, upon the Death of her Huſband Copyholder for Life, hath the Eſtate immediately veſted in her; for by the Death of her Huſband, the Law caſts the Eſtate upon the Wife before *Admittance*. Her Eſtate is only a Branch of the Eſtate of her Huſband, and no Fine is due from her to the Lord. [g] But her Huſband muſt *die ſeiſed*; not if in his Life-time after Marriage he ſurrenders, or for valuable Conſideration agrees to ſurrender, his Eſtate into the Hands of the Lord to the Uſe of another, and then dies.

The Lord himſelf may admit [h] out of Court and out of the Manor; but ſo cannot the Steward, unleſs at a Court holden out of the Manor by ſpecial Cuſtom.

A Copyholder cannot be admitted by Attorney without Leave of the Lord, becauſe he muſt do Fealty in Perſon, as aforeſaid.

4. Of *Fines* upon Copyholds.

A *Fine* [i] is a ſum of Money paid to the Lord of the Manor for an Admittance into any Lands or Tenements holden of him. By the [k] general Cuſtom of Manors, Copyholders are to pay Fines after Admittance; for Admittance is the Cauſe of the Fine; tho' by ſpecial Cuſtom, they are to pay Fines upon *Licences* granted to them to demiſe by Indenture. Fines may be due by [l] Change of the *Lord*, or by Change of the *Tenant*. Of the *Lord* by *Death* only, and according to Cuſtom. If it were by Change of the Lord upon *Alienation*, the Copyholder might be oppreſſed by a Multitude of Fines by the Lord's own Act. Of the *Tenant*, either by the Act of *God*, as Death, or the Act of the *Party*. Theſe Fines are due upon voluntary Grants, Surrenders, and Deſcents. [See 9 *Geo.* I. *ch.* 29. for enabling Lords to recover their Fines, when Copyholds deſcend to Infants or *Femes Covert*.]

Fines taken of Copyholders are either *certain* by Cuſtom, or *uncertain*. But tho' the Fine is *uncertain*, yet it muſt be *reaſonable*, perhaps a Year's Value, or a Year and an Half [a], and that Reaſonableneſs ſhall be determined by the Judges. And tho' it is adjudged afterwards to be a reaſonable Fine, Conteſting it is no Forfeiture; becauſe it was Matter of Controverſy, whether it was reaſonable or not? If the Fine is unreaſonable, the Copyholder is not bound to pay it.

If a Copyholder in Fee ſurrenders to the Uſe of one for Life, the Remainder to another for Life, the Remainder to another in Fee, there is but [b] one Fine due for the particular Eſtate, and the Remainders are but one Eſtate: Yet there may be a Cuſtom to the contrary.

If a Copyhold is granted for a Term of Years, the Executor of the Termor is obliged to be admitted: and the Lord is intitled to a Fine, upon ſuch Admittance.

A Copyholder ſurrenders to the Uſe of his Will, and by his Will orders and directs two Perſons to ſell, and to apply the Money ariſing thereby, for the Purpoſes in the Will; they may ſell without being admitted, and the Lord ſhall admit the Vendee, and ſhall have but one Fine.

The Lord may have an Action of Debt for his Fine. But if the Fine was [c] uncertain, the Copyholder muſt have Notice, and a reaſonable

[f] Hob. 181. 1 Roll. Abr. 502.

[g] 1 Salk. 185. Hinton v. Hinton, in Chan. 14 July 1755.

[h] 1 Inſt. 61. b. 4 Rep 26, 27. 1 Roll. Abr. 505, 527. 1 Ld. Ray. 76. Kitch. 165, 166. a.

See B. 4. ch. 1. §. 17 poſt.

[i] See B 4. ch. 1. §. 16, 17. poſt. 2 Black. Com. 98.

[k] 4 Rep. 27, 28. Coke's Compl. Cop. § 56.

[l] 1 Inſt. 59. b. 60. a. 1 Str. 654.

[a] 3 Cro. 196. 2 Str. 1042.

[b] 1 Roll. Abr. 505.

1 Burr. 218.

2 Wilſon. 400.

[c] 13 Rep. 1. 4 Rep. 27.

ble Time to pay it, if the Lord limits no Time. But a Fine certain ought to be paid preſently.

5. Of Copyhold *Cuſtoms.*

A Copyhold [d] *Cuſtom* is a Law not written, eſtabliſhed by Uſe, and practiſed Time out of Mind within a Manor. [e] Cuſtom is the Life and Soul of Copyhold Eſtates; for if Copyholders break their Cuſtom, they are ſubject to the Lord's Will. This Cuſtom muſt be [f] Time out of Mind; for a Copyhold cannot begin at this Day. Where there is no Cuſtom to guide Copyhold Eſtates, they ſhall be directed by the Rules of the Common Law.

[d] Coke's Comp. Cop. ſ. 33.

[e] 4 Rep. 21.

[f] 1 Inſt. 58. b. Coke's Compl Cop. ſ. 33. See ch. 3. ſ. 4. poſt.

[g] It is impoſſible to ſet down all the Cuſtoms of Manors. But they muſt be, 1. *Reaſonable*; and therefore a Cuſtom that no Tenant of the Manor ſhall put in his Cattle into his Common after the Corn ſevered, till the Lord hath put in his Cattle, is a void Cuſtom. For perhaps the Lord may never put in his Cattle; and then the Tenants ſhall loſe their Profits of it. 2. According to *Common Right*; And therefore if the Lord will preſcribe to have of every Copyholder a Sum of Money for keeping Courts, this is void; for he ought to do it *gratis* for the ſake of Juſtice. But to have a Fee for an extraordinary Court for the Benefit of ſome particular Tenant (called a *Purchaſe* Court) is according to Juſtice and common Right. 3. Upon *Good Conſideration*; and therefore if the Lord preſcribes to have a Penny of every one who paſſeth over a Bridge within his Manor, which is repaired by him, this is a Preſcription upon good Conſideration. But a Preſcription to have a Penny for paſſing thro' the King's Highway in that Manor is void. 4. They ought to be *compulſory*, not left to the Liberty of the Tenant to obſerve or not obſerve them. 5. Cuſtoms ought to be *certain*; for an uncertain Thing cannot be continued Time out of Mind. 6. They ought to be *beneficial* to the Lord or Tenant.

[g] Coke's Compl. Cop. ſ. 33. Kitch. 202, 203, &c. 206, &c.

[h] 2 Wilſon. 299.

6. A Copyhold Eſtate is [a] *extinguiſhed*, whenever it becomes not demiſable by Copy. 1. By *Act* of the *Lord*; as if a Copyhold eſcheateth, and the Lord granteth away any Eſtate therein by Deed. This is an Extinguiſhment, becauſe once not demiſable. But if he keepeth the Copyhold in his own Hands, this does not deſtroy the Copyhold. 2. By Act of *Law*; as if a Copyhold eſcheated be extended upon a Statute or Recognizance acknowledged by the Lord; or if the Wife of the Lord hath this Land aſſigned to her for her Dower. 3. By the Act of the *Copyholder*; as if he accepteth a Leaſe for Years at the Common Law from the Lord of the Copyhold. Thus a Copyhold Eſtate may be *extinguiſhed*.

See p. 7. & 8. ante.

[a] Coke's Comp. Com. ſ. 62.

The *Statutes* which do relate, or do not relate to Copyhold Eſtates, are taken Notice of under proper Heads; as under Title *Health*, *Eſtates-Tail*, *Jointures*, *Jointenancy*, *Fines*, *Covenants to ſtand ſeiſed to Uſes*, *Leaſes*, *Recognizances*, *Bankrupts*, *Forgery*, *Cottages*, *Limitation of Actions*, *Jury*, *Execution*, &c. But in general, it is to be obſerved, [b] That when a *Statute* or *Act of Parliament* altereth the Service, Tenure, or Intereſt of the Land, or other Thing in Prejudice of the Lord, or of the Cuſtom of the Manor, or in Prejudice of the Tenant, the *general* Words of the Statute extend not to a Copyhold Eſtate: But when generally made for the Good of the Commonwealth, and no prejudice may accrue by Reaſon of the Alteration of any Intereſt, Service, Tenure or Cuſtom of the Manor, there uſually Copyhold Eſtates are within the general Purview of ſuch Statute.

[b] 3 Rep. 8. Coke's Compl. Com. ſ. 53.

XI. [c] Eſtates in *Antient Demeſne* are certain Manors which were Antient Demeſnes of the Crown, and in Poſſeſſion of *Edward* the *Confeſſor*, or *William* the Conqueror, and ſo appear in *Doomſday* Book in the *Exchequer*. Lands in Poſſeſſion of a Subject are called *Demeſnes*, in a different Senſe from the Demeſne Lands of the Crown. *Demeſnes* or *Domains* in the Hands of a Subject are derived *à Domo*, becauſe they are Lands in his Poſſeſſion for Maintenance of his *Houſhold*. But the *Demeſnes* or *Domains* of the Crown ſignify Lands held originally of the King, who is abſolute Lord, having proper *Dominion*; and not by any feudal Tenure of a ſuperior Lord, as of Fee. Eſtates or Lands held in *Socage* of theſe Manors by ſuch Service as is required, according to the Cuſtom of the Manor, are alſo called *Antient Demeſne*.

Of Eſtates in Antient Demeſne.
1 Black.Com. 286.
2 Black. Com. 99.
[c] F. N. B. 14. 45,&c. 22, 23.
Pref. to the 3 Rep.
5 Rep. 105.
9 Rep. 31.
1 Inſt. 94. a.
2 Inſt. 542, 543.
4 Inſt. 269, 270.
1 Rol. Abr. 324. &c.

During the Time that Lands in Antient Demeſne are in the Hands of the King, they are *Frank-fee*, or free from Service. But if the King grants them over to hold of the Manor again, it is *Tenure* in Antient Demeſne.

The Tenants hold by the *Verge*, and have no other Evidences of their Eſtates but Copy of Court-Roll; yet they are ſaid to have Freehold.

Regularly all general Statutes extend to Antient Demeſne. But the Lord in Antient Demeſne and his Tenants are *exempted* and diſcharged from Taxes by Parliament, unleſs ſpecially named; from Toll in Fairs and Markets, for all Things concerning Huſbandry and Suſtenance; from Expences to Knights of the Shire; the Tenants are not to be ſued for their Lands out of the Court of that Manor [a], and ſhall not be put upon Juries out of Antient Demeſne, nor appear at any other Court; becauſe by their Tenure they are intended to apply themſelves to the Manurance and Huſbandry of the King's Demeſnes; and to reap the Corn, *&c.* for furniſhing his Houſhold with neceſſary Proviſions. And therefore for thoſe Lands ſo holden, they have this Privilege at this Day; tho' the original Cauſe thereof is ceaſed, and their Services changed into Money. But for buying and ſelling of Wares, that riſe [b] not upon the Manurance and Huſbandry of thoſe Lands, or for other Lands, held by the Common Law, they ſhall not have this Privilege.

4 Inſt. 269.
[a] See B 4. ch. 1. ſ. 18. poſt.
2 Wilſon, 17.
[b] 2 Inſt. 221.
F. N. B. 228.
1 Cro. 227.
1 Roll. Abr. 321.
See of Fairs and Markets, ch. 2. poſt.

Lands in Antient Demeſne are extendible upon a Statute-Merchant, Staple or *Elegit* [c].

[c] 2 Inſt. 397.
4 Inſt. 270.

Now follow Eſtates which may be either *Inheritances*, *Freeholds*, or *leſs* than Freeholds.

XII. An [d] *Eſtate upon Condition* is an Eſtate granted in Fee-ſimple, Fee-tail, for Life or Years, with a Quality annexed by him that hath Eſtate, Intereſt or Right to the ſame, whereby the Eſtate granted may be either defeated, enlarged, or created, upon an uncertain Event.

Of Eſtates upon Condition.
2 Black. Com. 152.
[d] 1 Inſt 201. a.
Lit. 325, 326.

There are Eſtates upon Condition in *Deed*, and upon Condition in *Law*.

1. A Condition in *Deed* is expreſſed by the Party in legal Terms. And here if a Feoffment is upon Condition, That one pay ſo much Rent, or *provided* or *ſo that* he pays ſo much Rent, it is not [e] neceſſary to add a Clauſe, *That upon Nonpayment of the Rent, it ſhall be lawful for the Feoffor*

[e] Lit. 330, 331.
1 Inſt. 205. a.

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[*] *Expreſſio eorum quæ tacite inſunt, nihil operatur.* 1 Inſt. 191. a. 205. a. Rep. 73. 8 Rep. 56, 145.

Quæ dubitationis cauſâ tollendæ inſeruntur, communem legem non lædunt. 1 Inſt. 205. a.

and his Heirs to enter, (tho' it is commonly done) becauſe the Feoffment is upon that Condition. But theſe Words in a Deed, *(viz.) If it happen that the Rent be behind*, &c. give no Re-entry, if a Clauſe of Re-entry is not added. A Conveyance in Fee upon Condition not to [f] *Alien*, is void: For it is abſurd, that he that hath no Poſſibility to have the Land again, ſhould reſtrain one that hath the Fee-ſimple, of Power to diſpoſe of it. So it is if a Man is poſſeſſed of a Leaſe for Years, a Horſe, or any other Chattel real or perſonal, and gives or ſells his whole Property therein upon ſuch Condition; becauſe it is againſt Trade and Traffick. But one may give an Eſtate in Fee, upon Condition that he ſhall not alien another Eſtate, or that he ſhall not alien the Eſtate to a [g] particular Perſon, for he is not thereby reſtrained of *all* his Power to alien. And in this Caſe, if the Feoffee enfeoffs another, to the Intent that he ſhould enfeoff or alien to that particular Perſon, he hath broken the Condition. And obſerve, that whatever is prohibited by Act of Parliament, may be prohibited by Condition; [h] and yet a general Power given by Act of Parliament may be reſtrained by Condition.

[f] Lit. 360. 1 Inſt. 222. b. 223. a.

[g] Lit. 361. 1 Inſt. 223. a. & b.

[h] 1 Inſt. 223. a. 224. a. 6 Rep. 41, 42, 43, See of Conditions, ch. 3. poſt.

A [a] *Mortgage* (from *Mort*, dead, and *Gage* a Pledge) is a Pawn of Land, *&c.* for Money borrowed, upon Condition to be the Creditor's, if the Money is not repaid on the Day agreed. He that mortgages or pawns, is called the *Mortgager*; and he to whom the Mortgage or Pawn is made is called the *Mortgagee*. It is uſually made by a Leaſe for a long Term of Years, or by Aſſignment of a ſubſiſting Leaſe, or in Fee, by Leaſe and Releaſe, and the Creditor holding the Land upon this Agreement, is in the mean Time called *Tenant* in *Mortgage*; and holdeth the Eſtate upon that Condition in Deed. But 'till Failure is made of Payment, the Mortgager holds the Lands; and tho' Failure is made and the Mortgagee doth enter into the Lands, yet the Mortgager hath an *Equity* of *Redemption* in the Court of *Chancery*; and he may call the Mortgagee to an Account for the Profits. And a Mortgagee tho' in Poſſeſſion ſhall not preſent to a Living which becomes void, unleſs by expreſs Agreement in the Mortgage Deed, or that the Advowſon is the only Thing in Mortgage [b].

[a] Lit. 332. 1 Inſt. 205. a. Terms of the Law, verb. Mortgage. 2 Black. Com. 157. 4 Black. Com. 435. 2 Burr. 969 to 980.

[b] Prec. Ch. 71. Com. 343. 2 Wms 404.

And a Feoffment in Fee, or a Gift in Tail, or a Leaſe for Life or Years, may be made upon Condition in Deed, That if the [c] Feoffor, or the Grantor, or Leſſor, or his Heirs or Executors, pay to the Feoffee, Grantee or Leſſee, ſuch Sum of Money at a certain Day, then the Feoffor, Grantor or Leſſor, his Heirs, or Executors, may re-enter.

[c] Lit. 332, 333.

In the former Caſe, the Mortgager keeps the Poſſeſſion till Failure; but here the Mortgagee or Grantee has the Poſſeſſion preſently and till Payment.

† It is allowed in Courts of *Equity* that where Lands are mortgaged thrice, the [d] third Mortgagee may buy in the firſt Incumbrance, to protect his own Mortgage: And he ſhall hold the Land againſt the ſecond

3 Black. Com. 435.

[d] 2 Ventr. 338.

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[f] *Regulariter non valet pactum de re mea non alienanda.* 1 Inſt. 233. a. *Rerum ſuarum quilibet eſt moderator et arbiter.* Ibid.

[g] *Quando aliquid prohibetur fieri ex directo, prohibetur et per obliquum.* 1 Inſt. 223. b. 3 Inſt. 158.

† Caſes upon Mortgages are ſo very numerous that it would be foreign to the purpoſe of this Work to inſert them all here, and therefore the Student is referred to the ſeveral eminent Reporters of Caſes in Equity, as *Peer Wms.* Mr. *Curſitor Baron Atkyns*, *Vezey*, &c. &c. Where he will find much Learning touching Mortgages, Redemption, Foreclosure, &c.

Mortgagee, unleſs he is ſatisfied the Money he paid the firſt Mortgagee, and alſo his own which he lent upon the laſt Mortgage. But when [e] Part only of the Lands are mortgaged to the firſt, and the whole to the ſecond, and after to the third, if the third Mortgagee buyeth *in* the firſt Title, it ſhall protect only that Part which is firſt in Mortgage: So a Purchaſer or Mortgagee coming *in* upon a valuable Conſideration without *Notice*, and then purchaſing *in* a precedent Incumbrance ſhall protect his Eſtate againſt any Perſon that hath a Mortgage ſubſequent to the firſt, tho' before the laſt Mortgage; and tho' he *purchaſed* in *the Incumbrance* after Notice of a ſecond Mortgage.

[e] 2 Ventr. 339.

Mortgages are not redeemable in *Chancery* after [f] twenty Years, no Demand being made, or Intereſt paid, unleſs there be an Excuſe by Reaſon of Impriſonment, Infancy, Coverture, or being beyond Sea. [See 21 *Ja.* 1. *ch.* 16.]

[f] 2 Ventr. 340. 3 Wms. 287.

[g] If a Feoffment on Condition is made, that if the Feoffor pays ſuch a Sum at a certain Day, he ſhall re-enter; yet if the *Heir* pays or tenders the Sum at the Day, he may enter, tho' the Words are, if the Feoffer pays, not mentioning *Heirs*; becauſe the *Heir* has an Intereſt in Right of the Condition. So likewiſe the Executors or Adminiſtrators of the Mortgager; or a Guardian in Socage may tender the Money. And if the Heir is an Idiot, any one may do it out of Charity. But in other Caſes, the Feoffee is not bound to accept a Tender by a Stranger.

[g] Lit. 334. 337. 1 Inſt. 205. b. 206. a.

Upon a [a] Mortgage in Fee, if the Feoffee maketh his Executors, and dieth before the Money is paid, the Redemption Money ſhall be paid to the Executor, tho' he is not named, and not to the Heir. But the Words of the Condition may be ſuch as the Payment ſhall be made to the Heir, as when particularly named, and then the Money cannot be paid to the Executors. And if the Words of the Condition be to pay the Money to the Feoffee, his Heirs [b] *or* Executors, then the Feoffor hath Election to pay it to either of them. If the Feoffee is to pay to the Feoffor, his Heirs and *Aſſigns*, and before Payment, the Feoffor makes his Executors, and dieth, the Feoffee may pay the ſame either to the Heir or to the Executors; for the Executors are his Aſſigns in Law to this Intent, where the Feoffor has but a bare Condition, of which he cannot make any Aſſigns; and therefore the Law will find out Aſſigns for him. But if the Feoffor is to pay to the Feoffee, his Heirs or Aſſigns, and the Feoffee dieth before Payment, he muſt pay it to the Heir, for the Executors in this Caſe are no Aſſignees in Law. Here *Aſſigns* were only intended by the Condition to be Aſſignees of the Eſtate. But in *Chancery* it is a conſtant Rule, that Money to be paid on Mortgages, upon the Death of the Mortgagee in Fee, ſhall go to the [c] Executors.

[a] Lit. 339. 5 Rep 96, 97. 1 Inſt 209. b. 210. a.

[b] 2 Inſt. 209 b. 210. a.

[c] 2 Ventr. 348, 351.

The Court of *Chancery* cannot ſhorten the Time of Payment of the Money, that is given by expreſs Covenant and Agreement of the Parties, but may [d] lengthen it; and then upon Non-payment, the Practice is to *foreclоſe* the Equity of Redemption of the Mortgager, and to make the Eſtate abſolute in the Mortgagee.

[d] 2 Ventr. 365.

[See 27 *El. ch.* 4. Againſt fraudulent Conveyances.]

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[a] *Expreſſum facit ceſſare tacitum.* 1 Inſt. 210. a. 5 Rep. 97. 7 Rep. 40. 11 Rep. 24.
Deſignatio unius perſonæ eſt excluſio alterius. 1 Inſt. 210. a.

By the 4 & 5 W. M. ch. 16. *If any Perſon, for Money borrowed or other valuable Conſideration, ſhall ſuffer a Judgment, Statute, or Recognizance, and ſhall afterwards, for other Money borrowed, or other valuable Conſideration, become indebted to a ſecond Creditor, and for the ſecurity of ſuch ſecond Debt, ſhall mortgage Lands to the ſecond Creditor, or to any other Perſon in Truſt for him, and ſhall not give* Notice *in Writing of ſuch Judgment,* &c. *to the Mortgagee; before the Execution of the ſaid Mortgage; ſuch Mortgager ſhall have no Benefit in Equity of Redemption of the Lands mortgaged; unleſs ſuch Mortgager (upon Notice given by the Mortgagee in Writing under Hand and Seal, atteſted by two Witneſſes, of ſuch former Judgment,* &c.) *ſhall within ſix Months pay off and diſcharge the ſame, and cauſe the ſame to be vacated or diſcharged by Record.*

And if any Perſon, who ſhall once mortgage Lands for valuable Conſideration, ſhall[e] again *mortgage the ſame Lands, or any Part thereof, to any other Perſon, for valuable Conſideration, (the former Mortgage being in Force) and ſhall not diſcover in Writing to the ſecond or after Mortgagee the firſt Mortgage, ſuch Mortgager ſhall have no Relief or Equity of Redemption againſt the ſecond or after Mortgagee. But ſuch ſecond or after Mortgagees may redeem any former Mortgage.*

This Act ſhall not extend to bar any Widow of any Mortgager of her Dower, who did not legally join with her Huſband in ſuch Mortgage, or otherwiſe lawfully bar herſelf from her dower.

And by 4 & 5 W. & M. ch. 20. *No Judgment not doggetted and duly entered, ſhall affect any Lands or Tenements as to Purchaſers or Mortgagees.*

[See 2 & 3 *An. ch.* 4. 5 *An. ch.* 18. 6 *An. ch.* 35. and 8 *Geo.* 2. *ch.* 6. For regiſtring Deeds, &c. within the County of *York*; and 7 *An. ch.* 20. For *Middleſex.*]

By 7 Geo. 2. ch. 20. *Where an Action on any Bond for Payment of Money ſecured by Mortgage, or for Performance of the Covenants therein, or any Ejectment to recover Poſſeſſion of the mortgaged Premiſſes, is brought by a Mortgagee, and no Suit is then depending in Equity to foreclоſe or redeem, the Perſon intitled to the Redemption may pay to the Mortgagee, or if he refuſe to accept, may bring into Court Principal, Intereſt, and Coſts, to be computed by the proper Officer of the Court, and the Monies ſo paid or brought in ſhall be deemed a full Satisfaction of ſuch Mortgage; and the Court may by Rule compel the Mortgagee to re-convey the mortgaged Premiſſes, and deliver up the Title Deeds to ſuch Mortgager, or as he ſhall appoint.*

And on Bills of Foreclоſure the Court may before the Hearing, on the Defendants Application, and Admiſſion of the Plaintiffs Title make ſuch Order as if the Cauſe had been regularly at Hearing.

But this not to extend to Caſes where the Right to redeem is controverted, or the Money due not adjuſted, nor to prejudice ſubſequent Mortgagees.

a Lit. 378. 379. 1 Inſt. 201. a. 232. b. 233. a. 8 Rep. 44.

2. A Condition in a *Law* is that which the Law intendeth or implieth without expreſs Words in the Deed: As in a Grant of an Of-

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[e] *Vendens eandem rem duobus, falſarius eſt.* 1 Rep. 45.

[a] *Quod neceſſario intelligitur, non deeſt.* 4 Rep. 22.

Quod tacite intelligitur non deeſt. Ibid.

Quædam tacita habentur pro expreſſis. 7 Rep. 40.

Expreſſio eorum quæ tacite inſunt, nihil operatur. 5 Rep. 11. 8. Rep. 56.

fice for Life, the Eſtate is upon Condition implied in Law, that the Grantee ſhall do his Duty, or otherwiſe that the Grantor or his Heirs may ouſt him, and grant the Office to another. So in a [b] Leaſe for Life, it is implied, that if the Leſſee make a greater Eſtate, the Leſſor may enter.

[b] 1 Inſt. 215. a.

Of an Eſtate by Statute-Merchant, Staple and *Elegit.*

XIII. A Statute-*Merchant* is a Bond, or Obligation of Record, acknowledged before a Clerk of the Statutes-Merchant and Lord Mayor of the City of *London*, or two Merchants of the ſaid City aſſigned for that Purpoſe; or before the Mayors of other Cities, as *York*, *Briſtol*, *&c.* or the Bailiff of any Borough or Town; or other ſufficient Men, for that Purpoſe appointed, that have Power to make Execution of the ſaid Bond, ſealed with the Seal of the Debtor and the King; upon Condition, that, if the Obligor pays not the Debt at the Day, Execution may be awarded upon Body, Lands, and Goods, and that the Obligee may hold the Lands to him, his Heirs and Aſſigns, till the Debt is levied and paid. Now during this Time of being in Poſſeſſion of the Lands, the Obligee hath an Eſtate by Statute-Merchant, or is Tenant by Statute-Merchant; the Bond or Recognizance being called a *Statute*, becauſe it is made according to Form by Statute. [See the 11 *Ed.* 1. and the 13 *Ed.* 1. *ſt.* 3. *ch.* 1.] In which laſt Statute the whole Proceedings are directed, and the Force of the Obligation or Recognizance is ſet forth, and the Nature of its Execution upon Body, Lands, and Goods.

1 Black. Com. 160.
4 Black. Com. 419, 421.
2 Black. Com. 160.

See ch. 3. ſ. 15. poſt.

A Statute-*Staple* is a Bond of Record acknowledged before the Mayor of the Staple, in the Preſence of one or more Conſtables of the ſame Staple; by Virtue of which Statute-Staple the Creditor may forthwith have Execution of the Body, Lands, and Goods of the Debtor upon Non-payment. And then he hath an Eſtate in the Lands by Statute-Staple, or is Tenant by Statute-Staple till his Debt is paid. *Eſtape* is a *French* Word (antiently written *Eſtaple*) and ſignifies [a] Mart or Market. So that the *Staple* ſignifies amongſt us this or that City or Town where the Merchants are commanded to bring their Wool, Leather, Woolfells, Lead and Tin. And the Bond is called a *Statute*, becauſe it is founded on the Statute of the 27 *Ed.* 3. *ſt.* 2. which ſets forth the Manner of entering into it, and of its Execution. This Statute alſo ſpecifies the Places which are to be Staples (or Marts) for the Commodities aforeſaid, their Duties upon Exportation, and the Juriſdiction of the Staples according to *Law-Merchant*. [See 23 *H.* 8. *ch.* 6. and 8 *Geo.* 1. *ch.* 25.]

2 Black. Com. 160.
4 Black. Com. 421.

[a] 4 Inſt. 238.

See ch. 3. ſ. 15. & B. 4. ch. 2. ſ. 9. poſt.

An *Eſtate* by *Elegit* (ſo called from the Words in the Writ, (*viz. Elegit ſibi Liberari*, *&c*) is where a Man hath recovered Debt or Damages by Judgment againſt another, and within the Year hath had a judicial Writ, called an *Elegit*, to have Execution on all the Party's Goods (Oxen and Beaſts of the Plough excepted) and Half of the Party's Lands or Tenements, to be delivered by the Sheriff to him till his Debt and Damages are fully levied. During this Time he hath an Eſtate by *Elegit*, or is Tenant by *Elegit*.

2 Black. Com. 161.

See B. 4. ch. 4. ſ. 10. poſt.

Theſe three Eſtates, (*viz.*) By Statute-*Merchant*, Statute-*Staple*, and by *Elegit*, are uncertain Intereſts in Lands and Tenements, and are but [b] Chattels, not Freeholds, tho' the Tenants are ſaid to hold the Lands [c] *Ut Liberum Tenementum*, until the Debts are paid. As a Chattel, the Eſtate ſhall go to the Executors. For *Ut* is ſimilitudinary only, becauſe by the Statute theſe Tenants may have an Aſſize, as a Tenant of

[b] 1 Inſt. 42. a.

[c] 1 Inſt. 43. b. 290. a.
2 Inſt. 396.

a Freehold may have ; and in that Reſpect their Eſtates are *like* a Freehold. [See 13 *Ed.* 1. *ch.* 18. 32 *H.* 8. *ch.* 5.]

No Execution on any of theſe Statutes ſhall go againſt the Heir of the Defendant within Age, or if two Daughters are Heirs, and one of them is within Age.

Of an Eſtate in Lands deviſed to Executors.

d 1 Inſt. 236. a.

e 2 Wilſon. 402.

a Lit. 383. 1 Inſt. 236. a.

b See of Aſſets, ch. 6. poſt.

Office of Executor, ch. 6. p. 105.

1 Wms. 390. 2 Wms. 416, 550.

XIV. An *Eſtate* in *Lands deviſed* to *Executors* for Payment of Debts, or Legacies, is different from a *Power* to ſell them. [d] When the Land is deviſed to Executors to be ſold, there the Deviſe taketh away the Deſcent to the Heir, and veſteth the *Eſtate* in the Executors ; and they may enter and take the Profits, and make Sale according to the Deviſe. So when a Man deviſeth his Tenements to be ſold by his Executors, it is all one as if he had deviſed his Tenements to his Executors to be ſold ; becauſe he deviſeth the *Eſtate* in the Tenements, whereby he breaks the Deſcent to the Heir. [e] But where a Man deviſeth that his Executors ſhall ſell the Land, there the Lands in the mean Time deſcend to the Heir ; and until the Sale is made, the Heir may enter and take the Profits ; becauſe here the Executors have only a *Power*. And when the Executor has the [a] *Eſtate* veſted in him, and the mean Profits, he is bound to make Sale as ſoon as poſſible after the Death of the Teſtator ; becauſe the mean Profits taken before the Sale, ſhall not be *Aſſets* [b] to pay Debts ; and therefore the Executor muſt not be ſuffered to make Advantage of his own Negligence and Delay. But if one deviſeth that his Executor ſhall ſell his Land ; there he may ſell it at any Time, becauſe he hath but a bare *Power*, and no *Profit*. [But this Diſtinction does not ſeem to be now of any Force, for the Eſtate itſelf is now held to be Aſſets ; but ſuppoſing the Rents and Profits are not properly legal Aſſets in the Hands of the Executors, yet they are but Truſtees in Equity, and therefore are accountable to the Creditors for thoſe Rents and Profits, as well as for the Money ariſing from the Sale ; and after Payment of the Teſtator's Debts, the Surplus as well of the Rents accrued after the Teſtator's Death, as of the Purchaſe Money, is conſidered as real Eſtate, and the Executors are but Truſtees as to that, and accountable for it either to the reſiduary Deviſee, if there is one, or elſe to the Teſtator's Heir at Law.]

c 1 Inſt. 112. b. 113. a. 181. b.

d 1 Ld. Ray, 660.

2 Wms. 103. (628)

[c] If one deviſeth *Lands* to his Executors to be ſold, and maketh two Executors, and one dieth ; yet the Survivor may ſell the Land, becauſe as the *Eſtate*, ſo the *Truſt* ſhall ſurvive. But where the Executors have but a *Power* to ſell, they muſt all join in the Sale, and if one dies, the Survivors cannot ſell. [d] Where a Man does ſuch an Act as cannot be good by any other Means but by Virtue of his Authority, it ſhall be intended to be an Execution of his Authority ; but where a Man has both an Intereſt and an Authority, and does an Act without reciting his Authority, it ſhall be intended to be done by virtue of his Intereſt. So *Note* the Difference betwixt a Truſt coupled with an Intereſt and a bare Power. But if the Sale is to be made by the Executors or the Survivors or Survivor of them, or by ſuch as take upon them the Probate of the Will, thoſe Words will prevent ſuch Diſputes.

e 9 Rep. 75.

If Executors have a bare Authority accompanied with a Truſt, they cannot ſell by [e] Attorney ; but if they are Owners of the Land, they may ſell by Attorney.

By 21 H. 8. ch. 4. *Where Lands, Tenements, or other Hereditaments, are deviſed to be ſold by Executors, and one or more refuſes to prove the Will, yet the Reſidue that take upon them the Charge of the Will may ſell.*

This is conſtrued to [f] extend to Executors that have the *Eſtate*, as well as to Executors that have *Power* only. But in neither Caſe may the Sale be made to him that refuſed; becauſe he remains Executor notwithſtanding his Refuſal.

[f] 1 Inſt. 113. a.

We have hitherto ſpoken of *Sole* Tenants to an Eſtate; now follow Eſtates in *Coparcenary*, *Jointenancy*, and *Tenancy in Common.*

XV. An Eſtate in [g] *Coparcenary* is where two or more have equal Portion in the Inheritance of their Anceſtors.

Of Eſtates in Coparcenary.
2 Black. Com. 187.

Coparceners are of two Sorts, (*viz.*) Parceners according to the Courſe of the *Common Law*, and Parceners according to *Cuſtom.*

[g] Lit. 241, 242.
1 Inſt. 163. b. 164, &c.

1. *Parceners* by *Common Law* are, where a Man or Woman ſeized of Lands or Tenements in Fee-ſimple, or in Fee-tail, hath no Iſſue but Daughters; or dies without Iſſue, and leaves only Siſters or Aunts, or other Females of Kin in equal Degree; and the Tenements deſcend to ſuch Daughters, Siſters, Aunts, &c. and the Daughters, Siſters, Aunts, or other Females of Kin in equal Degree enter into the Lands; then theſe Women are called Parceners, or Coparceners, and are but one Heir to their Anceſtor, and have but one Freehold. But tho' they have but one Freehold, yet between themſelves they have in Judgment of Law [a] ſeveral Freeholds to many Purpoſes. For one of them may enfeoff the other of her Part; and the Coparcenary is not ſevered or divided in Law by the Death of any of them; for if one dies, her Part ſhall deſcend to her Iſſue, be it Son or Daughter. Men deſcending of Daughters may be Coparceners, as well as Women, and ſhall jointly plead, or be impleaded.

[a] 1 Inſt. 164. b. 165. a.

2. Parceners by [b] *Cuſtom* are where Lands in Fee-ſimple, or Fee-tail, of the Tenure of *Gavelkind*, deſcend to all the Sons by *Cuſtom.* Here the Deſcent is to Men, as it was to Women by the Common Law.

[b] Lit 265.

You ſee this Eſtate of Coparceners is applicable only to Inheritances.

They are called *Parceners* [c] becauſe they are compellable by Writ *de Partitione Facienda*, to make Partition, tho' they may make Partition by Conſent. This was by the Common Law: And by 8 & 9 *W. ch.* 31. an eaſier Method of proceeding upon this Writ is provided. But ſome Inheritances [d] cannot be *divided* amongſt Coparceners, as reaſonable Eſtovers [e] of *Houſe-bote, Haybote, &c.* appendent to the Freehold, a Piſcary uncertain, a Common *ſans Nombre*, a Mill, &c. for that would be a Prejudice to the Tenant of the Soil. But the eldeſt Coparcener in theſe Caſes ſhall have reaſonable Eſtovers, Piſcary, Common, &c. and the reſt ſhall have an Allowance in ſome other Part of the Inheritance; or in ſome Caſes one ſhall have it for one Year, the other for another; or in the Caſe of a Piſcary, one may have the firſt Draught of fiſh, the ſecond the ſecond Draught, &c. if the common Anceſtor left no other Inheritance to give any Thing in Allowance, or to make up the Owelty or Equality. An Advowſon is an *entire* Thing, and yet in effect the ſame may be divided betwixt Coparceners; for they may preſent by Turns. [See of the *Nobility B.* 1. *ch.* 4. *ante*, where an Earldom deſcends to Coparceners.]

[c] Lit 243.
1 Inſt. 164. b. 167. b. 175. a.

[d] 1 Inſt. 164. b. 165. a.

[e] See ch. 2. poſt.

1 Ld. Ray. 136.

And by 7 A. ch. 18. *After Partition to preſent by Turns, each ſhall be deemed ſeiſed ſeparately of his or her Part of the Advowſon, to preſent in Turn.*

One

[g] 2 Roll. Abr. 31.

One Coparcener may juſtify the [g] Detaining the Deeds concerning the Land in Coparcenary againſt the other for they belong to one as well as the other.

Show. Rep. 13, 30, 105. 3 Lev. 259. 1 Vern. 465.

Partners in *Trade* are thoſe (two or more) who agree to come in Share and Share alike to any Trade or Bargain. Part-*Owners* are thoſe who are concerned together in Ships. But Coparcenary in Eſtates of Inheritance belongs only to this Place.

Of Eſtates in Jointenancy. 2 Black. Com. 180.
[h] Lit. 277, 281, 282.
[a] 1 Inſt. 181. a 182. a.
[b] Lit. 288. 1 Inſt. 186. a.
[c] Lit. 289. 1 Inſt. 186. a. & b. 188. b. 189. a.

XVI. An Eſtate in [h] *Jointenancy* is where a Man is ſeiſed of Lands or Tenements, and makes a Feoffment to two or more, and their Heirs; or makes a Leaſe to them for Life; or where two or more have a joint Eſtate or Poſſeſſion of a Chattel Real or Perſonal, or a joint Intereſt in a Debt, Duty, Covenant, or Contract, and the Part of him that dieth goes not to the Executor, but the Whole to the Survivors or Survivor. An Exception is to be made of two [a] Joint Merchants; for the Benefit of the Stock and Debts, which they have as Partners, goes to the Executor of him that dies, and to the Survivor, according to their Shares, by the *Law Merchant* for Incouragement of Trade; tho' the Debts and Credits as againſt third Perſons ſurvive. [b] Every Jointenant is ſeiſed *per my & per tout*, *i. e.* ſeiſed by every Parcel, in every Parcel, and in the whole jointly with his Companion; but each of them hath a Right to his Share to ſeveral Purpoſes, [c] as to give, † leaſe out, forfeit. One alſo may let a Leaſe to his Companion, or make him his Bailiff.

They are called *Jointenants*, becauſe Lands or Tenements are conveyed to them *jointly* by one and the ſame Title; and becauſe they take by Purchaſe only; whereas an Eſtate in *Coparcenary* is always by *Deſcent*; and an Eſtate in *Common* is always by ſeveral Titles, or by *one* Title and ſeveral Rights.

[d] Lit. 280. 1 Inſt. 180. b.
[e] 1 Inſt. 181. b.

Jointenants muſt jointly implead, and be jointly impleaded by others; which Property is common to them as Coparceners. But Jointenants have a ſole and peculiar Quality to take by [d] Survivorſhip, which Coparceners have not, and this Survivorſhip is called *Jus Accreſcendi*. Two or more may have a naked Truſt, an [e] Authority or Power committed to them jointly, and yet it ſhall not ſurvive. But a Truſt, an Authority or Power coupled with an Eſtate or Intereſt may Survive, as hath been ſaid concerning an Eſtate in Lands deviſed to Executors. * Authorities created by the Party for *private* Cauſes do not ſurvive, if there are no particular Words to empower the Survivor. As if a Man makes a Letter of Attorney to two to do any Act, and one of them dies, the Survivor ſhall not do it. But Authorities created by *Law* for Execution of Juſtice may ſurvive, becauſe it is for the Good of the Commonwealth. As if a Sheriff upon a *Capias* directed to him makes a Warrant to four or three jointly or ſeverally to arreſt a Defendant, two of them may arreſt him. [And ſo it ſhould ſeem to be in a private Caſe where the Authority is joint and ſeveral.] There may be Jointenants tho' there is not [f] equal Benefit of Survivorſhip on both Sides. And if one Jointenant grants [g] a Rent, Common or Way, out of his Part, and dies, the Survivor ſhall have the whole Land diſcharged. But if one Jointenant makes a [h] Leaſe for Years, to begin preſently, or *in futuro* of the Land, or of the Herbage, and dies during the Term, or before it begins, it cannot be avoided by the Survivor; becauſe the Leſſee has an Intereſt in the Land by force of the Leaſe. And if one Jointenant makes a Leaſe for Years, [i] reſerving a Rent and dieth, the Survivor ſhall have the Reverſon; but he ſhall not have the Rent, becauſe he claimeth by the firſt Feoffor, which is Paramount the Rent. A [k] Deviſe of Land, whereof the Deviſor is jointly ſeiſed or poſſeſſed, is void; for the Title of the Survivor cometh, as from the the firſt Feoffor, preſently upon the Death, and the Will takes Effect after Death. If a Jointenant in Fee-ſimple is indebted to the [a] King and dieth, the Lands cannot be extended in the Hands of the Survivor; becauſe the Survivor claims not from his Companion, but from the Feoffor. Two Women Jointenants of a Leaſe for Years, and one taketh Huſband, and dieth [b] before the Huſband hath altered the Property, or hath aliened her Part, the Term ſhall ſurvive. But otherwiſe it is of perſonal Goods, becauſe theſe are preſently veſted in the Huſband by the Marriage. If a Jointenant doth not aliene his Part to bar the Survivorſhip, the Jointenants uſually enter into Covenant, not to take Advantage of each other by Survivorſhip.

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[b] *Duo eandem rem in ſolido poſſidere non poſſunt.* 1 Inſt. 368. a.
* *Jura publica ex privato decidi non debent.* 1 Inſt. 181. b.

† If there be two jointenants, and each of them makes a ſeveral Leaſe of the Whole, there ſeveral Moieties only ſhall paſs by each Leaſe. 1 *Wilſon*. 1. 2 *Stran.* 1180.

[f] 1 Inſt. 181. a. &. b.
[g] Lit. 286. 1 Inſt. 185. a.
[h] Lit. 289. 1 Inſt. 186. a. & b.
[i] 1 Inſt. 185. a.
[k] Lit 287. 1 Inſt. 185. a. & b.
[a] 1 Inſt. 185 a.
[b] 1 Inſt. 185. b.

By 31 H. 8. ch. 1. *Jointenants and Tenants in Common of any Inheritance, [or of Eſtates for Life, Lives or Years, by* 32 H. 8. ch. 32.] *are compellable to make Partition by Writ of Partition, as Coparceners are compellable to do at Common Law.*

And by 8 & 9 W 3. ch. 31. *An eaſier Method of proceeding on that Writ and of obtaining Partition of Lands in Coparcenary, Jointenancy and Tenancy in Common is provided.* But theſe Statutes do not concern Copyhold Lands.

By 4 Ann. ch. 16. *Actions of Account may be brought by one Jointenant or Tenant in Common, his Executors and Adminiſtrators, againſt the other, as Bailiff, for receiving more than his juſt Share, and againſt his Executors and Adminiſtrators. And the Auditors ſhall examine the Parties about the Matters in Queſtion upon Oath, and for their Trouble in auditing ſhall be allowed what the Court ſhall judge reaſonable, to be paid by the Party on whoſe Side the Balance ſhall be.*

By 7 Ann. ch. 18. *Coparceners, Jointenants and Tenants in Common, having made Partition to preſent by Turns, each ſhall be deemed ſeiſed in Law of his or her ſeparate Part of the Advowſon, to preſent accordingly, if it be an Eſtate of Inheritance.*

Of Eſtates in Common.

XVII. An Eſtate [c] in *Common* * may be by Purchaſe, Deſcent, or Preſcription, and is where two or more have Lands and Tenements in Fee-ſimple, Fee-tail, for Life or Years by ſeveral *Titles*, (or by one Title and ſeveral *Rights*) and none of them knoweth his own Part, but takes

2 Black. Com. 191, 399.
[c] Lit. 292 1 Inſt. 188. b. 189 a.

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[g] *Jus accreſcendi præfertur oneribus.* 1 Inſt. 185. a.

[h] *Alienatio rei præfertur juri accreſcendi.* Ibid.

[i] *Jus accreſendi præfertur ultimæ voluntati.* 1 Inſt. 185. b.

* In a Deed of Uſes theſe Words, "To the Uſe of all and every the Children of *J. G.* and their Heirs equally to be divided amongſt them" make a Tenancy in Common. 1 *Wilſon.* 341. Tenants in Common cannot make a join Leaſe of the Whole, for their Eſtates are ſeveral and diſtinct and there is no Privity between them. 2 *Wilſon.* 232.

the Profits in Common. As if there be two Jointenants, which claim by one and the ſame Title, and one Aliens his Part, now the Alienee and the other Jointenant are Tenants in Common, becauſe they claim by ſeveral *Titles*. So if Lands are given to two to have and to hold, the one [d] Moiety to the one and his Heirs, and the other Moiety to the other and his Heirs, they have an Eſtate in Common; [e] becauſe they have ſeveral Freeholds, and their Occupation is undivided. [f] So if a Man lets Lands to two Men for Term of their Lives, and to the longeſt Liver of them; and one grants all his Eſtate to another, then the other Tenant for Term of Life, and he to whom the Grant is made are Tenants in Common, during the Time that both Leſſees are alive; for here the Jointure is ſevered, and there can be no Survivorſhip; but the Leſſor ſhall enter into the Moiety, [*Qu.*] and the Survivor ſhall have no Advantage of theſe Words, (*viz.*) *to the longeſt liver of them*; becauſe, I ſay, the Jointure is ſevered, and theſe Words are no more than the Law would have implied without them. As there may be Eſtates in Common of Lands or Tenements, ſo there may be of [a] *Chattels real*, as Leaſes for Years. For if two Jointenants are of a Leaſe for twenty-one Years, and one of them letteth his Part for three Years, *&c.* the Jointure is ſevered; and they become Tenants in Common, and Survovorſhip † does not take Place, as in Jointenancy. [*Qu.*] For a Term for a ſmall Number of Years is as high an Intereſt as for many more Years. In the ſame Manner it is of *Chattels* [b] *perſonal*. As if two have jointly an Horſe, and one grants his Part to another; the Grantee, and he that did not grant, poſſeſs ſuch Chattel perſonal in Common; and if one dies, the other ſhall not have the Whole by Survivorſhip; but the Executor ſhall be Tenant in Common with the Survivor. Thus it is where there are *ſeveral Titles*.

As thoſe are Eſtates in Common where the Claim is by ſeveral *Titles*; ſo thoſe alſo are Eſtates in Common, that are claimed by one Title and ſeveral [c] *Rights*, as you may obſerve by the Definition of an Eſtate in Common. As where *Lands* in Fee veſt in two Biſhops or Parſons, and their Succeſſors, in Right of their Churches, and in their politick Capacities; theſe have an Eſtate in Common, and not in Jointenancy; becauſe Jointenants ought to have the Eſtate in one and the ſame Right and Capacity; whereas two Biſhops, or two Parſons, are ſeized of their Moieties by ſeveral Rights, (*viz.*) in the Right of their two Biſhopricks, or two Parſonages; and ſo in ſeveral Capacities. Thus it is if Lands are given to the King and a Subject, and their Heirs; or to a Layman and his Heirs, and a Parſon and his Succeſſors: But this does not hold in *Chattels real* or *perſonal*; for if a Leaſe for Years, or Goods, be granted to a Biſhop, and ſecular Man, they are Jointenants; becauſe Goods and Chattels cannot go in Succeſſion, and therefore the Biſhop cannot take them in his political Right or Capacity.

The eſſential Difference then betwixt Jointenants and Tenants in Common is, that Jointenants have the Lands by one joint Title and in one Right, and Tenants in Common by ſeveral Titles or by one Title and ſeveral Rights. And this is the Reaſon that Jointenants have one joint Freehold, and Tenants in Common ſeveral Freeholds.

[d] Lit. 298. 1 Inſt. 190. b.

[e] 1 Inſt. 190. b.

[f] Lit. 301. 1 Inſt. 191. a.

[a] Lit. 319. 1 Inſt. 192. a. 199. a.

[b] Lit. 321.

[c] 1 Inſt. 189. a. & b. 190. a.

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† See 1 *Wilſon*. 165. 3 *Atkyns*, 524. What Words in a Will make a Tenancy in Common, and yet there ſhall be a Survivorſhip, if any of the Deviſees die under Age.

See the *Statutes* concerning an Eſtate in Common, under the Title of an *Eſtate* in *Jointenancy*, *ante*.

Hitherto we have ſpoken of Eſtates that are ſuppoſed to be in *Being*; now follow, in the laſt Place, Eſtates in *Expectancy*, as a *Remainder* and *Reverſion*.

XVIII. An Eſtate in [d] *Remainder* is the Reſidue of an Eſtate in Land depending upon a particular Eſtate, and created together with the ſame. A *particular* Eſtate is *that* which is derived from a general and greater Eſtate. As if a Man ſeiſed in Fee letteth Lands or Tenements for Term of Years, the Remainder over to another for Life, in Tail or in Fee. Here is firſt a particular Eſtate for Years, *created* out of a Fee, and afterwards the Reſidue diſpoſed of, which we call the Remainder; tho' the particular Eſtate, and all the Remainders, make but one Eſtate in Law.

Of an Eſtate, in Remainder.
2 Black. Com. 164.
[d] 1 Inſt. 49. a. & b. 143. a.

The following [e] *Rules* are to be obſerved in the Creation of Remainders.

[e] Plowd. 25, &c. 35. Noy's Max. 31, 123, 124, 125, 126, 127. Hern, &c. 2, 3, 4, 5.

1. There muſt be a *particular* Eſtate precedent made at the ſame Time, that the Remainder may depend on it. 2. [a] The particular Eſtate muſt *continue* 'till the Remainder veſts, and the Remainder muſt commence in Poſſeſſion, at the very Time the particular Eſtate endeth; for there muſt not be a Mean between them. 3. The Remainder muſt paſs out of the Leſſor or Grantor, executed or executory, at the Time of the Poſſeſſion taken by the particular Tenant; [b] but it cannot depend upon a Matter *ex poſt facto*; as where there is an Eſtate-tail, with Condition, that if the Tenant in Tail aliens in Fee, or Fee-tail, then the Eſtate to ceaſe, and the Land to remain to another. This is a void Remainder; becauſe the Alienation veſts the Eſtate in the Alienee, or elſe in the Donor. A Remainder may depend upon a Condition that is not repugnant or againſt Law, and then it will paſs either executed or executory. 4. The *Perſon* to whom the Remainder is limited muſt be capable at the Time it was created, or elſe [c] by common Poſſibility, or *in Potentiâ propinquâ* to be thereof capable during the particular Eſtate. Therefore Leſſee for Life, Remainder to the right Heirs of *J. S.* is good; for by common Poſſibility *J. S.* may die during the Life of the particular Tenant; but if the Tenant or Leſſee for Life dieth, living *J. S.* The Remainder is become void, becauſe there is no Perſon capable to take at that Time. But a Remainder to the firſt begotten Son of *J. S.* (in general Terms) born during the particular Eſtate, is good. If the Remainder had been limited in particular by Name of Baptiſm and Surname, it had not been good, if he was not *in Eſſe*; for it was *Potentia remota*, and not probable that *J. S.* ſhould have a Son of that Name. *But by* 10 & 11 W. 3. ch. 16. *A poſthumous Child may take under a Remainder limited to the Iſſue of any Perſon, as if born in his Father's Life-time, tho' there are no Truſtees to preſerve contingent Remainders.* 5. The *Thing* whereof a Remainder ſhall be created muſt be *in Eſſe*, before and at the Time of the Appointment and Creation thereof, elſe the Remainder is void. As if I grant a Rent out of my Land, and the Remainder in Fee; this Remainder is void, becauſe the Rent was not *in Eſſe* before. [[d] But by later Caſes it hath been held, that a Rent *de novo* may be limited to one for Life, with Remainder over in Fee, for that the Law conſiders the whole Intereſt or Fee in the Rent to be firſt granted, and the immediate or particular Eſtate therein to be carved out of it, and that it may be granted to commence *in futuro*, ſo that this 5th Rule ſeems not to be Law.]

[a] 1 Rep. 66, 129, 130, 134, 138. 1 Inſt. 378. a.
[b] Lit. 720, 721, 722, 723. 1 Rep. 83. 1 Inſt. 378. a. Plowd. 25, &c. 35. Noy's Max. 31.
[c] 2 Rep. 51. 3 Rep. 20. 1 Inſt. 378. a.
2 Saund. 388.
[d] 2 Roll. Abr. 415. 2 Salk. 577. 1 Sid. 285. 1 Lev. 144. 1 Ld. Ray. 52. 3 Wms. 230.

An Eſtate at Will is not ſuch a particular Eſtate whereon a Remainder may depend. One may grant a Leaſe for *Years* to one, for ſo long as he ſhall live of thoſe Years, [e] Remainder to another for the reſt of the Years.

[e] 1 Rep. 153. 2 Roll. Abr. 415.

[f] 8 Rep. 94. 10 Rep. 47. 1 Roll. Abr. 610, &c.

1 Wms. 663. 2 Wms. 620. 3 Wms. 259.

In a [f] *Deviſe*, or laſt Will and Teſtament, a Leaſe for Years may be given to one for Life, or ſo long as he ſhall live, and after to another for the Reſidue of the ſaid Term; for in this Caſe the Intent of the Teſtator (which is to be followed in *Deviſes*) may take Effect by Way of executory *Deviſe*, tho' not by Way of Remainder. Yet one muſt take Care not to *deviſe* a Term for Years expreſly in *Tail*, with Remainder over to raiſe a Perpetuity. For the Law abhors Perpetuities. [But a Deviſe over of a Term for Years upon the Contingency of the firſt Taker's dying without Iſſue, (that is, without leaving Iſſue at the Time of his Death) hath been held to be a good Deviſe, and not too remote.]

[a] Noys Max. 31, 99, 100.

2 Vern. 246, 331. 1 Wms 502, 652.

No Remainder can be of a *Chattel* [a] *perſonal*; as to give my Study of Books to one for Life or Years, Remainder to another. But if I had given the *Uſe* of my Books to one for Life, and then thoſe Books to another, it would have been good. [A Deviſe of a Chattel perſonal for Life is now taken to mean the ſame Thing with a Deviſe of the uſe of it for Life.]

[b] 3 Rep. 20. 10 Rep 85. 1 Inſt. 378. a,

Remainders are either *abſolute* or *contingent*. *Abſolute*, as a Leaſe for Years, with a Remainder to another in Fee-ſimple, Fee-tail, *&c.* [b] *Contingent*, where the Eſtate is limited to take Place *in futuro*, upon a dubious and uncertain Event; or where the particular Eſtate, which doth ſupport the Remainder, may, or may not, determine before the Remainder commences. There the Remainder doth not veſt forthwith, but dependeth on Contingengy. As in the Caſe above-mentioned, where a Leaſe is made to one for Life, the Remainder to the right Heirs of *J. S.* This Remainder is good upon Contingency, that is, if Leſſee for Life ſurvives *J. S.* or elſe not. For *J. S.* hath no Heir whilſt he is alive.

[c] 1 Ventr. 189.

To prevent the Diſappointing contingent Eſtates, the [c] common Way of Conveyancing was to make a Feoffment, *&c.* to the Uſe of *J. S.* for Life, Remainder to the Uſe of the Feoffees for the Life of *J. S.* for preſerving contingent Remainders, yet the more modern Way is to make the firſt Eſtate only for Years. In both Caſes, he that hath the firſt Eſtate cannot deſtroy the Remainder. [See 19 *Car.* 2. *ch.* 6. 6 *An. ch.* 18. In *Page* 125 and 126. *ante.*]

2 Black. Com. 172. 1 Wilſon 225. 2 Wilſon 29. Caſes Temp. Ld. Hardwicke, 258.

Note, That there is a Difference betwixt a *Contingent* Remainder and an *executory Deviſe*. For in all Caſes of executory Deviſes the Eſtate deſcends until the Contingency happens, and nothing is veſted till then in the executory Deviſee; whereas a Remainder is an Eſtate veſted.

Of an Eſtate in Reverſion.

2 Black. Com. 175.

[d] 1 Inſt. 22. b. 142. b.

XIX. An Eſtate in *Reverſion*, (from *Reverto* to Return) is the [d] Reſidue of the Eſtate left in the Grantor after ſome particular Eſtate granted away, always continuing in him that granted the particular Eſtate; or where the particular Eſtate is derived out of his Eſtate. As in a Gift in Tail, the Reverſion of the Fee-ſimple is in the Donor; in a Leaſe for Life, or for Years, the Reverſion is in the Leſſor. If one has a Leaſe for twenty Years, and leaſeth out ten of thoſe Years, a Reverſion is in the ſecond Leſſor, as well as in the firſt that granted the twenty Years. A Reverſion alſo may commence after a Remainder, where one diſpoſeth of a leſs Eſtate than *that* whereof he was ſeiſed at the Time of ſuch Diſpoſition.

The Reverſion expectant upon an Eſtate-tail is of [e] no Account in Law, becauſe it may be cut off by Fine and Recovery; and therefore a Reverſion upon an Eſtate-tail is no [f] Aſſets. Otherwiſe it is of a Reverſion on an Eſtate for Life or Years.

The Poſſeſſion of the [g] Tenant does preſerve the Reverſion in the Donor or Leſſor; and conſequently the Rents and Services due to him.

There was no Reverſion or Remainder upon Eſtates in [h] Tail at Common Law.

By the Common Law no Grantee or Aſſignee of a Reverſion, could take Advantage of any Condition or Covenant broken by the Leſſees of the ſame Lands. But now,

By 32 H. 8. ch. 34. *Grantees of Reverſions may take Advantage of Conditions and Covenants againſt Leſſees of the ſame Lands, as fully as the Leſſors themſelves, their Heirs or Succeſſors might have done. Leſſees alſo may have the like Remedies againſt the Grantees of Reverſions, as they might have had againſt the Leſſors themſelves, their Heirs or Succeſſors.*

[See 19 *Car.* 2. *ch.* 6. 6 *An. ch.* 18. *p.* 125 and 126. *ante.*]

C H A P. II.

The ſecond Diviſion *of* Eſtates *in* Lands, Tenements, *or* Hereditaments, *(viz.) Into Eſtates* Corporeal *and* Incorporeal. *And therein of* Dignities, Advowſons, Tithes, Tenures *and* Services, Annuities, Commons, Ways, Multure *of a Mill,* Corrodies *and* Penſions, Offices, Franchiſes, Privileges.

ESTATES are either [a] *Corporeal* or *Incorporeal*; *Corporeal*, as Houſes and Lands, which may be touched or handled. Theſe are properly called Lands and Tenements, becauſe they are held of ſome Lord by ſome Service or other. *Incorporeal*, which cannot be touched or handled; but are only [b] Rights iſſuing out of corporeal Inheritances, or concerning them, or annexed to, or exerciſeable within the ſame. As *Dignities*, *Advowſons*, *Tithes*, *Tenures*, and *Services*, *Annuities*, *Commons*, *Ways*, *Multure* of a *Mill*, *Corrodies* or *Penſions*, *Offices*, *Franchiſes*, *Privileges*. Theſe may be comprehended under the Word *Hereditaments*, and are conveyed by [c] Deed only, and without any Livery and Seiſin, or other Ceremony.

Reverſions and *Remainders* are not Things *incorporeal* in their own *Nature*; but are ſo called, becauſe they are Eſtates in *Expectancy* only. They are a preſent Intereſt, yet ſtand in a Degree removed from the Poſſeſſion, till the particular Eſtate is determined. However, of theſe I have already ſpoken in the laſt Chapter.

Of a Dignity.

I. A *Dignity* is a Title of *Nobility* [d].

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[e] 1 Inſt. 173. a.

[f] 6 Rep. 58. 1 Ld. Raym. 53.

[g] 1 Inſt. 324. b.

[h] 1 Inſt. 327. a. See p. 119, 120. ante.

1 Inſt. 215.

[a] 1 Inſt. 9. a. 49. a.

[b] 1 Inſt 20. a.

[c] 1 Inſt. 9. See of Grants, ch. 3. poſt.

[d] See p. 42. ante.

Of Advowſons.
2 Black. Com. 21. 4 Black. Com. 419, 106.
e 2 Inſt. 29. 3 Inſt. 155. 1 Burn Eccl. law, tit. Benefice.

II. Concerning *Advowſons* it will be neceſſary to know, 1. What is a *Benefice*; and then, 2. What is an *Advowſon*, and how *divided*. 3. How an *Advowſon* may *lapſe*. 4. How it may be gained by *Uſurpation*.

1. A [e] *Benefice* is any Eccleſiaſtical Dignity, Promotion, or ſpiritual Living whatſoever. All Church Preferments are Benefices. [See 13 *R.* 2. *ſt.* 2. *ch.* 2. concerning *Biſhopricks.*] They muſt be given for Life, not for Years, or at Will.

See B 1. ch. 3. ante.

Deaneries, *Archdeaconries*, *Prebends*, &c. are Benefices with Cure of Souls, tho' not comprehended, as Benefices with Cure of Souls, within the Statute of *Reſidency*, (*viz.*) 21 *H.* 8. *ch.* 13. But according to a more ſtrict and proper Acceptation, Benefices are *Rectories* and *Vicarages*. A *Rectory* or *Parſonage* is a Church endowed with a Houſe, Glebe and Tithes. Some Rectories have a Cure of Souls annexed to them, and ſome have no Cure of Souls. Theſe are called *Sine-Cures*, as when the Church is fallen down, and the Pariſh becomes deſtitute of Pariſhioners, or where the Rectors have Vicars under them. A *Vicarage* is a Benefice where ſome or all of the Tithes are Impropriate.

a Finch. 133. 1 Inſt. 17. b. 119. b. 1 Burn Eccl. law. tit. Advowſon.
b Dr. & Stud. Dial 2. ch. 26. & 36.
c 2 Inſt. 273, 646.
d 1 Inſt. 374. b. 2 Str. 879, 3 Wms. 398.
e Finch. 133.
f 1 Inſt. 17. b. 18. a.

1. An [a] *Advowſon*, (*Advocatio, Jus Patronatûs*) is a Right of Preſentation or Collation to a Church. The Nomination was originally in the Biſhop of the Dioceſe, but granted afterwards by him to the Patrons (either as Founders or Benefactors to the Church) reſerving a Right to himſelf of Approving the Perſon preſented to him. So that now Patrons have as abſolute [b] Ownerſhip and Propriety in the Advowſon or Right of Preſentation, as they have in their Lands; it being of a [c] temporal Nature, and a Lay Fee. It may be granted by Deed or Teſtament, and it is [d] *Aſſets* by Deſcent. And it may lie in [e] Tenure; for a common Perſon may give it to hold of him.

See P. 143. ante.

There may be [f] *Advocatio Medietatis Eccleſiæ*, and *Medietas Advocationis*, *i. e.* an *Advowſon* of the *Moiety* of the *Church*, and a *Moiety* of the *Advowſon*. An *Advowſon* of the *Moiety*. is where there are ſeveral Patrons and two ſeveral Incumbents in one Church; the one of the one Moiety, the other of the other Moiety, and one Part as well of the Church as of the Town, allotted to one, and the other Part thereof to the other. The *Moiety* of the *Advowſon* is, where two muſt join in the Preſentation, and where there is but one Incumbent; as where there are two Coparceners. And tho' they agree to preſent by Turns, yet each of them hath but the Moiety of the Church.

This is the *Deſcription* of an Advowſon.

g Lit. 184. 1 Inſt. 121. b. 122. a. 1 Burn. Eccl. law. 4. 5, 6.
h 1 Inſt. 77. a. 307. a. 10 Rep. 63. Hob. 323.
i 1 Inſt. 120. b. 121. b. 122. a.

Advowſons are *divided* thus. Advowſons are of *two Kinds*. [g] *Appendant* and in *Groſs*. 1. *Appendant* is a Right of Preſentation dependent upon a Manor, Lands or Tenements; and does paſs in a Grant of the Manor as an [h] Incident, without ſaying, *With the Appendants, or Appurtenances thereunto belonging*. But in Caſe of the King, tho' *with the Appurtenances* is added, an Advowſon will not paſs without expreſs Mention of it. [See 17 *Ed.* 2. *ch.* 15.] 2. In *Groſs*, is a Right ſubſiſting by itſelf. belonging to a [i] Perſon, and not to a Manor, Lands, *&c.* So that when an Advowſon Appendant is ſevered by Deed or Will from the corporeal Inheritance, to which it was Appendant, then it becomes an Advowſon in Groſs.

Again, Advowſons are either *Preſentative*, *Collative*, or *Donative*.

k 1 Inſt. 120. a. See p. 33. 34. ante. 1 Burn Eccl. law. 121, &c.

1. An Advowſon [k] *Preſentative* is, where the Patron does preſent or offer his Clerk to the Biſhop of the Dioceſe, to be inſtituted in his Church, as hath been obſerved. [See 1 *Geo.* 1. *ch.* 10. Concerning the Patronage of ſome augmented Cures.]

This may be done either by Word or Writing. The King may preſent by Word, or in Writing under any Seal; who otherwiſe cannot do any legal Act but by Matter of Record. But where an aggregate Corporation doth preſent, it muſt be under Seal. The Preſentation to a [a] Vicarage doth of Common Right belong to the Parſon. If a *Feme Covert* hath Title to preſent, the Preſentation muſt be by Huſband and Wife, and in both their Names, except in Caſe of the *Queen* Conſort.

And if a *Feme Covert* is ſeiſed of an Advowſon, and the Church becometh void, and the Wife [b] dieth, the Huſband ſhall preſent to the Advowſon. [c] A *Guardian* in Socage or by Nurture, cannot preſent to a vacant Living in Right of the Heir, or in his Name, becauſe he can make no Benefit of it, or Account for it, though it is ſometimes practiſed, and made good by Time. Therefore the Infant ſhall preſent of whatſoever Age. If a common Patron preſents firſt one Clerk, and then *another*, the Biſhop may Inſtitute which he pleaſes; [d] unleſs he Revokes the Preſentation of one of them before he is admitted by the Biſhop. [*Qu*] If there is a Right of *Nomination* in one, and a Right of *Preſentation* in another, to the ſame Benefice; he that has the Right of [e] *Nomination* is the true Patron, and the other is obliged to preſent the Clerk which is nominated. If one that hath a Turn preſents his Clerk, and he is admitted, inſtituted, and inducted, but he doth not read the thirty-nine Articles, *&c.* [f] This ſhall not be accounted his Turn, becauſe the Admiſſion, Inſtitution, and Induction are void [g]. Otherwiſe, if he was deprived for a Crime. If the Preſentation bears Date whilſt the Church is *full* of another Clerk, it is void.

A *Deacon* may be preſented; but he muſt be made a Prieſt, before he he can be inſtituted. A *Patron* cannot preſent *himſelf*; but he may pray to be admitted by the Ordinary; and if admitted it is valid. [h] A *Dean and Chapter* cannot preſent the *Dean*, nor *Maſter* and *Fellows, the Maſter*.

The *Patron* muſt regularly and generally preſent within [i] *ſix* Calendar Months after the Avoidance of the Church. It is not ſufficient, that the Preſentation bears date within the ſix Months. And if the Biſhop [k] *refuſes* to admit the Clerk preſented, he muſt give Notice of his Refuſal, with the Cauſe of it forthwith. And on ſuch Notice, the Patron muſt preſent another Clerk within the ſix Months from the Avoidance, if he thinks the Exceptions againſt his firſt Clerk are ſufficient Cauſes of *Refuſal*. Otherwiſe he may bring his *Quare Impedit* againſt the Biſhop. But it is ſaid, that a ſpiritual Perſon is not intitled to have any Notice upon Refuſal of his Clerk, eſpecially for want of Learning. If the Church becomes void by the *Act of God*, as *Death*; or by *Creation*, or *Ceſſion* of the laſt Incumbent, or otherwiſe by the *Act* of the *Incumbent*, the [l] Patron at his Peril is bound to take Notice of the Avoidance, and to preſent within ſix Months after. But if it becomes void by Deprivation by the *Canon Law*, or Reſignation, the Patron muſt have Notice from the Ordinary, and then he muſt preſent within ſix Months after that Notice. For the Church was void by the *Act* of the *Ordinary*. If a Church becomes [m] *Litigious* by the Preſentation of two ſeveral Patrons of their Clerks to a void Church, within the ſix Months, the Biſhop may ſuſpend the Admitting one Clerk or the other, and ſuffer Lapſe to incur, without Awarding a *Jus Patronatûs*. But upon Requeſt of either Party, Patron, or Clerk, he muſt award it; and then if he admits the Clerk according to the Verdict found, and Certificate of the Commiſſioners, he ſecures himſelf from being a Diſturber, tho' the Right, (in a *Quare Impedit*,) is found for the other

[a] F. N. B. 33. b. 34. b.

[b] 1 Inſt. 120. a.

[c] F. N. B 33. 1 Inſt. 17. b. 89. a. 246. a. 3 Inſt. 156. 2 Cro. 99.

[d] 2 Roll. Abr. 349, 354. Contra, F. N. B. 634.

[e] F. N. B. 33.

[f] 5 Rep. 102. 2 Roll. Abr. 347, 348.

[g] See p. 40. ante.

[h] Davis 76. 2 Roll. Abr. 348.

[i] 6 Rep. 61, 62.

[k] 2 Burn Eccl. law. tit. lapſe, 2 Inſt. 363. 2 Cro. 166, 167.

[k] 2 Roll. Abr. 364, 365. See p. 33. ante.

[l] Dr. & Stud. Dial. 2. ch. 31. F. N. B. 35.

[m] 2 Roll. Abr. 384, 385, 364, 566.

2 Cro. 93.
See B. 4. ch. 1. of Writs, poſt.

other. The Biſhop may award it, if one Patron only preſents, and aſſign Commiſſioners to inquire into his Title. By which you may apprehend, that a *Jus Patronatus* is a Commiſſion, granted by the Biſhop to ſome Perſons, to inquire who is the rightful Patron. But if the Biſhop delays the Patron upon his Preſentation, by Deferring to examine his Clerk, *&c.* he may ſue his *Quare Impedit*, and thereupon a Writ of *Ne Admittas* to the Biſhop, within the ſix Months. And then if the Biſhop, after the Receipt of ſuch Writ, admits the Clerk of any other, the true Patron may have a *Quare Incumbravit* againſt the Biſhop, and recover the Preſentation with Damages.

[a] Dr. & Stud. Dial. 2. ch. 36.
F N.B. 33. b.
See p. 20. ante.
See p 19. ante.
[b] F. N. B. 34, 36.
1 Inſt. 90. a.
[c] 4 Inſt. 356, 357.
3 Lev. 377, 382.
Show. Caſes Parl. 164.
[d] Dyer 228.
4 Mod. 200.

But it is to be obſerved that as to Advowſons, or Right of Preſentation, the *King* has his *Prerogative*. He hath the [a] ſupreme Right of Patronage of all the Benefices in *England*. So that he may preſent by *Lapſe*, or upon *Forfeitures* by Attainder, Simony, Outlawry. He hath Right to preſent to all the Dignities and Benefices of the Advowſon of Archbiſhops and Biſhops during the Vacancy of the Sees, not only after the Seiſure of the Temporalties, but after the Death of the Archbiſhop or Biſhop; and altho' the Temporalties are reſtored to the ſucceeding Biſhop. [See 14 *Ed.* 3. *ch.* 5.] And if a Church belonging to the Patronage of a Biſhop becomes void, and the Biſhop collates, and dies before Inſtallment or Induction, the [b] King ſhall preſent. Upon the Promotion of of a Clerk to a [c] Biſhoprick in *England* or *Ireland*, (tho' the Dignities or Benefices lie in *England* or *Ireland*,) the King hath Right to preſent to ſuch Dignities or Benefices (except Donatives,) as the Perſon was poſſeſſed of before ſuch Promotion; and altho' he grants him a Diſpenſation to hold that Church in *Commendam* for Years; [d] unleſs the Commendatory dies, or reſigns, during that Term.

See p 37. ante.
[e] F. N. B. 35.
[f] See B. 4. ch. 1. §. 4. poſt.
[g] Hob. 214.
[h] 6 Rep. 29.
1 Inſt. 344, b.
2 Roll. Abr. 353.

In his Right alſo the Lord Chancellor, or Keeper of the Great Seal, may preſent to the Benefices, belonging to the King in Right of his Crown, under the Value of [e] twenty Marks in the King's Book of Firſt-Fruits and Tenths. But the Uſe is, that the Lord Chancellor or Keeper [f] preſents to Livings of and under [g] twenty Pounds; though the King may preſent to them if he pleaſes. And when the King does preſent at any Time to a Church, and his Clerk is inſtituted, yet before [h] Induction the King may revoke his Preſentation; or if he preſents another, it is a Revocation in Law, if the ſecond Preſentation was not obtained by Fraud.

See p. 36. ante.
[i] 6 Rep 49.
7 Rep. 26.

Therefore if the King's Clerk is inſtituted, and dies before Induction, the King's Turn is not ſerved. By Inſtitution a Church Preſentative is full againſt a common Perſon, but not againſt the King till [i] Induction, if the King hath a Right to preſent.

1 Inſt. 119. b.
2 Roll. Ab. 349.
1 Burn Eccl. law 146, 152.

2. An Advowſon *Collative*, is *that* Advowſon which is lodged in the Biſhop; for *Collation* is the giving of a Benefice by a Biſhop, when he is the original Patron thereof, or gains a Right by *Lapſe*. Inſtitution is given by the Biſhop upon a Preſentation of a Patron; but Collation here is an immediate Inſtitution, becauſe the Biſhop is both *Patron* and *Ordinary*. *Inſtitution* and *Collation* are in Effect (for the moſt part) the ſame; and are Terms made Uſe of to diſtinguiſh the Perſons, who have the Power to beſtow the Benefice.

2 Burn Eccl. law tit. Donative 183 to 190.

3. An Advowſon *Donative* is, when the King, or other Patron (in whom the Advowſon of the Church is lodged) does by a ſingle Donation in Writing put the Clerk into Poſſeſſion without Preſentation, Inſtitution or Induction. If the Clerk is diſturbed, the Patron may have a *Quare Impedit*; but if the Patron of a Donative will not nominate a Clerk,

there can be no *Lapſe*, [a] except it be ſpecially provided for in the Foundation. Yet the Biſhop may compel him to nominate a Clerk by Eccleſiaſtical Cenſures. For though the Church is exempted from the Power of the Ordinary, the Patron is not exempted. Donatives are of Churches Parochial, Chapels, Prebends, *&c.* and may be exempt from all ordinary Juriſdiction; ſo that the Ordinary cannot viſit them, and conſequently cannot demand Procurations. [But ſee 1 *Geo.* 1. *St.* 2. *ch.* 10. For Augmenting the Maintenance of the Poor Clergy.] The Patron may appoint Commiſſioners to viſit for him. The Patron and Incumbent may charge the Glebe, to bind the Succeſſors. The Incumbent may reſign to the Patron. But if the true Patron of a Church or Chapel Donative doth once preſent to the Ordinary, and his Clerk is admitted and inſtituted, it becomes a Church Preſentative, and ſhall never have the Privilege of a Donative afterwards. Yet if a Stranger preſents to ſuch a Donative, and Inſtitution is given, all is void.

[a] 1 Inſt. 344.a. Yelv. 61. 2 Cro. 63. S. C.

Statutes concerning *Advowſons* Preſentative, Collative or Donative.

By the Common Law no one could recover Damages for the Loſs of the Preſentation. But now,

By Weſt. 2. ch. 5. *When ſix Months paſs hanging a* Quare Impedit, *or Aſſize of* Darrein Preſentment, *by the Diſturbance of any one, ſo that the Biſhop hath a Right to preſent by Lapſe, the Perſon ſhall recover Damages by two Years full Value of the Church, if he loſe his Preſentation. Otherwiſe, if he recovers his Preſentation within the ſix Months, Damages ſhall be given to half a Year's Value only.*

2 Inſt. 362, &c.

So that the Patron may either loſe his Preſentation, and have double Damages, or have his Preſentation with ſingle Damages. It is ſaid, that the Value of the Church ſhall be reckon'd only according to the King's Books, and not according to the real value.

By this Statute Damages are not given to the [b] King, becauſe he cannot loſe his Preſentation. But in all Caſes the three ordinary Points inquirable on this Statute are, 1. If the Church be full, and if ſo, by whoſe Preſentation. 2. The yearly value of the Church. 3. If ſix Months paſs'd after the Avoidance.

[b] 2 Inſt. 362. 6 Rep. 48, 49, 51. Hob. 137.

[*By* 31 El. ch. 6. *If any ſhall preſent or collate any Perſon to any Benefice with Cure, Dignity, Prebend, or Living Eccleſiaſtical, or give or beſtow the ſame for any Money or Reward, or Promiſe or Aſſurance thereof, directly or indirectly, ſuch Preſentment, Collation or Gift, and the Admiſſion, Inſtitution aud Induction thereon, ſhall be utterly void, and the Crown ſhall preſent for that Turn, and the Perſon preſenting ſhall forfeit double the Value of one Year's Profit of the Living, and the Preſentee ſhall be diſabled ever after to enjoy that Living.*

1 Inſt. 120. a. 3 Inſt. 153, &c. 1 Ld. Ray. 449.

And if any Incumbent of a Benefice with Cure, ſhall corruptly reſign or exchange the ſame, or corruptly take for the Reſigning or Exchanging the ſame, any Penſion, Sum of Money or Benefit whatſoever, directly or indirectly, as well the Giver as the Taker ſhall forfeit double the Value of the Sum ſo given or taken, one half to the King, and the other to the Informer.]

The [a] King himſelf cannot preſent the diſabled Perſon to that Church; neither can the Patron of a Donative grant it to the ſame Clerk.

[a] 1 Inſt. 120. a.

[b] 2 Cro. 248, 274. 3 Cro. 180. But ſee the Reports in Chancery, 2d Part. 399. Durſton againſt Sandys. Heſket v. Gray. K.B. Hil. 28. G. 2.

[c] Same Caſe in Chan. 15 March, and 25 July 1755.

But it is to be obſerved, that [b] general Bonds of Reſignation upon Notice or Requeſt are allowed, notwithſtanding this Statute; becauſe there doth not appear a corrupt or ſimoniacal Contract in the Condition; and becauſe a Man may bind himſelf to reſign upon good and valuable Reaſons, as in Caſe of Plurality or Non-Reſidence, or when the Patron's Son is at Age, and qualified to take the Beneſice. But if it had been for a Leaſe of the Glebe or Tithes, or Sum of Money, *that* had been within the Statute. And Courts of Equity will not admit the Bond, tho' the Condition is general, to be made an ill Uſe of [c]; but will in ſuch Caſe reſtrain the Obligee from proceeding thereon at Law.

By 1 W. & M. ch. 16. *After the Death of a Perſon ſimoniacally promoted to any Beneſice, the Offence or Contract of Simony ſhall not be alledged to the Prejudice of any other Patron innocent of Simony, or of his Clerk; unleſs the Perſon ſimoniacally promoted, or his Patron was convicted of ſuch Offence in the Life-time of the Simoniack Perſon.*

Hob. 165.

If the guilty Patron doth preſent another Clerk upon the Deceaſe of the former, the Simony upon the firſt Preſentation, may be alledged both againſt the guilty *Patron*, and his ſecond *Clerk*, though innocent.

By 12 Ann. ſeſſ. 2. ch. 12. *If any Perſon ſhall, for any Sum of Money, Reward, or other Advantage, or Promiſe, or Aſſurance thereof, directly or indirectly, in his own Name, or the Name of any other Perſon, take or accept the next Avoidance of, or Preſentation to a Beneſice with Cure, Dignity, or Living Eccleſiaſtical, and ſhall be preſented thereto; every ſuch Preſentation ſhall be void, and ſuch Agreement deemed a ſimoniacal Contract; and the Crown may preſent for that Turn, and the Preſentee ſhall be diſabled to have that Living, and be ſubject to the ſame Eccleſiaſtical Penalties, as if the corrupt Agreement had been made after the Vacancy of the Beneſice.*

This Act reſtrains only thoſe that are to be *preſented* to the next Avoidance of the Living, and that upon Purchaſe only, not Laymen, or thoſe of the Clergy that are not to be preſented to the Beneſice.

By 3 Ja. 1. ch. 5. 1 W. & M. ch. 26. *and* 12 An. St. 2. ch. 14. *All Preſentations or Grants of Avoidances by Perſons profeſſing the Popiſh Religion, or their Children being under twenty-one, and not being Proteſtants, or by their Truſtees, are null and void; and one of the Univerſities ſhall preſent; and the Ordinary may tender the Declaration againſt Tranſubſtantiation, mentioned in* 25 Car. 2. ch. 2. *to the Patron, which if he refuſes to make and ſubſcribe, his Preſentment ſhall be void as aforeſaid.*

[See 10 *Ann. ch.* 11. As to the fifty new Churches. 1 *Geo.* 1. *St.* 2. *ch.* 10. For Augmenting the Maintenance of the poor Clergy.]

2 Burn. Eccl. law, tit Lapſe 307 to 311.

3. A *Lapſe* is a Title given to the Ordinary to collate to a Church, by the Neglect of the Patron to preſent to it within ſix Months after Avoidance. Or a *Lapſe* is a Devolution of a Right of Preſenting from the Patron to the Biſhop; from the Biſhop to the Archbiſhop; from the Archbiſhop to the King. The Term in which the Title by *Lapſe* Commences from one to the other ſucceſſively is ſix Months, or half a Year according to the [a] Calendar, not accounting twenty-eight Days to the Month, as in other Caſes; becauſe this Computation is by the Eccleſiaſtical Law, and becauſe *Tempus Semeſtre* in the Statute of *Weſt.* 2. *ch.* 5. is intended of half a Year; the whole Year containing three hundred and ſixty-five Days, which being divided, the half Year for the Patron to preſent

[a] Dr. & Stud. Dial 2. ch. 36. 6 Rep 61, 62. 1 Inſt. 135 b. Hob. 154. 2 Roll. Abr. 521.

preſent is one hundred and eighty-two Days. The Day in which the Church becomes void, is not to be reckoned as Part of the ſix Months.

I ſaid [b] before, that where the Benefice is void by *Death*, *Creation* or *Ceſſion*, the Patron muſt take *Notice* at his Peril; but in Caſe of a *Reſignation* or *Deprivation* by *Canon* Law, (not for any temporal Crime, as Felony, *&c.* or by Act of Parliament, except the Act requires it, as 13 *El. ch.* 12. 31 *El. ch.* 6. 13 *&* 14 *Car.* 2. *ch.* 4.) Notice ought to be given to the Patron directly by the Ordinary; and from ſuch Notice only do the ſix Months begin to give a Title by *Lapſe*. When a Clerk is [c] *refuſed* for Illiterature or ill Life, the Patron ought to have Notice, that he may preſent another in due Time; but the *Lapſe* ſhall ſtill incur from *Death*, *Ceſſion* or *Creation*. Notice is requiſite, to give the Ordinary a Title by *Lapſe*. But as to others, the true Patron may loſe his Preſentation without Notice. For the true Patron is bound to take Notice of the Avoidance againſt [d] Strangers at his Peril. But if a Patron preſents his Clerk, before the Biſhop hath [e] collated; tho' the ſix Months are expired, yet the Preſentation is good, and the Biſhop cannot take Advantage of the *Lapſe*. So if the Patron makes his Preſentation to the Biſhop, before the Archbiſhop hath collated; tho' twelve Months are paſſed ſince the Vacancy. But if the Biſhop after twelve Months are expired does collate, this bars the Patron, but not the Archbiſhop; for he may have a *Quare Impedit*. If the Biſhop does not collate to Benefices of his own Gift, they *Lapſe* at the End of ſix Months to the Archbiſhop: And if the Archbiſhop does not collate within ſix Months to a Benefice of his own Gift it lapſes to the King. If Title by *Lapſe* accrues to the Biſhop, and he dies, or is tranſlated, before he takes Benefit of it, the Devolution is to the Archbiſhop, as he is Guardian of the Spiritualties. But if a *Lapſe* happens while the King has the Temporalties of the Biſhop, the King ſhall have the Benefit of it. If *Lapſe* accrues to the Biſhop in a [f] metropolitical Viſitation, the Biſhop ſhall have the Benefit of the *Lapſe*, and not the Archbiſhop; tho' the Biſhop muſt preſent his Clerk to the Archbiſhop for Inſtitution, inſtead of Collating him.

If a *Quare Impedit* is brought, when the Patronage of the Church is litigious, and one Party doth recover againſt the other, if the Biſhop was not [g] named in the Writ, and ſix Months paſs while the Suit is depending, *Lapſe* ſhall incur to the Biſhop, for there was no Fault in him. [a] Therefore bring a *Quare Impedit* as ſoon as may be againſt the Biſhop, and Name him in the Writ, and then neither the Biſhop, Archbiſhop, or King can take Benefit by *Lapſe*. But if the Patron within the ſix Months brings a *Quare Impedit*, the Church not being litigious, againſt the Biſhop, and then the ſix Months *Lapſe* without any [b] Preſentation by the Patron, *Lapſe* ſhall incur to the Biſhop.

By Preſentation and Inſtitution *Lapſe* is prevented, to the inferior Ordinary, tho' the Clerk is never inducted.

A *Lapſe* may incur againſt an [c] Infant or Feme Covert, if they do not preſent within ſix Calendar Months.

If the Biſhop is a [d] Diſturber, or the Church remains void above ſix Months by his Fault, there can be no *Lapſe*.

A Donative cannot *Lapſe* to the Ordinary, or to the King; as hath been ſaid. [See 1 *Geo.* 1. *ch.* 10.]

The King hath a *Prerogative* as to *Lapſe*.

There is no *Lapſe* from the *King*. [e] He may take his own Time, ſo that the Patron cannot preſent before the King takes Advantage of the *Lapſe*.

[b] Dr. & Stud. Dial. 2. ch. 31. 4 Rep. 75, 76.

[c] 5 Rep. 57. 2 Inſt. 632. See p. 34. ante.

[d] 2 Roll. Abr. 369.

[e] Dr. & Stud. Dial. 2. ch. 36. 2 Inſt. 273. 2 Roll. Abr. 350, 367.

[f] 2 Roll. Abr. 357, 367.

[g] 2 Roll. Abr. 365, 366, 368.

[a] 6 Rep. 52. 1 Inſt. 344. b. 345. a. Hob. 201.

[b] Hob. 201.

[c] 1 Inſt 246. a. 2 Roll. Abr. 367.

[d] 1 Inſt 344. b. 2 Roll. Abr. 369.

[e] Dr. & Stud. Dial 2 ch. 36. 2 Inſt. 273.

[f] 7 Rep. 28. 2 Cro. 216.

Lapſe. The King by *Quare Impedit* may recover his Preſentation, and remove any Clerk inducted into the Living without his Preſentation, tho' eighteen Months are paſt. [*See* 17 *Ed.* 2. *ch.* 8. 1 *Geo.* 1. *ch.* 10. Concerning augmented Cures.] But if the Patron preſents, and the Clerk is inſtituted and inducted, and then [f] dies incumbent, or is deprived, the King has loſt his Title to preſent by *Lapſe*: For the King was to have the next Preſentation only, which cannot now be reſtored to him. But many will not allow the ſame Reaſon, if the Incumbent *reſigns*; becauſe it may be by Contrivance to cheat the King of his Right.

[g] 6 Rep. 29. 2 Roll Abr. 351.

If the King preſents by *Lapſe*, when he had an [g] original Title, tho' the Clerk is inſtituted and inducted, yet the King may preſent another; becauſe the firſt Preſentation was void.

[h] 3 Cro. 355.

The King hath not only a Right of Preſenting to Churches which *Lapſe* to him during his own *Reign*, but alſo ſuch as *lapſed* in a [h] former *Reign*, by the expreſs Saving in 25 *Ed.* 3. *St.* 3. *ch.* 1.

[i] 1 Inſt. 277. b. 4 Burn Eccl law tit. Uſurpation 35. [k] 6 Rep. 29, 50. 1 Inſt. 344. b.

4. *Uſurpation* is [i] when one, that hath no Right, preſenteth to a Church, and his Clerk is admitted and inſtituted into it, and hath peaceable Poſſeſſion ſix Months after Inſtitution, before a *Quare Impedit* is brought. An *Uſurpation* muſt Commence upon a [k] Preſentation, not a Collation; and is ſettled by Inſtitution ſix Months before a *Quare Impedit* brought.

[l] 1 Inſt. 120. a.

By Collation the Church is not full, nor is Plenarty by ſix Months upon Collation pleadable; but the right Patron may bring his Writ at any Time, to remove the Perſon collated; unleſs he is ſuch a Patron, that hath alſo a Right to collate; for then againſt another collating Patron, Plenarty by Collation is pleadable. A Preſentation which is [l] void in Law (as in the Caſe of Simony, or to a Church that is full, *&c.*) makes no Uſurpation againſt the rightful Patron.

[m] 6 Rep. 49. 1 Inſt. 344. a. & b. 2 Ld. Ray. 954.

The [m] Fee of an Advowſon may be gained by Uſurpation, and not only the Avoidance upon which the Uſurpation is made. As if a Purchaſer of an Advowſon in Fee-ſimple, before any Preſentation, ſuffers an Uſurpation, and ſix Months to paſs without bringing his *Quare Impedit*, he has loſt his Right to the Advowſon; becauſe he has loſt his *Quare Impedit*, which was his only Remedy: For, he could not maintain a Writ of Right of Advowſon; and though he afterwards uſurps, and dies, and the Advowſon deſcends to his Heir, yet the Heir cannot be remitted, but the Advowſon is loſt for ever. [But ſee 7 *Ann. ch.* 18. *poſt.*]

[a] 2 Rep. 93.

[a] If one preſents to a Church in Time of War, and upon it the Preſentee is admitted and inſtituted in Time of Peace, the Law regards the original Act; and the Preſentment and all that follows after is void, and ſhall not put the Rightful Patron out of Poſſeſſion.

[b] 1 Inſt. 344. a.

There can be no Uſurpation by preſenting to a [b] *Donative.*

[c] 6 Rep. 30, 49. Contra, 2 Cro. 54.

The *Prerogative* of the King is, that tho' he may uſurp upon others, and gain the Inheritance of the Advowſon thereby; [c] yet no one can uſurp upon the King, ſo as to gain the Inheritance of his Advowſon; for that is Permanent, and in this Senſe *Nullum Tempus occurrit Regi.*

[d] 1 Inſt. 115. b. 344. a. 2 Inſt. 358.

[d] Inſtitution by ſix Months before a *Quare Impedit* brought, is a good Plenarty againſt a common Perſon or Subject; but Plenarty is not a Plea againſt the King, till ſix Month's after Induction. But if there is

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[c] *Nullum tempus occurrit Regi.* Lit. 178. 6 Rep. 49. 1 Inſt. 90. b. 118. a. 294. b. 2 Inſt. 495, 496.

an Uſurpation upon the King, by a [c] complete Plenarty by ſix Months after Induction, the Plenarty can only be pleaded againſt the King's *Preſentation*, for the Quiet of the Church. For he may remove the Incumbent by due courſe of Law and Judgment by *Quare Impedit*, (whether he claimeth in Right of the Crown, or in Right of a Subject) and then he may preſent [See 13 *Ri.* 2. *St.* 1. *ch.* 1.] For as to the King's Right no Time ſhall Prejudice him. Plenarty by ſix Months after Inſtitution is a good Plea againſt the Queen Conſort, tho' ſhe claims the Advowſon of the King's Endowment. But in this Caſe of Plenarty, if the Incumbent pleads the Preſentment of a Stranger, *Quære* if he ought not to ſhew, that the Stranger had [f] Title: If the Incumbent was *in* ſix Months after Inſtitution, by Preſentment of the *Plaintiff*, or by *Lapſe*; there he need not ſhew Title.

[c] 6 Rep. 30, 49, 50. 1 Inſt. 314. b. 2 Inſt. 358, 361, 362. 2 Cro. 385.

[f] Noy 50. Liſter *verſ.* Crameel.

By Weſt. 2. ch. 5. *If a Defendant alledgeth Plenarty of the Church of his own Preſentation, the Plea ſhall not fail by reaſon of the Plenarty, if the Writ be purchaſed within ſix Calendar Months, though he does not recover his Preſentation within the ſix Months.*

So that if the rightful Patron brings his Writ *within* ſix Months, it is maintainable by this Statute; and if the Incumbent is [g] named in the Writ, he may be removed; whereas Plenarty at any Time before the Writ brought was good at Common Law.

[g] 6 Rep. 49, 51.

The [h] King is not within this Clauſe of the Statute, where Plenarty by the Space of Six Months is made a Bar to a *Quare Impedit*; for the King ſhall not be concluded by ſuch general Words.

[h] 6 Rep. 51.

Plenarty upon a Collation is not pleadable, as was intimated before. And the Reaſon why Collation does not make a Plenarty, is, [i] becauſe then the Biſhop would be Judge in his own Cauſe. For the Biſhop muſt certify whether the Church is full or not; and therefore the Biſhop's Collation on this Account is interpreted to be no more than a temporary Proviſion for Celebration of divine Service, until the Patron does preſent. [See more in the aforeſaid Statute concerning *Heirs* and *Infants*, *Heirs of full Age*, *Feme Coverts*, *Eccleſiaſtical Perſons.*]

[i] 6 Rep. 50. 1 Inſt 344. b. 1 Cro. 207, 208.

By 7 Ann. ch. 18. *No Uſurpation upon any Avoidance ſhall diſplace the Eſtate or Intereſt of any Perſon entitled to the Advowſon, or hinder him to preſent upon the next Avoidance, or to maintain a* Quare Impedit *to gain the Poſſeſſion.*

III. Of *Tithes*; 1. How *defined* and *divided*. 2. To whom *due*. 3. Of what *Things* due and payable, or not; and the *Manner* of paying what is due. 4. How they may be *recovered*; as alſo how *Mortuaries* and *Penſions* may be recovered. 5. To what publick *Payments* ſubject. 6. Who may be *diſcharged* from Payment of Tithes.

Of Tithes. 3 Burn. Eccl. law tit. tithes. 1 Black Com. 384, 388. 2 Black. Com. 24.

1. *Tithes* (*Diſmes*, *Decimæ*) are the tenth Part of the Increaſe, yearly ariſing from the Profits of Lands, Stocks upon Lands, and the Induſtry of the Pariſhioners, payable for the Maintenance of a Pariſh Prieſt, by every one that hath Things titheable, if he cannot ſhew a ſpecial Exemption. [a] They are an Eccleſiaſtical Inheritance, collateral to the State of the Land, not iſſuing out of it, but diſtinct from it, and therefore not extinct by Unity of Poſſeſſion only.

[a] 2 Rep. 40. 11 Rep. 13, 14. Davis. 4, 5, 6, the Caſe of Proxies.

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[g] *Res inter alios acta, alteri nocere non debet.* 6 Rep. 1, 51. 2 Inſt. 513.

They are of [b] three *Kinds*, *predial*, *perſonal*, and *mix'd*. *Predial*, (*à Prædio*). Thoſe that immediately ariſe from the Land, either by Manurance, or of its own Nature; as Grain of all Sorts, Hay, Wood, Fruits, Herbs, *&c.* Theſe are due without Deducting the Coſts, and are payable where they ariſe. *Perſonal*, ſuch as ariſe only from the Labour and Induſtry of Man (other than Common Day-Labourers) being the Tenth of his clear Gains in his Trade or Profeſſion, after Charges deducted. [See 2 & 3 *Ed.* 6. *ch.* 13. §. 7 & 8.] Theſe are paid where they are due by Cuſtom only, but ſcarce paid any where in *England*, unleſs for Mills, or Fiſh caught at Sea; and then payable where the Party hears Divine Service, and receives the Sacraments. *Mix'd*, thoſe that ariſe not from the Ground, but from Cattle and other Things, that receive their Nouriſhment immediately from the Ground, as Colts, Calves, Pigs, Wool, Lambs, Milk and Cheeſe from Cows, Chickens or Eggs, *&c.* and are payable where they ariſe.

Tithes, with Regard to their *Value*, are alſo *divided* into *great* and *ſmall*. *Great* Tithes are Corn, Hay, and Wood. *Small* Tithes are all other predial Tithes beſides Corn, Hay and Wood; as alſo thoſe Tithes which are perſonal and mix'd. Theſe ſmall Tithes ſometimes in the Endowments of Vicars are comprehended under the Word *Altaragium*, as well as the Profits that ariſe from the *Altar*. [c] *Cuſtom* will make Wood and Hay a ſmall Tithe in the Endowment of a Vicarage, [d] or to paſs by the Word *Altaragium*. And the *Quantity* will turn a ſmall Tithe into a great one, if the Pariſh is generally ſown with it. And ſome Things may be great or ſmall Tithes in regard of the *Place*, as Hops in Gardens are ſmall Tithes, and in Fields may be great Tithes. [The Notion [e] that the Quantity or the Place where ſown alters the Nature of the Tithe, or makes it become great or ſmall, is now exploded.]

2. *To whom due.* The Maintenance of the parochial Clergy is by the *Glebe*, which takes in the Houſe, by *Offerings*, by *Tithes*. All *Tithes* are *due* of Common Right to the Parſon or Rector of the Pariſh where they ariſe; but by *Endowment* or *Preſcription* they may become due to the Vicar; and the [a] Parſon of one Pariſh may preſcribe to have a *Portion* of *Tithes* ſeperately and divided in the Pariſh of another; probably becauſe the Lord of the Manor had Part of his Eſtate lying in another Pariſh, and obliged his Tenants to pay Tithes, *&c.* to the Church which he built within his Manor; or becauſe of ſome Grant by Parſon, Patron and Ordinary.

If there was any Land within ſuch Mannor or Pariſh, which did not hold of the Lord who built the Church, or was Parcel of the Manor which had no Church built in it, one might pay his Tithes to any Church heretofore, eſpecially if it was ſo near that he could go thither to hear Divine Service. But this was altered about the Year 1200 by the Council of *Lateran*.

No [b] *Layman* at this Day is capable of Tithes, or a Portion of Tithes, but under the Statutes of Diſſolution of religious Houſes, or by a Grant made by the Parſon, Patron and Ordinary before the diſabling Statutes; by Virtue whereof they may become temporal Inheritances in the Hands of Laymen.

If an [c] Impropriator, Parſon or Vicar leaſeth his Glebe Lands and does not grant the Tithes thereof, the Farmer or Tenant, or Under-Tenant, ſhall pay Tithes to the Impropriator, Parſon or Vicar. And if a Parſon ſows his Land, and ſells the Corn growing, the Buyer ſhall pay the

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[b] 2 Inſt. 490, 649, 656, 657, 621. 3 Burn Eccl. law. 375. 1 Roll. Abr. 656.

3 Burn Eccl. law 375.

[c] 1 Roll. Abr. 643.

[d] 1 Cro. 467, 578.

[e] 3 Lev. 365. Bunb. 19, 169. Simms and Bennet in Chanc. 10 Nov. 1760.

[a] 2 Inſt. 641, 642, 646, 653. Hob. 296.

[b] 2 Rep. 43, 44. 11 Rep. 13, 14.

[c] 11 Rep. 13, 14. 1 Roll. Abr. 655. 1 Cro. 161.

Tithes of it to the Parſon. [d] But if a Parſon purchaſeth Lands in the ſame Pariſh whereof he is Parſon, and leaſeth out his Tithes, he ſhall pay Tithes to the Farmer of them.

[d] 11 Rep. 14. 1 Cro. 479. 578, 579.

A Vicar upon a general Endowment ſhall * not pay Tithes of his Glebe to the Parſon, if he keeps it in his own Hands. [c] So if a Vicar is endowed of all the ſmall Tithes ariſing within the Pariſh, he ſhall not have the ſmall Tithes ariſing upon the Glebe Lands of the Parſon, while they are in his own Hands; otherwiſe if the Glebe was in the Hands of a Tenant. But if the Endowment had been by expreſs Words of the ſmall Tithes of the Glebe Land of the Parſonage, the Parſon ſhall pay tithes to the Vicar, tho' the Glebe was in his own Hands.

[c] 11 Rep. 14. 1 Cro. 479. 578, 579.

If a Pariſhioner ſows his Lands, and before ſeverance the Parſon dies; the ſucceſſor ſhall have the Tithes, and all Profits from the Death of the laſt Incumbent. But if the Corn is cut down, the Executor of the Parſon ſhall have the Tithes, tho' the Corn was not actually tithed.

[f] Extraparochial Tithes (as in ſeveral Foreſts, *&c.*) belong to the King. For the Council of *Lateran* did not extend to them. [See 2 & 3 *Ed.* 6. *ch.* 13. §. 3.]

[f] 2 Rep 44. 5 Rep. 15. in Cawdry's Caſe.

By 28 H. 8. ch. 11. *If a Parſon ſows his Glebe and dies, the Executor ſhall have the Corn ſown by his Teſtator. But Tithes and other Profits ariſing during Vacancy, belong to the* Succeſſor.

The Executor ſhall pay Tithe for the Corn to the Succeſſor.

If the Glebe was in the Hands of a Tenant, and the Parſon dies after Severance of the Corn, and before Rent is due; neither the Executor or Succeſſor can claim the Rent, but the Tenant may retain it, and alſo the Crop; unleſs there was a ſpecial Covenant that the Tenant ſhould pay to the Parſon's Executor proportionably to the Rent for ſo much as he ſhould receive. But it ſeems that this Caſe is within the Equity of 11 *G.* 2. *ch.* 19. for Apportionment of Rent, where the Demiſe is at an End by the Death of the Tenant for Life.

2 Inſt. 646, 647, 651, 652. 1 Roll. Abr. 657. 1 Cro. 511, 512. See p. 20. ante.

3. Of what *Things* Tithes are due and payable or not, and the *Manner* of paying them where due.

Tithes are to be paid of Common Right of ſuch Things only, which do yield an [a] yearly Increaſe; and but once in the Year. But this is to be underſtood where *Cuſtom* does not over-rule. For by Cuſtom a Parſon may have Tithes of ſuch Things as are not titheable of Common Right. Things *Feræ Naturæ* are not titheable where no one hath Property. But what Things are titheable, and what not, and the *Manner* of paying Tithes where due, will appear from this ſhort *Alphabetical* TABLE. †

[a] F. N. B. 53. 2 Inſt. 643, 651, 652, 664. 11 Rep. 16.

A

[b] ACorns, Maſt, or Pannage, if ſevered and ſold, pay Tithe; [c] not if they drop, and the Hogs eat them. But if ſevered and given to Swine, then the Tenth of the Value thereof is due.

[b] 2 Inſt. 643. 11 Rep. 49. [c] Hetley 27.

[d] *After-moth*, (or ſecond Mowth) pays no Tithe, unleſs by Cuſtom.

[d] 2 Inſt. 652. 2 Danv. Abr. Tit. Diſmes. 589. 1 Ld. Ray. 242. Cont. 1 Roll. Abr. 640.

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* *Eccleſia decimas eccleſiæ ſolvere non debet.* 1 Cro. 479.

† Of the ſeveral Particulars tithable, the Student may compare this Table with 3 Burn Ecci. law. tit. Tithes from 406 to 500. where theſe Matters are treated of more fully and largely than the Nature of this Work will allow.

After-

e 2 Inſt. 621, 632. 2 Danv. Abr. 590.

[e] *After-Paſture* pays only by Cuſtom: For it is the Remains of the Graſs before tithed.

f 2 Danv. Abr 600, 601. Cont. F. N. B. 53. Sh. P. C. 192.

g 1 Ld. Ray. 137.

h 2 Danv. Abr. 614.

[f] *Agiſtment* from (*Giſer, Jacere* to lay) is a Feeding of Cattle upon Paſture Lands, which pay no other Tithe that Year; where the Cattle are either taken in for Hire, or not fed for Plow or Pail, or otherwiſe profitable to the Parſon by the Tithe of their Milk, Wool or Labour. If the ground is let to a Stranger, the tenth Part of the Money receiv'd is payable. Otherwiſe Reſpect ought to be had to the *Number* of the *Cattle*, and *Time* of their Depaſturing in that *Land*. If the Owner eats it all up with unprofitable *Cattle*, the tenth Part of the Value of the Land is payable. But often *Cuſtom* or *Preſcription* directs the Payment, tho' this Tithe is due *de jure*[g]. If they are [h] *Gueſt* Cattle (or taken in for Hire) Suit may be commenced either againſt the Occupier of the *Land*, or the Owner of the *Cattle*. But regularly againſt the Occupier of the *Land*. Sometimes a *Pariſhioner* will agiſt till *May*, and then hain the *Land*; and give the Parſon the Tithe of the Hay that is cut, being a great deal *leſs* than if he had hained it from the Beginning. Now it ſeems reaſonable, that Tithe ought to be paid in Proportion to the Agiſtment, as well as Tithe of the Hay that is made.

Agreement for Tithes by the Parſon with a Pariſhioner, is good for his own Time only.

i 2 Cro. 199.

[i] *Alders* pay Tithes tho' above twenty Years Growth.

k 2 Inſt. 643.

[k] *Aſh* is Timber, and therefore if above twenty Years Growth is free from Tithe. [See *Wood*.]

l 2 Inſt. 643.

[l] *Aſp Trees* are exempted, if above twenty Years Growth, in Places where they are uſed for Timber.

B

Barley. See *Grain*.

a 11 Rep. 49. 2 Inſt. 643.

[a] *Bark, Root*, and *Germins* (of what Age ſoever) which grow upon the antient Stock, are not titheable, if the Tree was Timber.

b 2 Inſt. 655, 656. 1 Cro. 475.

[b] *Barren Land*, Heath or Waſte Ground, which is ſo of its own Nature, (not by Accident or ill Huſbandry) is not titheable. And when made good by Huſbandry, Tithes ſhall not be paid for the firſt ſeven Years, by 2 & 3 *Ed.* 6. *ch.* 13. But Lands gained from the Sea, Woodlands converted into Arable, are not within the Statute. And *Barren Land* ſhall, during the firſt ſeven Years of Improvement, pay ſuch Tithes as have been accuſtomably paid before, as Wool and Lamb.

Bawks. See *Headlands*.

c 2 Danv. Abr. Tit. Diſmes. 589.

[c] *Beech* is titheable; but when uſed for Timber it is exempted by the Statute of *Sylva Cædua*, (*viz.*) 45 *Ed.* 3. *ch.* 3.

d 3 Cro. 404, 559. F. N. B. 51.

[d] *Bees* titheable for their Honey and Wax by the tenth Meaſure, not by the tenth Swarm.

Beans. See *Grain*.

e 2 Inſt. 643. 1 Cro. 1.

[e] *Birch* is titheable, tho' of twenty Years Growth, becauſe it is not proper for Building.

f 2 Inſt. 651.

[f] *Brick* not titheable. It is of the Subſtance of the Earth, and not an annual Increaſe.

g 2 Danv. Abr. Tit. Diſmes. 597. 1 Cro. 609. 3 Cro. 113.

[g] *Broom* ſhall pay Tithe. But if burn'd in the Owner's Houſe kept for Huſbandry within the Pariſh, it may be diſcharg'd. And ſo it may be diſcharg'd by Cuſtom.

C

h Raym. 277.

Calves are titheable, and the Tenth is to be taken away [h] when it is weaned, and can live on ſuch Food as the Dam doth. If there are fewer

Calves than ten, Cuſtom muſt direct in the Payment; and a Cuſtom for paying the tenth Part of the Price for every Calf that is ſold, is a good Cuſtom. The Tithe is to be [i] apportion'd by the Month-Rate, if they are engendered, brought forth and nouriſhed in different Pariſhes.

1 Roll. Abr. 648.

[i] Lyndwood Cap. Quoniam, ut Audivimus. Tit. De Decimis.

Cattle feeding upon Waſtes and Commons where the Bounds of the Pariſh are not known, pay Tithe to the Parſon, where the Owner of the Cattle dwelleth, by 2 & 3 *Ed.* 6. *ch.* 13. §. 3. If they are kept for the [k] Plough and Pail, they pay no Tithe for their Feeding. The Parſon hath the Benefit of their Labour. Oxen or Steers bred or bought, and then ſold, ſhall pay Tithe for their Paſture; and ſo ſhall other fatted Cattle. And barren Cattle, tho' kept for the Plough, if not uſed for the Plough within the Pariſh where fed, ſhall pay Tithe for their Feeding [l]; and ſo muſt Cattle when turned off from the Plough to be fatted and grazed for Sale [m]. If they feed one Half-Year in one Pariſh, and the other Half in another, the Tithe ſhall be equally divided betwixt the two Parſons, and ſo proportionably. See *Agiſtment.*

[k] 1 Roll. Abr. 646, 647. Bunbury. 3.

[l] 1 Ld. Ray. 129.

[m] Show. P. C. 192. Eq. Ab. 366. S. C.

[n] *Chalk* or *Chalk-pits, Clay* and *Coal* being part of the Freehold, and not annual, pay no Tithe.

[n] 2 Inſt. 651.

Cheeſe is only titheable, where Tithe is not paid of the Milk. [o] And is due only by Cuſtom.

[o] 1 Cro. 609. 1 Rol. Abr. 651.

Cherry-Trees, if uſed for [a] Timber in the County (as in *Buckinghamſhire*) are diſcharged. Otherwiſe not.

[a] 2 Roll. Rep. 83.

[b] *Chicken* not titheable, where Tithe Eggs are paid.

[b] 1 Roll. Abr. 642.

[c] Clover Seed titheable to the Vicar, if he is endowed of ſmall Tithes.

[c] Comyns 633. Bunb. 344.

Colts are titheable in the ſame Manner as Calves.

[d] *Conies* titheable only by Cuſtom for thoſe that are ſold, but not for thoſe ſpent in the Houſe.

[d] 2 Danv. Abr. Tit. Diſmes 583.

Corn Titheable. And the [e] Pariſhioners of Common Right ought to cut down the Corn, prepare it and bind up the Wheat-Sheaves. And if the Pariſhioner will not [f] ſow his Land, the Parſon may have his Action againſt him for his Due. [*Qu.* for the Caſe cited, *viz.* 2 *Ventr.* 48. does not warrant this.] See *Grain.*

1 Roll. Abr. 635.

[e] 1 Roll. Abr. 644. 1 Sid. 283. Latch. 226.

[f] 2 Ventr. 48.

Cows pay no Tithe for their Paſturage, if they yield Milk.

D.

[g] *Deer* not titheable (becauſe they are *Feræ Naturæ*) without Cuſtom.

[g] 2 Inſt. 651.

[h] *Dotards,* or old decay'd Trees, having been once privileg'd as *Sylva Cædua,* ſhall not pay Tithes, tho' cut down for Fire. See *Wood.*

[h] 11 Rep. 49. 81. 2 Inſt. 643.

[i] *Doves* kept in a Dovehouſe titheable. If ſpent in the Houſe, not titheable of Common Right. See *Pigeons.*

[i] 1 Vent. 5. 1 Roll Abr. 635, 644.

E.

[k] *Eggs* are titheable when Tithe is not paid for Chickens, or when the Young are not paid in Kind.

[k] 1 Roll. Abr. 642.

[l] *Elm* being Timber is diſcharged by the Statute of *Sylva Cædua.* But not if under twenty Years Growth.

[l] 2 Inſt. 643.

F.

[m] *Fallow Ground* is not titheable, becauſe it improves the Land by lying freſh. But if it be kept Fallow beyond the Courſe of Huſbandry to the Prejudice of the Parſon, the Parſon ought to have Tithes of the Land. *Qu.*

[m] 1 Roll. Abr. 642.

[n] *Fern* not Titheable.

[o] *Fens* being drained are not privileged as Barren Land, by 2 & 3 *Ed.* 6. *ch.* 13.

[p] *Fiſh* taken in the Sea titheable by Cuſtom in Money, after Coſts deducted; becauſe a perſonal Tithe. Fiſh in Ponds and Rivers incloſed (not common Rivers) ought to be ſet forth as a predial Tithe in Kind. Fiſh in common Rivers titheable only by Cuſtom.

[q] *Flax* is a ſmall Tithe, tho' ſown in large Fields; and every Acre of Hemp or Flax ſown, ſhall pay yearly five Shillings for Tithe, and no more; and ſo proportionably for more or leſs Ground, according to the 11 & 12 *W.* 3. *ch.* 16.

Fleeces. See *Wool.*

[r] *Foreſt* (tho' in a Pariſh) ſhall pay no Tithes while in the Hands of the King. But a Foreſt within a Pariſh in the Hands of a Subject ſhall pay Tithes. And if a Foreſt be diſafforeſted, and within a Pariſh, it ſhall pay Tithe.

Fowls, as Hens, Geeſe, Ducks, are to pay Tithes either in Eggs or the Young, according to Cuſtom, but not in both. See *Turkeys poſt.*

[s] *Fruit*, as *Apples*, *Pears*, *Plumbs*, *Cherries*, &c. is due in Kind when gathered. If ſold on the Trees, the Vendee or Buyer pays the Tithe.

Fruit-Trees cut down and ſold, pay no Tithe, if they have paid Tithe Fruit that Year, before they were cut down and ſold.

Fuel, if ſpent in the Pariſhioner's Houſe, not titheable. See *Wood.*

Furzes, if ſold pay Tithe. But if uſed for Fuel in the Houſe, or to make Pens for Sheep by the Huſbandman, otherwiſe.

G.

Gardens are titheable as other Land, and therefore Tithe in Kind is due for all Herbs and Plants, as *Parſly*, *Sage*, *Cabbage*, *Turneps*, *Saffron*, *Woad*, &c. But Money is uſually paid by Cuſtom or Agreement.

Geeſe. See *Fowl.*

Grain (as *Wheat*, *Barley*, *Beans*, &c.) ſowed is titheable according to the Cuſtom of the Place; and is commonly tithed by the tenth Shock, Sheaf or Cock, where the Cuſtom of the Place is not otherwiſe. The Parſon or his Servant may come upon the Land, to ſee the Tithes ſet forth, and to carry them away. [a] If Corn, *&c.* is ſold ſtanding, the Vendee or Buyer ſhall pay the Tithe. But if ſold after Severance, the Vendor or Seller muſt pay it.

[b] *Graſs* mowed is titheable by payment of the tenth Cock. But the Manner of Tithing is governed by Cuſtom. As to Graſs ſtanding, ſee *Agiſtment*, *ante*. If cut down and carried away in Swaths without Fraud, for neceſſary Suſtenance of Plough-Cattle, (Cart-Horſes being included under that Term) having otherwiſe not ſufficient to feed them, no Tithe is due.

[c] *Gravel* being of the Subſtance of the Earth, and not annually Increaſing, yields no Tithe.

H.

[d] *Hazle*, *Holly*, *Willow*, *Maple*, *White-thorn*, &c. regularly titheable, tho' of twenty Years Growth; unleſs they are uſed for Building by the Cuſtom of the Country.

Hay is titheable by the Payment of the tenth Cock, and (if the Cuſtom is not otherwiſe) the Pariſhioners ſhall make the Graſs Cocks into Hay for the Parſon's Tithe [e]. But if the Pariſhioner is not obliged to make the Tithe into Hay, he may leave it in Graſs Cocks or Swaths, as the Cuſtom is, and the Parſon muſt make his Graſs into Hay; and he may do it on the [f] Lands in which it grew, and go over the Land of the Pariſhioner in the Way to make it. [See 2 & 3 *Ed.* 6. *ch.* 13.] [g] And if Meadow Ground is ſo Rich, that there are two Crops of Hay in one Year, the Parſon ſhall have Tithe of both. [See *Aftermowth.*] Alſo Tithe ſhall be paid of Hay made of Graſs growing in [h] Orchards. It is no good [i] *Modus,* that the Pariſhioner having ſpent all his Hay upon the Beaſts of the Plow, that therefore he ſhould be free from Payment of Tithe Hay.

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[n] 2 Inſt. 652.

[o] Moor 430.

[p] 2 Danv. Abr. Tit. Diſmes 583, 584. 2 Roll. Abr. 636, 656. Bunb. 43, 256.

[q] 3 Cro. 264. 3 Lev. 365.

[r] 1 Roll. Abr. 655. Bunb. 128. 3 Cro. 94.

[s] Dr. & Stud. Dial. 2. ch. 55. 2 Inſt. 621. 652.

Bunb. 10.

[a] 2 Danv. Abr. Tit. Diſmes 614.

[b] 1 Roll. Abr. 644, 645.

[c] 2 Inſt. 651.

[d] 2 Danv. Abr. Tit. Diſmes 589.

[e] 2 Wms. 523. Contra.

[k] *Headlands* not titheable, if only large enough for turning the Plow. Therefore of larger *Headlands* Tithe is payable.

Heath. See *Barren Land.*

Hearth Penny or *Smoke Penny,* ſeems to be a Payment for Wood burn'd in the Houſe, and due only by Cuſtom.

Hemp. See *Flax.*

Herbage is titheable for barren Cattle kept for Sale, which yield no Profit to the Parſon.

[a] *Herbage* of Ground whereon Corn has grown the ſame Year, and whereof Tithe has been paid the ſame Year is not titheable.

Holly. See *Hazle.*

Honey. See *Bees.*

Hops pay Tithe by the Poll or Meaſure; and the Tenth may be ſet out after they are picked, and before they are [b] dried. But the Hop-poles are not titheable. [It hath been lately determined, that they are to be tithed by the Bag after Picking [c].] There can be no *Modus* for Hops, becauſe lately come into *England.*

Horſes. See *Agiſtment,* & *Bunb.* 3.

[d] *Houſes* do not pay Tithes of common Right. But a *Modus* may be paid for Houſes in Lieu of the Tithe of the Land, upon which the Houſes are built, and may be ſued for in the Eccleſiaſtical Court. [See 37 *H.* 8. *ch.* 12. 22 & 23 *Car.* 2. *ch.* 15. For Tithes of Houſes in *London.*] A great many Cities and Boroughs have a Cuſtom to pay a *Modus* for their Houſes [e]. [See 2 & 3 *Ed.* 6. *ch.* 13.]

K.

Kids are titheable as *Calves.* See *Calves.*

L.

Lamb is titheable in the ſame Manner as *Calves.* See *Calves.* [f] If they are payable at a certain Day, and the Pariſhioner ſells all his *Lambs* before the Day, to deceive the Parſon, it is Fraud, and he ſhall pay the Value. If they are yeaned in another Pariſh, and do not tarry there thirty Days or more, no Tithe is due for them to the Parſon of that Place. [g] A Cuſtom to pay a Half-penny for every *Lamb* under ſeven, and if there be ſeven, then the Parſon to have the ſeventh *Lamb,* paying three Half-pence, &c. is good.

[h] *Lead* is only payable by Cuſtom; for it is of the Subſtance of the Earth.

Lime titheable only by Cuſtom, as Lead.

[i] *Loppings* are titheable, except of Timber-Trees, the Branches being then privileged with the Body, according to the Statute of *Sylva Cædua.* If the Trees were uſually lopped, the Age of the Loppings is not material.

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[f] 1 Roll. Abr. 643, 647, 1 Str. 245.

[g] Hob. 250. Contra.

[h] 2 Inſt. 652.

[i] 1 Roll. Abr. 650.

[k] 2 Inſt. 652. 1 Roll. Abr. 646.

1 Cro. 702.

[a] 2 Inſt. 652.

[b] 1 Roll Abr. 644. Bunb. 20. 1 Sid. 283, 443.

[c] Tyers's Caſe in the Houſe of Lords 1753.

[d] 11 Rep. 16. 2 Inſt. 659. 660. Hob. 10.

[e] Bunb. 102, 107.

[f] 1 Roll. Abr. 652. 1 Ld. Raym. 677. Bunb. 133.

[g] Lyndwood cap. Quoniam propter. 3 Cro. 403. Bunb. 308.

[h] 2 Inſt. 651.

[i] Dr. & Stud. Dial 2. ch. 55, 11 Rep. 48. 2 Inſt. 643.

terial. Tho' they were cut before within twenty Years, yet they ſtill continue privileged. See *Wood.*

M.

Maple. See *Hazle.*

Maſt of Oak or Beech. See *Acorns.*

[k] 2 Danv. Abr. Tit. Diſmes, 596. 1 Ld. Ray. 359. Bunb. 73.

[k] *Milk* is titheable, when Tithe is not paid of Cheeſe, all the Year, unleſs Cuſtom over-rules. And it is to be paid to the Parſon of that Pariſh for that time where the Cows feed, at every tenth Meal, not by the tenth Part of every Meal, by reaſon of the Trouble that would ariſe in collecting ſuch ſmall Parcels. And of common Right, it muſt be fetched away from the Place of Milking, by the Parſon in his own Pails, before the next milking Time, unleſs there is a particular Cuſtom to bring it to the Church-porch, or other Place; which if there is, the Pariſhioner muſt obſerve it.

[l] 2 Danv. &c. 590. [a] 2 Inſt. 621.

[l] *Mills* are of two Sorts, *Corn-Mills,* or *Mills* for other Uſes, as *Paper-Mills, fulling-Mills, Iron-Mills,* &c. *Corn-Mills,* driven by Wind or Water, pay the tenth Toll Diſh to the Parſon of the Pariſh where the Mill ſtands. *Other* Mills pay no Tithe, unleſs by Cuſtom. All *Corn-Mills* not erected [a] before 9 *Ed.* 2. *ch.* 5. are titheable. But if it can be proved, that the *Mill* was erected before the Memory of Man, and that it never paid Tithe, the Law will preſume it to be ſuch an antient *Mill* as is within that Statute. But it is ſaid, that the tenth Toll-diſh is no where paid, and that it is only a perſonal Tithe, and muſt be paid, with Deduction of Coſts, where the Miller dwells and hears Divine Service: For a Miller is of an Art and Faculty. See 2 & 3 *Ed.* 6. *ch.* 13.]

* Bunb. 73. Eq. Ab. 366. 2 Wms. 463.

* It is now determined, that *Corn-Mills* are titheable; but that it is only a perſonal Tithe, and ſo ought to be paid out of the clear Gain, after all Manner of Charges and Expences deducted.

[b] 2 Inſt. 621, 652.

If one pays Tithe for his Corn, and after grinds the ſame at a Mill in the ſame Pariſh, no Tithe for [b] Meal.

[c] F. N. B. 53. 2 Inſt. 651.

[c] *Mines* are only *titheable* by Cuſtom. For they are of the Subſtance of the Earth, and not an annual Increaſe.

Modus. See *Who may be diſcharged from the Payment of Tithes, infra.*

[d] 2 Inſt. 491.

[d] *Mortuaries,* or Corſe-Preſents, are not Tithes, yet they were given for Recompence for perſonal Tithes and Offerings not paid thro' Ignorance, Negligence or Fraud, in the Life-time of the Pariſhioner; as the beſt Horſe, *&c.* They are due by Cuſtom only and are now ſettled to be paid in Money; for,

By 21 H. 8. ch. 6. *Where Mortuaries are due by Cuſtom, he that dieth poſſeſſed of moveable Goods to the Value of Forty Pounds and upwards (his Debts firſt paid) pays Ten Shillings; he that dies poſſeſſed of Goods to the Value of Thirty Pounds, and under Forty Pounds, pays Six Shillings and Eight Pence; dying poſſeſſed of Goods to the Value of Six Pounds Thirteen Shillings and Four Pence, and under Thirty Pounds, pays Three Shillings and Four Pence. Goods under Six Pounds Thirteen Shillings and Four Pence yield no Mortuary. No Mortuary is to be paid for any Feme Covert, Child, Perſon not keeping Houſe, Way-faring Man, one not reſiding in the Place where he happens to die; for his Mortuary ſhall be paid in the Place where he had at his Death his moſt Abode.* [See 12 *Ann. Seſſ.* 2. *ch.* 6. For taking away Mortuaries within the Dioceſe of *Bangor, Landaff, St.*

David's, and *St. Aſaph*, and giving a Recompence to the reſpective Biſhops, *&c.*

N.

[e] *Nag*, or Riding Nag, kept only for the Maſter to ride on, pays no Tithes for Paſturage. But ſome inſiſt, that if no Tithes are to be paid for its Paſturing, the Nag ought to be rode by the Maſter only about his Concerns of Huſbandry.

[e] 1 Roll. Abr. 641, 642. 2 Cro. 430. Bunb. 3.

[f] *Nurſeries* ſhall pay Tithes, if the Owner digs them up, and makes Profit of them, and ſells them into another Pariſh; or if the Owner pulls them up, he ſhall pay the Tithes. But if the Owner ſells them ſtanding, and the Vendee pulls them up, he ſhall pay the Tithe.

[f] 2 Danv. 585, 614. &c.

O.

[g] *Oak*, together with *Aſh* and *Elm*, is privileged, as Timber, from paying Tithe by the Statute of *Sylva Cædua*, if of or above twenty Years Growth. *Oaks* under twenty Years Growth, which may be Timber, are alſo privileged. And though they become dry and rotten, and not fit for Timber, they ſhall pay no Tithe if they were once privileged.

[g] 2 Danv. 589. &c.

Oblations, *Obventions*, *Offerings*, [a] (one and the ſame Thing, though *Obvention* is the largeſt *Word*) are in the Nature of Tithes. *Offerings* are reckoned amongſt perſonal Tithes, and ſuch as ariſe from the Labour and Induſtry of the Pariſhioner, payable according to Cuſtom to the Parſon or Vicar, either *occaſionally* at *Sacraments*, *Marriages*, *Burials*, *Churching of Women*; or at conſtant *ſtated Times* as at *Eaſter*, &c. They are to be paid to the Parſon of the Pariſh where the Party dwells. *Eaſter* Offerings have been held to be due of common Right at Two-pence *per* Head *. [See 2 & 3 *El.* 6. *ch.* 13. *ſ.* 10.]

[a] 11 Rep. 16. 2 Inſt. 659, 661.

*Bunb. 174, 198.

[b] *Orchards* pay Tithe of Fruit. And if the Soil of an *Orchard* is ſown with any Kind of Grain, the Parſon ſhall have Tithe of the Fruit-Trees and of the Grain, as alſo of the Graſs; for they are of ſeveral and diſtinct Kinds. If one cuts down Trees which have born Fruit, whereof Tithe has been paid that Year, no Tithe ſhall be paid of the [c] Faggots or Billets of the Trees.

[b] 2 Inſt. 652.

[c] 2 Inſt. 621, 652.

P.

Park pays Tithe for the Deer, and for the Herbage by Cuſtom. If converted into Tillage, it ſhall pay Tithe in Kind. [See *who may be diſcharged from the Payment of Tithes, poſt.*]

[d] *Partridges* and *Pheaſants*, being *Feræ Naturæ*, yield no Tithe of Eggs or Young. And though they are tame and kept in a Place incloſed, and lay Eggs, and hatch young Ones, yet they pay no Tithe.

[d] 2 Danv. 583. &c.

Paſture. See *Agiſtment.*

[e] *Peaſe* gathered for Sale, or to feed Hogs, are titheable; but not green Peaſe to eat in the Houſe.

[e] 1 Roll. Abr. 647.

Penſion. [See how *Mortuaries* and *Penſions* may be *recovered, infra.*]

[f] *Pidgeons* ought to pay Tithe, if they are ſold, and not ſpent in the Houſe. This is alſo true if they lodge in Holes about a Houſe, as well as in a Dove-Houſe. But by Cuſtom *Pidgeons* ſpent in the Houſe may be titheable, though not of common Right.

[f] 2 Danv. 583, 593, 597. &c. 1 Roll. Abr. 635.

Pigs are titheable as *Calves*, as ſoon as they are weaned, and can live without the Dam. Uſually when three Weeks old. See *Calves.*

[g] *Pits* and *Quarries* pay no Tithe.

[g] 1 Roll. Abr. 637.

Plants. See *Nurſeries.*

[h] 1 Lev. 189. Plowd. 470. [h] *Pollards* of fifty Years Growth, when felled, pay Tithe. [i] *Pollards* are Trees uſually lopped, and therefore diſtinguiſhed from Timber-Trees.

R.

[k] 2 Inſt. 652. 2 Danv. 598. &c. [k] *Rakings* are not titheable of common Right; but this is to be underſtood of *Rakings* involuntarily, not fraudulently, ſcattered.

Rate-Tithe is a Payment by Cuſtom, for feeding of Sheep, *&c.*

[l] 2 Danv. 585, 589. &c. [l] *Roots* not titheable, unleſs by Cuſtom, if the Wood paid Tithe; becauſe they do not renew annually. Roots of Timber-Trees of what Age ſoever are exempted, as Parcel of the Inheritance. And ſo the Germins that grow out of the Roots.

S.

[a] 1 Cro. 467. [a] *Saffron* is a Predial and ſmall Tithe, and is titheable, tho' gathered but once in three Years.

Salt not titheable but by Cuſtom only.

[b] 1 Roll. Abr. 642, 647. 3 Cro. 237. [b] *Sheep* are titheable for *Lamb* and *Wool.* [See *Lamb* and *Wool.*] If killed and eaten in the Houſe, no Tithe is to be paid for their Feeding.

[c] 2 Inſt. 651. [c] *Slate* is not titheable of common Right, but only by Cuſtom.

[d] 2 Inſt. 652. [d] *Stubble* pays no Tithe, becauſe this is only part of the *Stalk*, upon which the *Corn* (which was tithed before) did grow.

Sylva Cædua. See *Wood.*

T.

[e] 1 Cro. 139. Bunb. 279. *Tares* or *Vetches*, and other coarſe Grain, pay Tithe. But if they are cut down [e] Green, and given to the Cattle of the Plough, no Tithe ſhall be paid of them, if there is not ſufficient Paſture in the Pariſh for the Cattle that pay Tithe.

[f] 2 Inſt. 651. [f] *Tile* is not titheable, being of the Subſtance of the Earth, and no annual Increaſe.

Trees. See *Nurſeries.*

[g] Ibid. [g] *Turf* is Tithe-free, as Part of the Freehold.

[h] 2 Danv. 583. &c. 2 Wms. 463. contr. [h] *Turkeys* and their Eggs are ſaid to be exempt from Tithe, becauſe *Feræ Naturæ. Quære.*

[i] Bunb. 314. [i] *Turnips* (ſown after the Corn is cleared) fed with Sheep or barren Cattle ſhall pay Tithes.

U.

Veniſon. See *Deer.*

[k] 2 Inſt. 642. [k] *Underwood* is titheable, and the Tithe ſhall be paid of *Underwood* digged up by the Roots. If *Underwood* is ſold ſtanding, the Tithe ſhall be paid by the Buyer.

W.

Warren. See *Conies.*

Waſte, where Cattle feed, pays Tithe. And,

By 2 Ed. 6. ch. 13. ſ. 3. *Cattle feeding on large Waſtes, where the Pariſh is not certainly known, ſhall pay Tithe to the Incumbent of the Pariſh, in which the Owner of the Cattle does dwell.*

Wax. See *Bees.*

Wheat. See *Grain,*

[l] 2 Inſt. 642, 643. Hob. 219. [l] *Willoughs* ought to pay Tithe, if not uſed for Timber.

[m] 2 Danv. 594. &c. [m] *Woad* growing in the Nature of an Herb, is a Predial and ſmall Tithe.

Wood is titheable, becauſe it is of annual Growth, tho' the Tithe is not of annual Payment. It is a Predial and great Tithe, due of common Right, [n] though ſome ſay it is due by Cuſtom only, [which ſeems to be the better and later Opinion, and now eſtabliſhed .] But between Parſon and Vicar, either by Virtue of the *Endowment*, or by *Preſcription*, [o] it has ſometimes been conſtrued to be a *ſmall* Tithe, and to belong to the Vicar.

It may be *diſcharged* of Tithe. 1. With Regard to the [p] *Age*, as Timber of or above Twenty Years Growth, by the Statute of *Silva Cædua*, 45 *Ed.* 3 *ch.* 3. Some have affirmed it may be diſcharged if under twenty Years Growth, if it is or may be Timber. [But it ſeems that tho' above twenty Years Growth, yet if it is cut and corded for Fuel, it is titheable[a].] 2. With Regard to the *Uſe* it is put to, as for the Owner's Firing in a Houſe of [b] Huſbandry, or to burn Brick to repair the Houſe; or for hedging and fencing the Eſtate in the ſame Pariſh; unleſs it is titheable by Cuſtom. 3. With Reſpect to the *Place* of its Growth, as in the *Wilds* or *Wealds* (*Silva*, the Woody Part) of *Kent* and *Suſſex*, it is diſcharged by *Preſcription*. For a [c] County may preſcribe to be quit of the Tithe of Wood, or any other *cuſtomary* Tithe, but a Town cannot. *Qu.*

[d] When it is titheable, it is ſet out while ſtanding by the tenth Acre, Pole or Perch, or when cut down, by the Tenth Faggot or Billet, as the Cuſtom has been. If he that ſells the Wood doth not ſet out the Tithe, he is liable to pay treble Damages by the 2 *Ed.* 6. *ch.* 13. and the Parſon may [e] ſue either the Buyer or the Seller by the Spiritual Law; but the Buyer only by Common Law. But *Quære*, for perhaps the Vendee may not be known.

Wool is a mixed and ſmall Tithe. All agree that it is titheable of common Right, when it is clipped. It is due and payable of Sheep [f] killed and ſpent in the Houſe, of [g] rotten Sheep which die, of Neck-wool cut off for the Benefit of the Wool (not if it is to preſerve the Sheep from Vermin, nor of Locks of Wool) becauſe otherwiſe there might be Fraud, or an Opportunity of ſpoiling the Fleece under the Pretence of Neck-ſhearings; of the Wool of Lambs [h] ſhorn at *Midſummer*, tho' Tithe was paid of the Lambs at *Mark-tide*; for this is a new Increaſe. If there is under ten [i] Pounds of Wool at the ſhearing Time, a reaſonable Conſideration ſhall be paid; becauſe being due of Common Right, a *Modus in non Decimando* cannot be allowed. So if leſs than ten Fleeces, they ſhall be divided into ten Parts, or an Allowance otherwiſe made. If Sheep are [k] removed from one Pariſh to another between the Times of Shearing, each Parſon muſt have Tithe *pro Rata*. But for Feeding under thirty Days, no Rate-Tithe is to be paid. Likewiſe, if Sheep feed all the Year in one Pariſh, and couch in another, the Tithe ſhall be equally divided betwixt the Parſons. If Sheep are brought from one Pariſh, to be ſhorn in another, where they were not before, the Tithe is payable to the Parſon of the Pariſh whence they came, if the Pariſh is known; otherwiſe the whole Tithe is payable where they are ſhorn. Laſtly, [l] If a Son or Daughter have five or ſix Sheep in the Father's Flock, the Father ſhall pay Tithe for them with the reſt, if he takes the Profits of them to his own Uſe.

In a Word, it is to be obſerved, that the *Manner* of Payment of Tithes is for the moſt part governed by the Cuſtom of every Pariſh. [See Biſhop *Gibſon's Codex Jur. Eccleſ. Angl. pag.* 706, &c.]

[n] Dr. & Stud. Dial. 2 ch. 55. 13 Rep. 13.

[o] 1 Lo. Raym. 137.

[p] 2 Inſt 642, 643, 644 2 Danv. 597, &c Bunb 126.

[a] Bunb. 99.

[b] 2 Inſt 652. 1 Ventr. 75.

[c] Dr. & Stud. Dial. 2. ch 55. 2 Inſt. 645.

[d] Hob. 250.

[e] 2 Danv. 614, &c.

[f] 1 Roll. Abr. 646, 647.

[g] F. N. B. 51. 1 Roll. Abr. 645, 646, 649. 2 Inſt. 652.

[h] 1 Roll Abr. 642.

[i] 1 Roll. Abr. 648.

[k] Lyndwood cap. Quoniam Propter cap. Quoniam Audivimus.

[l] Lyndwood cap. Quoniam Propter. verb. Decimal Laræ. Degg's Parſ. Counſ. Par. 2. ch. 6. 3 Burn Eccl. law. 463, &c.

3. How *Tithes* may be *recovered*; as alſo how *Mortuaries* and *Penſions* may be *recovered*.

See of an Indicavit, poſt. B. 4 ch. 4. *By* 9 Ed. 2. ch. 2. *If Debate ariſe upon the Right of Tithes* (*having its Original from the Right of the Patronage*) *and the Quantity of the ſame Tithes amounts to a* Fourth *Part of the Goods of the Church, The King's Probibition will lie to the Spiritual Court, and the Right muſt be tried at Common Law.*

By 27 H. 8. ch. 20. *If a Judge of an Eccleſiaſtical Court makes Complaint to two Juſtices of the Peace* (*one* Quorum) *of any Contumacy or Miſdemeanor committed by a Defendant in any Suit depending for Tithes, Offerings, and other Duties of the Church, the ſaid Juſtices ſhall commit ſuch Defendant to Priſon, there to remain without Bail, till he find ſufficient Surety to be bound by Recognizance, or otherwiſe, to give due Obedience to the Proceſs, Decrees and Sentences of the ſaid Eccleſiaſtical Court.*

[a] 2 Inſt. 662. This act extends to [a] *Predial, Perſonal,* and *Mixed* Tithes, due to Eccleſiaſtical Perſons, and their Farmers only, and out of the City of *London*. It does not extend to give Remedy to Lay Impropriators. There- [b] 2 Inſt. 648. fore for the Relief of [b] Impropriators and Laymen that had Right to Tithes afterwards upon the Diſſolution of Monaſteries, *&c.* It is enacted,

By 32 H. 8. ch. 7. *That if Tithes and Offerings are not ſet out and paid, the Party grieved, Eceſiaſtical or* Lay, *and his Farmers, may convene him that detains them before the Eccleſiaſtical Judge,* &c.

But *all Perſons that are diſſeiſed, or kept from their lawful Inheritance, Freehold, Term, Right or Intereſt in any Parſonage, Vicarage, Penſion, Tithes, Oblations, or other Eccleſiaſtical or Spiritual Profit, which are made Temporal, and abide in Temporal Hands to Lay Uſes by Law, may have like Remedy in the Temporal Courts, as for other Lands and Tenements.*

This Act does not extend to the City of London, *or Suburbs thereof.*

Note, That the former Part of this Act does only extend to *Tithes* and *Offerings*, not to other Church-Duties. But this Statute gives Remedy in the *Temporal* Courts to Lay-men, not only for *Tithes* and *Offerings*, but for any Eccleſiaſtical or Spiritual Profit, where the Owner [c] 1 Inſt. 159. a. 2 Inſt. 640, 641, 646. 2 Rep. 44, 45. is [c] diſſeiſſed, or otherwiſe put from the ſame. Yet the Owner may ſue for the *Subſtraction* of the ſame in the Eccleſiaſtical Courts, or at the Common Law, at his Election. For the Suit here is commenced againſt them that ought to pay the Tithes, and not againſt thoſe that were wrongful Takers of them.

Note alſo, That by this Statute the Party cannot be compelled in the Eccleſiaſtical Court, to give Security for his Obedience, but only to the *definitive* Sentence, and that the Security muſt be by *two* Sureties. Whereas by the 27 *H.* 8. *ch.* 20. before mentioned, Surety may be demanded by Eccleſiaſtical Perſons and their Tenants, upon *Contumacy* in any Part of the Proceedings; and one Surety ſufficeth.

[d] 2 Inſt. 648, 662. By 2 & 3 *Ed.* 6. *ch.* 13. [d] Remedy is given both to lay and eccleſiaſtical Perſons for predial, perſonal, and mixed Tithes. *For it is enacted, to ſupply former Defects, that every Subject ſhall without Fraud yield and pay all* predial *Tithes in Kind,* as hath of Right been yielded *and paid within forty Years before the making of this Act, or* Of Right and Cuſtom ought to have been paid. *And if any carries away ſuch Tithes, before he hath juſtly divided and ſet forth the ſame, or otherwiſe agreed for them with the Parſon, Owner, or Farmer thereof, he ſhall forfeit treble Value of the Tithes ſo taken away.*

[e] The Senſe of theſe Words, *As hath of Right been yielded*, relates to Tithes in Kind yielded within forty Years. And the Words *Of Right and Cuſtom ought*, &c. relate to a rightful Cuſtom, *De modo Decimandi*; which ought to be paid.

[e] 2 Inſt. 650.

If the Tithes are ſet out and ſevered from the nine Parts by the Owner, they are become ſo far Lay-Chattels, as that, if after the Severance they are carried away by a [a] Stranger, the Remedy againſt the Stranger, is in the Temporal Courts for treble the Value. If the Owner [b] of the Land carries them away after Severance, this is no ſetting forth. Turning of Cattle into Tithe makes it a fraudulent Severance [c]; [[d] But the Parſon muſt carry away the Tithes in a convenient Time after Severance, or he will be liable to an Action on the Caſe for Damages, for the Pariſhioner cannot put in his Cattle to eat the Tithes in ſuch Caſe.]

[a] 1 Cro. 607.
[b] 2 Inſt. 613, 649.
[c] Comyns 22.
[d] 1 Ld. Ray. 188. 1 Str. 246.

Obſerve, that the treble Damages are to be recovered in the Temporal Courts by Action of Debt; for the treble Damages are given *generally*, not limiting *where* to be recovered; and that the Forfeiture is to be given to the Party [e] *grieved*, not to the King; tho' it is not given to any Perſon in Certain by the Statute. But the Forfeiture cannot be claimed of Executors, becauſe the Wrong was perſonal, and it was a perſonal Contempt of the Statute.

[e] 1 Inſt. 159. a. 2 Inſt. 612, 650. 4 Inſt. 84.

It is enacted alſo, *That at all Times, and as often as the* predial *Tithes ſhall be due, and at the tithing Time of the ſame, it ſhall be lawful for the Party to whom the ſame are payable, or his Deputy or Servant, to view and ſee their Tithes juſtly ſet forth, and the ſame quietly to take and carry away. And if any Perſon carry away his* Corn, *or other predial Tithes, before the Tithe thereof is ſet forth, or willingly withdraw his Tithes of the ſame, or do ſtop or let the Owner thereof, or his* Deputy *or* Servant, *to view and carry away the Tithes, to the Loſs or Hurt of the ſame; then upon due Proof before a Spiritual Judge, the Party ſhall pay* double *the Value of the Tithes, beſides Coſts of Suit, and may be excommunicated for Diſobedience to the Sentence of the Judge.*

Note, Theſe two Clauſes of the Statute extend to *Predial* Tithes only, and give Remedy as well to Laity as Clergy. *Mixt* and *Perſonal* Tithes are provided for in a Clauſe afterwards.

The Laws of the [f] *Church* oblige the Owner of the *Corn*, *Hay*, &c. to give Notice to the Parſon, *&c.* But by *Common Law* ſuch *Notice* is not neceſſary; and the Statute gives the Parſon, *&c.* only a Right of ſeeing the Tithes ſet out; but does not oblige to Notice.

[f] 2 Danv. 595, &c. 2 Ventr. 48.

The *double* Value to be recovered in the Eccleſiaſtical Court, is [g] equivalent to the *treble* Forfeiture to be recovered in the Temporal Courts; becauſe one may ſue in the Eccleſiaſtical Court for the Tithes themſelves, *i. e.* a Recompence for them, and have moreover the double Value. [h] So that the Suit in the Eccleſiaſtical Court is more advanrageous than the Suit for the treble Forfeiture in the Temporal Courts; becauſe in the Temporal Courts he ſhall recover no Coſts, as he may in the Eccleſiaſtical Court with the Tithes themelves and a double Value. But then it is to be conſidered, that tho' the *Plaintiff* is caſt in the Temporal Courts, he ſhall pay no Coſts to the Defendant, as he may in the Eccleſiaſtical Court. But now,

[g] 13 Rep. 24. 1 Inſt. 159. a. 2 Inſt. 612, 651.
[h] 2 Inſt. 651.

By 8 & 9 W. 3. ch. 11. *Coſts are given with the treble Value in the Temporal Courts, where the ſingle Value or Damage found by the Jury ſhall not exceed twenty Nobles. And by this Statute the Defendant ſhall recover his Coſts.*

Again, By 2 & 3 Ed. 6. ch. 13. *Small Tithes, Offerings, Mortuaries, Penſions, Synodals, Proxies,* &c. *and* Perſonal *Tithes may be ſued for in the Eccleſiaſtical Courts.* But *for Perſonal Tithes, the Ordinary cannot exa-*

mine the Party upon Oath. Offerings *are to be yearly paid to the Parſon of the Pariſh where one does dwell or abide.*

Note, That the taking away of the Oath to prove that Perſonal Tithes are due, has rendered the Recovery of Perſonal Tithes almoſt impracticable. And this ſeems to be the Reaſon why they are not now demanded or paid, as formerly.

[a] 2 Inſt. 662. [a] This Act ſeems to extend to *predial* and *perſonal* Tithes only; but as it rehearſeth the 27 *H.* 8. *ch.* 20. and the 32 *H.* 8. *ch.* 7. which extend to all Kinds of Tithes, it includes *mixt* Tithes alſo.

2 Inſt. 648. [See in the ſaid Act of *Ed.* 6. concerning a *Suggeſtion* for a Prohibition, and Coſts for want of Proof of the Suggeſtion within ſix Months, *&c.*]

By 7 & 8 W. 3. ch. 6. Small *Tithes of or under the yearly Value of forty Shillings from any one Perſon, if not paid within twenty Days after Demand, may be recovered at any Time within two Years after due, before two Juſtices of the Peace not intereſted in the Tithes, who may ſummon the Party in Writing, and after Appearance, or in Default thereof, upon due Proof of Summons, hear and determine the Complaint, and award in Writing ſuch Compenſation for the Tithes as they ſhall judge reaſonable, with Coſts not exceeding ten Shillings; with Liberty of Appeal to the Quarter-Seſſions, whoſe Judgment ſhall be final, unleſs the Title to ſuch Tithes be in Queſtion. The Juſtices in this Caſe have Power to adminiſter an Oath to Witneſſes, and to levy the Money adjudged by Diſtreſs upon Refuſal to pay within ten Days after Notice. And the Judgment ſhall be enrolled by the Complainant at the next Seſſions. But if the Defendant inſiſts upon a* Modus, *Preſcription, or Title of Exemption, and gives Security to pay Coſts and Damages in the Courts above, the Juſtices ſhall not proceed.*

This Act is intituled, *An Act for the more eaſy Recovery of ſmall Tithes.* But in the Body of the Act, *Oblations*, *Offerings*, *Obventions*, and *Compoſitions* too are included.

But this Statute does not extend to the City of London, *or to any other Corporation where the Tithes are ſettled by Act of Parliament.*

By 7 & 8 W. 3. ch. 34. Quakers *refuſing to pay* great *or* ſmall *Tithes, or to pay Church-Rates, may upon Complaint to the two next Juſtices of the Peace (not intereſted in the Tithes) be convened by Warrant under their Hands and Seals; who ſhall examine Witneſſes upon Oath, and by Order under their Hands and Seals direct Payment, ſo as the Sum ordered to be paid do not exceed ten Pounds. And any one of the ſaid Juſtices may levy the Money ſo ordered by Diſtreſs and Sale of the Offender's Goods. But any Perſon finding himſelf aggrieved may appeal to the next Quarter-Seſſions, and the Juſtices then preſent may finally determine the Matter, and may either reverſe or confirm the Judgment, and, if they confirm, give Coſts againſt the Appellant, to be levied by Diſtreſs and Sale of his Goods. And the Cauſe cannot be removed by* Certiorari, *unleſs the Title of the Tithes comes in Queſtion. Provided, if Appeal be made, no Warrant of Diſtreſs ſhall be granted, till the Appeal is determined.* And

By 1 Geo. 1. St. 2. ch. 6. *The* 7 & 8 W. 3. *is extended to the Recovery of* any *Rates, Dues, or Payments, payable for the Stipend or Maintenance of any Miniſter or Curate officiating in any Church or Chapel, and the Juſtices may order reaſonable Coſts not exceeding ten Shillings.*

By the Statute of Circumſpecte agatis, *or* 13 Ed. 1. St. 4. *A* Mortuary [a] *and a* Penſion *may be recovered in the Eccleſiaſtical Court, and no Prohibition ſhall lie.*

[a] See Tithing Table, ante

By 34 & 35 H. 8. ch. 19. [b] Penſions, Portions, Corrodies, Indemnities, Synodies, Proxies, *and other Profits due out of religious Lands diſſolved, ſhall be paid to Eccleſiaſtical Perſons by the Occupiers of the ſaid Lands. And the Plaintiff may recover the Value thereof in Damages in the Eccleſiaſtical Court, together with the Coſts of Suit. The like he ſhall recover at Common Law, when the Cauſe is there determinable.*

[b] 12 Rep. 45.

[c] *Penſions* due by Virtue of an Ordinance made by the Ordinary upon a Controverſy for Tithes, or the like, (as in the Endowment of a Vicar, where one ſhall enjoy the Tithes and pay to another a Penſion for them,) ſhall be recovered in the Eccleſiaſtical Court, becauſe it beginneth by an Eccleſiaſtical Act, and by Ordinance of an Eccleſiaſtical Judge. But if a *Penſion* be claimed by Preſcription, the Preſcription ſhall be tried at Common Law, or in the Eccleſiaſtical Court. A Biſhop may ſue for a *Penſion*, &c. due by Preſcription (not by Deed) out of religious Lands diſſolved, before his [d] Chancellor, and an Arch-deacon before his Official.

[c] F. N. B. 51, 52. 3 Burn Eccl. law 78. 1 Cro 675. 1 Ventr. 3, 120. Contra, 2 Inſt. 491.

[d] Ventr. 3.

But notwithſtanding all theſe Statutes, Tithes, &c. (if of any conſiderable Value) are generally ſued for in the Courts of *Equity* by *Engliſh* Bill, and for the moſt Part in the *Exchequer*, but not upon the Statute for treble or double Value. [e] For there can be no Suit in *Equity* for the Recovery of the double or treble Value.

[e] Hardr. 190.

By 37 H. 8. ch. 12. *Tithes in* London *are to be recovered before the Lord Mayor.* [See the 22 & 23 *Car.* 2. *ch.* 15. An Act for the better Settlement of the Maintenance of Parſons in *London*.]

But if Tithes in *London* are due by Cuſtom, they may be ſued for in the [f] *Exchequer*, notwithſtanding the Statute; becauſe there are no negative Words in the Statute, to reſtrain that Court.

[f] Hardr. 116.

4. To what publick *Payments* are Tithes ſubject?

Tithes are at this Day chargeable with all Payments impoſed by Act of Parliament, if they are not excepted. They are ſubject by *Statutes* to contribute to the Poor, maimed *Soldiers*, *King's Bench* and *Marſhalſea* Priſons, the Militia, Highways and Bridges, Watch and Ward, Conſtables Rates, Robberies committed in the Hundred, and are liable to be taxed by Commiſſioners of Sewers, &c. though they were not ſubject to any Temporal Charges at Common Law. They are likewiſe ſubject to the Payment of *Firſt-Fruits* and *Tenths*. [a]

See p. 27. ante.

[a] See p. 38. ante.

5. Who may be *exempted* or *diſcharged* from the Payment of Tithes.

Lands may be exempted or diſcharged from the Payment of Tithes. 1. By real *Compoſition*. 2. By *Cuſtom* or *Preſcription*. 3. By *Act of Parliament*.

3 Burn Eccl. law 377 to 391.

1. By real [g] *Compoſition*, as when an Agreement is made with a Parſon or Vicar with the Conſent of the Patron and *Ordinary*, that ſuch Lands for the Future ſhall be diſcharged from the Payment of Tithes in *Specie*, by Reaſon of a Recompence made to the Parſon or Vicar for them out of other Lands.

[g] Dr. & Stud. Dial. 2. ch 55. F. N. B. 44. 2 Inſt. 490, 655. 2 Rep. 43, 44, 45.

But ſince 1 *Eliz. ch.* 19. in the Caſe of Archbiſhops and Biſhops, and 13 *El. ch.* 10. in the Caſe of other Eccleſiaſtical Corporations, ſole or aggregate, no Alienations can be made, other than for twenty-one Years, or three Lives, &c.

See of Leaſes ch. 3. poſt.

So that a real Compoſition, tho' made by Conſent of Parſon, Patron and Ordinary, ſhall not now bind the Succeſſor beyond that Term.

[a] Real Compoſitions cannot be tried in Court Chriſtian; but muſt be tried at Common Law, if there is a Suit in the Court Chriſtian for Tithes

[a] 2 Inſt. 490. 610. Hob. 297.

Tithes in Kind. But one may ſue in the Eccleſiaſtical Court for a Compoſition, as well as for a *Modus Decimandi*.

2. By *Cuſtom* or *Preſcription* [b]; either, 1. *De modo Decimandi*; or 2. *De non Decimando*.

1. A [c] *Modus Decimandi* is when Land or ſome annual Profit, Penſion or Rate-Tithe, hath been given Time out of Mind to a Parſon and his Succeſſors, in full Satisfaction and Diſcharge of all the Tithes in Kind in ſuch a Place.

This *Preſcription* aroſe at firſt from a real Compoſition, which was made beyond the Memory of Man, and now loſt, ſo that the Pariſhioner is forced to claim by Perſcription for Want of it.

This *Modus* is ſuppoſed to be the [d] full Value of the Tithe at the Time of the original Compoſition. If it appears to be greatly above the Value, it is a rank *Modus* and not good [e]. And if it does not now come up to the Value, it is to be intended, that the Tithes are either improved, or elſe, that Money is become of leſs Value than it was at the Time of the *Modus* agreed on; which occaſions the preſent Inequality.

A [f] *Layman*, Lord of a Manor, may preſcribe *De modo Decimandi* for himſelf and Copyholders; or a Copyholder may preſcribe in the Name of his *Lord*, or a [g] *Pariſh* or *Hamlet* for this or that Sort of Tithe; as to be quit of Wood or Hay, *&c.* or a *private* Perſon for his own Lands, or Part thereof; paying a Penſion or rate Tithe in Money, or ſo much yearly to the Parſon in lieu of the Tithes. But to make a good Preſcription, the *Modus* muſt be, 1. For the [h] Benefit and Advantage of the Parſon, not for the Benefit of another only. 2. One Tithe muſt not be in Conſideration of [i] another, as Tithe of Cows for the Tithe of Oxen, *&c.* 3. It muſt be ſomething different from the Thing that is due. Therefore it is a void Preſcription, to pay a Load of Hay yearly in Diſcharge of all Tithe Hay; for that is to pay a Part in Diſcharge of the Whole. But this holds only where Tithes are payable of Common Right, not by Cuſtom only. For leſs than a tenth Part of [k] Fiſh taken in the Sea, and due by Cuſtom only, may be a good Recompence. 4. It muſt be ſomething as [l] *certain* and *durable* as the Tithe, tho' it may not be ſo valuable.

But a *Modus*, tho' founded upon a good Conſideration, may be ſeveral Ways diſcharged, and Tithes may then become due in Kind, As, 1. Where the Land is converted to [m] other Uſes, or the Thing altered or deſtroyed, for which the *Modus* was paid. So a Preſcription for a *Modus* for Hay or Graſs ſpecially, in ſo many Acres of Land, is gone, if the Land is converted into a Hop-Garden, or into Tillage, ſo long as it continues a Hop-Garden or in Tillage. But when laid for Hay or Graſs again, it ſhall revive. So where a Park is diſparked, and the Lands are converted to Tillage, *&c.* if the *Modus* was general for the Park; but it is otherwiſe if the *Modus* is for the Tithe of ſo many Acres of Land contained in the Park; or if a *Modns*, or certain Sum of Money, is for all the Tithes of ſuch a Park, the *Modus* ſhall ſtand, tho' the Park is diſparked; becauſe the Preſcription is in the *Soil*, and not in the *Park*, which is a Franchiſe, and a Thing incorporate and imaginary. Thus by Alteration of a Fulling-Mill into a Corn-Mill, the *Modus* for the Fulling-Mill is gone, and Tithes for the Corn-Mill muſt be paid in Kind: But if the Land is diſcharged by a *Modus*, and the Owner [a] builds a Corn-Mill on the ſame, he ſhall not pay Tithe for the Mill. 2. By [b] Non-payment of the Conſideration, or by Payment of Tithes in Kind for ſo long

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[b] See ch. 3. ſ. 4. poſt. 3 Burn Eccl. law. 395, &c.

[c] 2 Rep. 48. 13 Rep. 40. Co. Select. Caſes 40. 2 Inſt. 490. 610.

[d] 13 Rep. 15. Hob. 40, 41.

[e] Bunb. 10. 20, 78, 301.

[f] 2 Rep. 47. 1 Cro 784, 599.

[g] 1 Cro. 587.

[h] 1 Roll. Abr 649, 650. 1 Cro. 276.

[i] 1 Roll. Abr. 651. 1 Cro. 446. 475, 786. 1 Cro. 609. 2 Salk. 656. 1 Ld. Ray. 242. Bunb. 307.

[k] 1 Lev. 179.

[l] Hob. 40. 1 Cro. 139. Bunb. 105, 126, 171, 198. 2 Wms. 462, 572.

[m] 2 Danv. Abr. Tit. Diſmes 607, 608.

[a] 2 Inſt. 490.

[b] 1 Roll. Rep. 932. Hob. 43.

Time, that the Preſcription for a *Modus* cannot be proved. But a ſhort Interruption ſhall not deſtroy it. A Payment of different Sums is Evidence that there is no *Modus*.

There may be a *Modus* for [c] *perſonal Tithes*.

[See 2 & 3 *Ed.* 6. *ch.* 13. and 7 & 8 *W.* 3. *ch.* 6. Where the Cauſe may be removed (giving Security for Damages and Coſts) upon pleading a *Modus* before the Juſtices of Peace of ſmall Tithes.]

A Parſon may ſue in [d] Court Chriſtian for a *Modus Decimandi* or Rate-Tithe, *allowed* between the Parties. But if the *Modus* is denied, it muſt be tried at the Common Law. This Diſtinction ariſes upon the Words of the Statute of 2 & 3 *Ed.* 6. *ch.* 13. *Or of Right and Cuſtom ought to be paid*. [See the Statute *De Circumſpecte Agatis*, 13 *Ed.* 1.] So where a *Modus Decimandi* is pleaded in the Spiritual Court to a Demand of Tithes in Kind, a Prohibition lies, upon Suppoſition, that the Spiritual Court will not admit of any Plea againſt Tithes.

2. A Cuſtom or Preſcription *De non Decimando* is to be diſcharged abſolutely of Tithes, and to pay nothing in Lieu thereof. Thus the [e] King ſhall pay no Tithes, tho' his Leſſee ſhall pay them, even for the antient Demeſnes of the Crown. Thus [f] Spiritual Perſons and Spiritual Corporations, as Biſhop, Dean and Chapter, may preſcribe by the Common Law *De non Decimando*, becauſe they are capable of Tithes, and the Tithes are not taken from the Church. Their Tenants may have the like Privilege. But it is a general Rule that a Layman cannot preſcribe, either againſt a Lay or Spiritual Rector [g], by the Common Law *De non Decimando*, tho' his Lands may be diſcharged by way of Retainer. The King is *Perſona Mixta*, and not ſaid to be a Layman in Law. But a Layman is capable of a Diſcharge of Tithes for Lands in his [h] own Hands by grant from *Parſon, Patron* and *Ordinary*; tho' not by Preſcription. A Church-warden (admitting that he may have Lands by Preſcription) may not preſcribe *De non Decimando* for Lands holden by Preſcription, and given for the Reparation of the Church; for he is not a Spiritual Perſon. [i] A *Pariſh* or a particular *Hamlet* cannot preſcribe *De non Decimando*, for particular Tithes, much leſs from the Payment of all Tithes, tho' it may preſcribe *De modo Decimandi*. But a [k] *County, Wild* or *Hundred*, may preſcribe to be free from the Payment of Tithe *Wood*, or any other particular Thing due by Cuſtom only: for as ſuch Tithes are due by Cuſtom only, they are diſcharged of them without a Cuſtom to the contrary, and they do but inſiſt on their ancient Right, and that Cuſtom hath not prevailed againſt it. [a] But where the Thing is titheable *De jure*, it hath been determined, that (notwithſtanding what is ſaid in ſome of the old Books to the contrary) a County or Hundred, cannot preſcribe *in non Decimando* any more than a private Perſon.

All Preſcriptions in theſe Caſes are triable at Common Law.

Thus of *real Compoſitions* and *Preſcriptions*, which are continued by 2 & 3 *Ed.* 6. *ch.* 13.

3. By *Act* of *Parliament* Lands may be diſcharged from Payment of Tithes.

[b] Abbeys, &c. before their Diſſolution held their Lands diſcharged by *Bulls* of Popes, by real *Compoſition* with the Parſon, Patron and Ordinary, by *Preſcription*, by Order, (as of the *Ciſtertians, Hoſpitallers* of *St. John of Jeruſalem, Templers*, [See 17 *Ed.* 2. *St.* 3.] ſo long as their Lands remained in their own Hands, and were manured by them:) [See 2 *H.* 4. *ch.* 4.] But *Monaſteries, Abbeys*, &c. being diſſolved, this Privilege of Ex-

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[c] 2 Inſt. 657.

[d] 2 Rep. 45. 11 Rep. 16. 2 Inſt. 490. 610, 611. 2 Roll. Abr. 283.

3 Burn. Eccl. law. 392.

[e] 1 Cro. 511, 512. Hardr. 513.

[f] 2 Rep. 44, 45. 1 Roll. Abr. 653, 654, 655. 656. 1 Cro. 512.

[g] Bunb. 325, 345.

[h] 2 Rep. 44.

[i] 1 Roll. Abr. 653.

[k] Dr. & Stud. Dial. 2 ch. 55. 13 Rep. 13. 2 Inſt. 645. 1 Roll. Abr. 653, 654.

[a] 1 Ld. Ray. 137. 4 Mod. 336. S. C. 2 Salk. 655. S. C.

[b] 2 Rep. 44. 47. 2 Inſt. 652, 653, 661. 2 Cro. 58, 457, 559. Hob. 296, 297.

emption, and all Appropriations had fallen with them, [c] if they had not been upheld and continued by the *Act of Parliament* that did diſſolve them. For

By 31 H. 8. ch. 13. *The Lands, Parſonages appropriate*, &c. *of Abbeys*, &c. *which were of the yearly Value of above Two hundred Pounds*, (called the greater Abbeys) *are diſſolved and given to the Crown, with a* Proviſo *in the Act, That the King and his Patentees, and all and every other Perſons, their Heirs and Aſſigns, which have, or ſhall have hereafter any Lands*, &c. *belonging to the ſaid Monaſteries, and other religious and Eccleſiaſtical Houſes and Places, ſhall keep and enjoy them diſcharged of the Payment of Tithes, in as large a Manner as the ſaid Abbots*, &c. *enjoyed the ſame at the Day of their Diſſolution.*

So that Purchaſors now ſhall hold the Lands diſcharged, in the ſame Manner as they were in the Hands of the Abbots, *&c.*

By this act [d] perpetual *Unity* of the *Poſſeſſion* of the Lands, and the Rectory in the ſame Hands, is made an Exemption; which was not ſo before at Common Law. For if the Monaſtery, *&c.* was ſeiſed of the Lands and Rectory, and paid no Tithes within the Memory of Man for the Lands; thoſe Lands ſhall now be exempted from Payment of Tithe by a ſuppoſed *perpetual* Unity of Poſſeſſion, *&c.* But the Unity of Poſſeſſion of a Manor and Rectory will not exempt the Demeſne Lands from the Payment of Tithes, when they come to be ſevered [e].

[f] *Religious* and *Eccleſiaſtical* Corporations are only within this Act. Therefore *Biſhops, Deans, Dean* and *Chapter, Archdeacons, Colleges, Hoſpitals*, &c. that were not *religious*, or which were not *regular* but *ſecular*, are not to be underſtood here. If it be Eccleſiaſtical only, it is out of the Act.

Note alſo, That the [g] King, and his Patentees for Life or Years, ſhall enjoy the Lands diſcharged, becauſe the King cannot manure them; but the King's Patentees in Fee, and others ſhall enjoy the Lands only in the ſame Manner as the Abbots, *&c.* or the abovementioned three Orders held them, *i. e.* whilſt in their own Hands, or not let out or manured by another.

The Act ſays, diſcharged from *Payment* of Tithes, not diſcharged of [h] *Tithes*; becauſe ſuch Diſcharges of the *Monaſteries*, &c. cannot be found.

A Catalogue of the ſeveral Monaſteries within *England* and *Wales*, which were return'd to be of above two hundred Pounds *per Annum*, diſcharg'd of Tithes, and diſſolv'd by 31 *H.* 8 *ch.* 13, may be ſeen in the *Exchequer*; and in many modern Books that have treated of the Law concerning Tithes. [See *Degge's Parſon's Counſellor*, *Godolphin's Repertorium Canonicum*, *Watſon's Clergyman's Law*, Biſhop *Gibſon's Codex*, and 3 *Burn Eccleſiaſtical Law*, 383 to 388.]

Hob. 295. Other Lands belonging to the greater Monaſteries, *&c.* which were not diſcharged before the Diſſolution of them, are ſtill ſubject to the Payment of Tithes. No other Lands that came to the Crown are diſcharged, but by the Statute above-mentioned. For it is to be obſerved, that tho' by 27 *H.* 8. *ch.* 28. the Lands, *&c.* of Religious Houſes, which were not above the clear yearly Value of two hundred Pounds, (commonly called, *the ſmaller Abbeys*) were given to the Crown, yet they were not diſcharged of the Payment of Tithes.

For there are no ſpecial Words in this Statute that the Lands, *&c.* given thereby, ſhall be diſcharged, as the Abbots, Priors, *&c.* held them diſcharged before the Statute. So that if there had been any Diſcharge

[c] 2 Rep. 47. Hob. 297. 309.

[d] 2 Rep. 47, 48, 49. 11 Rep. 10, 14. 2 Inſt. 653. Hob. 298, 306, 307, &c. 1 Cro. 206. 2 Cro. 452. 3 Cro. 424.

[e] Comyns 498.

[f] 2 Rep. 48, 49.

[g] Hardr. 174.

[h] 2 Rep 47. 11 Rep. 10, 14.

charge before, the Privilege now as to Lands, *&c.* under, or of the Value of two hundred Pounds *per Annum*, is determined, and the Preſcription *In non Decimando*, as well as the Privilege. But if the leſſer Abbeys, *&c.* had Right to a *Modus Decimandi*, Real Compoſition or Preſcription may be pleaded.

But again obſerve, that not all the religious Houſes of or under two Hundred Pounds *per Annum* were diſſolved by 27 *H.* 8. *ch.* 28. for ſome of them were diſſolved by 31 *H.* 8. *ch.* 13. by Virtue of a *Proviſo* in 27 *H.* 8. (left out of the Statute in the Book of *The Statutes at large*) That notwithſtanding that Act, the King might, by Letters Patent, *continue* any of the ſaid Monaſteries, *&c.* which he did; and ſo they were not diſſolved till 31 *H.* 8. and therefore are within the Branch of the ſaid Act concerning the Diſcharge of Tithe.

And now tho' Titles of Diſcharge under 31 *H.* 8. are loſt, and the Manner of Diſcharge cannot be made out at this Day; yet if the Lands of a religious Houſe, diſſolved by that Statute, have been held ſince the Diſſolution freed from the Payment of Tithes, it ſhall be intended that they were held ſo before; and Preſcription ſhall be allowed for a Diſcharge of Tithes under that Statute, either abſolutely *De non Decimando* for all Tithes, or for this or that Sort, *&c.*

Bunb. 37. 122.

All theſe Titles may be ſupported by [a] Preſcription; and from hence all other Preſcriptions *De non Decimando* are ſuppoſed to have their beginning.

[a] 2 Rep 48. 11 Rep 14. Hob. 297.

So that by Virtue of 31 *H.* 8. a Layman Patentee of the King may preſcribe (generally without ſhewing *how*) *In non Decimando* for Abbey Lands, as under an Abbot's Title; which he could not do for any Lands by the Common Law upon any account.

By 32 H. 8. ch. 24. *The King ſhall enjoy the Manors, Parſonages, Tithes, Privileges,* &c. *of the Hoſpital of* St. John *of* Jeruſalem.

But *Quære* [b] Whether theſe Lands are freed from the Payment of Tithes.

[b] Raym. 225. Contra, 2 Cro. 58. Bunb. 214.

See 2 *H.* 4. *ch.* 4. 7 *H.* 4. *ch.* 6. And ſee the Notes on 27 *H.* 8. *ch.* 28. and 31 *H.* 8 *ch.* 13 *&c.* in *Danvers's Abr.* Tit. *Diſmes* 618, 619, 620. See alſo 1 *Ed.* 6. *ch.* 14. The Act for Chantries Collegiate, and 2 *Rep.* 46, 47, 48, 49.

By 2 & 3 Ed. 6. ch. 13. *None ſhall pay the Tithes for Lands otherwiſe than they were paid forty Years before, nor where by the Laws and Statutes of this Realm, or by any Privilege or Preſcription, they are not chargeable, or that are diſcharged by any Compoſition real.*

2 Inſt. 649, &c.

Since the Diſſolution of Monaſteries, *&c.* the Learning of *Profeſſion, Deraignment,* &c. *is out of Uſe.*

IV. A *Tenure* is the [a] Manner whereby Tenements are holden of a Lord; or the Service that the Tenant oweth to the Lord. There can be no Tenure without ſome Service; becauſe the Service makes the Tenure. Theſe Tenures and Services were divided into twelve Parts, (*viz.*) *Homage, Eſcuage, Knight-Service, Homage Anceſtrel, Burgage, Villenage, Grand Serjeanty, Petit Serjeanty, Frankalmoign, Fealty, Socage* and *Rents*. But,

Of Tenures and Services, 2 Black. Com. ch. 5. 59. Of the Ancient Engliſh Tenures. [a] 1 Inſt. 1. a. 93. a. See P. 68 and 129. ante.

By 12 Char. 2. ch. 24. *All Tenures are turned into free and common Socage; and all Tenures by Knight-Service of the King or other Perſon, and by Knight-Service in* Capite *and Socage in* Capite *of the King, and the Fruits and Conſequences thereof are taken away. And all Tenures to be created by the King ſhall be in free Socage only,* *and not by Knight-Service or in* Capite; *ſaving Rents certain, Heriots and Suits of Court, and Services incident to common Socage, and ſaving Tenures in Frankalmoign, by Copy, and the honorary Services of Grand Serjeanty, other than Charges incident to Knight-Service.*

[b] F. N. B. 5. 2 Black. Com. 60. 1 Inſt. 108. a. 7 Rep. 11. 2 Inſt. 64, 65. Danv. 66, 67.

[b] A Tenure *in Capite*, in common Underſtanding, was only applied to the King as of his Perſon and Crown, that is, as he is King, (for the Defence of him and his Crown) and not when the Land is holden of the King, as of any Honour or Manor. The original Tenure muſt be created by the King. It was not ſufficient, that it was held only of the Perſon of the King; for the Land might come to him by Eſcheat. Tenure *in Capite*, largely taken, was ſometimes applied to a Subject, when one held of a common Perſon, as of his Perſon.

It remaineth therefore that I ſpeak only of *Grand Serjeanty*, *Petit Serjeanty*, *Frankalmoign*, *Fealty*, *Socage* and *Rents*.

[c] Lit. 153. 1 Inſt. 105. b. 2 Black. Com. 73.

Lit. 158.

1. [c] *Grand Serjeanty* (from *Serjeant*, a Waiter) is a Tenure whereby one holds his Lands of the King by ſuch Services, as he ought to do in his proper Perſon to the King. It may concern Matters Military within the Realm, or Services of Honour in Peace; as to be the King's Carver, Butler, *&c.* at his Coronation. Tenant by Grand *Serjeanty* was ſaid to hold by Knights-Service, becauſe the King had Ward and Marriage of ſuch Tenant; and tho' theſe are taken away by 12 *Car.* 2. *ch.* 24. yet the honorary Services of Grand Serjeanty ſtill remain. [See 1 *Ed.* 3. *St.* 2 *ch.* 12.]

[d] Lit. 159. 2 Black. Com. 81. 1 Inſt. 108. a. b.

2. [d] *Petit Serjeanty* is, where a Man holds the Lands of the King, to yield to him a Bow, a Sword, or certain Thing, to be rendered yearly, as one pays his Rent.

[a] Lit. 133. 2 Black. Com. 101. 1 Inſt. 94. a. &. b.

[b] 1 Inſt. 95. a. & b.

[c] Lit. 137. 1 Inſt. 95. a. & b. 94. b.

[d] Lit. 140. 1 Inſt. 94. b. 98. b. 99. a. 5 Rep. 40.

[e] See ch. 4. §. 2. poſt.

[f] Lit. 141. 1 Inſt. 99. a. & b.

3. [a] *Frankalmoign* (*Libera Eleemoſyna*, Free Alms) is the only ſpiritual Service; and is where an Eccleſiaſtical Corporation, ſole or aggregate, holdeth to them and their Succeſſors, of ſome Lord and his Heirs in *pure* and *perpetual* Alms. *Perpetual* ſuppoſes it to be a Fee-ſimple, tho' it may paſs without the Word Succeſſors. The Word *frank* or *free* diſtinguiſhes it from a Tenure by divine Service; for [b] that Service is certain, but in *Frankalmoign* no certain Service is mentioned; tho' both now are reduced to a Certainty, according to the Form of our Liturgy. A lay Perſon cannot hold in *free* Alms. And when a Grant is in *free* Alms, [c] no Mention is to be made of any Manner of Service, for it is free from any temporal Service, and is of the higheſt Nature, becauſe it is a Tenure by ſpiritual Service. [d] None can hold in *Frankalmoign*, but only by Preſcription, or by Force of ſome Grant made before the Statutes of *Mortmain*, 7 *Ed.* 1. *ch.* 36. and *Quia Emptores Terrarum*, or 18 *Ed.* 1. *ch.* 1. So that the Tenure cannot be created at this Day to hold of a Founder and his Heirs in *Frankalmoign* or free Alms. But the King is not reſtrained by the Statutes, nor a Subject that is licenſed or diſpenſed with by the King, to make ſuch a Grant. [See 7 & 8 *W.* 3. *ch.* 37. by which the King himſelf may diſpenſe with the Statutes of *Mortmain* [e].] For tho' the Alienation is * prohibited, yet if all Parties conſent in whoſe Favour the Prohibition is made, the Grant is good. And the [f] Reaſon, why a Grant in *Frankalmoign* ſince the Statute of *Quia Emptores Ter-*

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* *Alienatio licet prohibeatur, conſenſu tamen omnium, in quorum favorem prohibita eſt poteſt fieri.* 1 Inſt. 98. b. 99. a.

Quilibet poteſt renunciare juri pro ſe introducto. 1 Inſt 99. a. 223. b.

rarum is void, except in Caſe of the King, is becauſe none can hold in *Frankalmoign* but of the Donor; whereas, that Statute obliges to hold of the chief Lord, by the ſame Service by which the Feoffor himſelf held. But the King [g] may Grant away any Eſtate and reſerve the Tenure to himſelf.

[g] 1 Inſt. 223. a.

If an Eccleſiaſtical Perſon holds by Fealty and certain Rent, the Lord at this Day may [h] confirm his Eſtate to hold to him and his Succeſſors in *Frankalmoign:* For the former Services are extinct, and nothing is reſerved but that he ſhould hold of him, which he did before. So that this Change is not within the Statute of *Quia Emptores Terrarum.*

[h] Lit. 540.
1 Inſt. 99. a.
306. b.

A Tenure in *Frankalmoign* is incident to the [i] inheritable Blood of the Donor or Founder; except in Caſe of the King, who may grant in *Frankalmoign* to hold of him and his Succeſſors. And if thoſe that hold their tenements in *Frankalmoign,* [k] fail to do ſuch Divine Service as they ought, the Lord may complain of it, according to the Courſe of the *Eccleſiaſtical* Law, to their Ordinary or Viſitor, which is the King, if he is Founder, or a Subject, if he was appointed Viſitor upon the Foundation. And the Ordinary or Viſitor ought to puniſh the Neglect according to the Eccleſiaſtical Laws. But for [l] *Divine Service* in certain (as to read Prayers every *Friday* or to Diſtribute Alms to *poor Men,* &c.) The Lord may diſtrain for it, and *Fealty* is incident to this Tenure which is different from *Frankalmoign.*

[i] Lit. 135.
1 Inſt. 95. b.
[k] Lit. 136.
1 Inſt. 96. a.
[l] Lit. 137.
1 Inſt. 96. b.

This Tenure in *Frankalmoign* is an ancient Grant; and therefore ſhall be allowed as the Law was then taken. It is chiefly to be met with in Grants to *religious Houſes, Biſhops, Deans, Deans and Chapters, Colleges, Hoſpitals,* &c. But tho' it may poſſibly be made at this Day, it is out of Uſe.

4. [a] *Fealty, (Fides, Fidelitas)* ſignifieth an Oath taken at the Admittance of every Tenant to be true to the Lord of whom he holdeth his Land. And he that holdeth Land by this Oath only, holdeth in the freeſt Manner, that any Subject can do. But bare Tenant at [b] Will at the Common Law ſhall not do Fealty, for he hath no certain Eſtate; and becauſe the Matter of an Oath ought to be certain. Leſſee for Life or Years ought to do Fealty, to the Leſſor; for they hold of him, and there can be no Tenure without ſome Service. The Service makes the Tenure; [c] Fealty is incident to all Manner of Tenures except *Frankalmoign.*

[a] Lit. 91.
1 Inſt. 67. b.
68. a.
1 Black. Com.
367.
2 Black Com.
45, 53, 86.
[b] Lit. 132.
1 Inſt. 93. b.
[c] Lit. 131.

This Oath of Fealty is not aboliſhed, but it is [d] neglected.

[d] 1 Inſt. 68. a.

5. [e] *Socage (à Socâ,* a Plough) is when the Tenant holdeth of the Lord by certain Service for all Manner of Services, ſo that the Service be not Knights-Service. Since 12 *Car.* 2. *ch.* 24. abovemention'd, every temporal Tenure of a Subject is in *Socage.* But *Grand Serjeanty* holden of the *King,* and *Frankalmoign* (being a ſpiritual Service) are not in *Socage.* If a Man holds by Fealty only, [f] ſuch Service is Tenure in *Socage.* [g] In ancient Time, Tenants in Socage at certain Days in the Year plough'd and ſow'd the Lord's *Demeſnes.* Under the Service of the Plough all Services of Huſbandry were included. But afterwards ſuch Services were changed into annual Rent of Money, *&c.* yet the *Name* of *Socage* remaineth. And in divers Places Tenants do ſuch Services with their Ploughs. Tenure by *Petit Serjeanty* and in *Burgage* are but Tenures in *Socage* in Effect.

[e] Lit. 117,
119.
1 Inſt. 86. a.
2 Black. Com.
79.
4 Black. Com.
412.
[f] Lit. 118.
[g] Lit. 119,
160, 162.
1 Inſt. 86. a.
& b. 108. b.

6. [h] A *Rent (Redditus)* is a Sum of Money or other Conſideration iſſuing yearly out of Lands or Tenements: It is reſerved out of the Profits of the Land, and is not due till the Tenant takes the Profits.

[h] 1 Inſt. 141.
b. 142. a.
10 Rep. 128.

Yet a Rent may be reſerved every [i] two, three or more Years; but it muſt be reſerved to the *Feoffor*, *Donor* or *Leſſor*, [k] and not to a *Stranger*, except in the Caſe of the King, who may reſerve Rent to a Stranger. Regularly it muſt be reſerved out of a [l] corporeal Inheritance, whereunto the Grantor may have Recourſe to diſtrain. But as to incorporeal Inheritances the Reſervation may be good by way of *Contract*, to have an Action of Debt. A Rent may be reſerved out of a Reverſion or Remainder of Lands, for the apparent Poſſibility that they may come into Poſſeſſion. *Rent* is not a Thing merely in Action, becauſe it may be [m] granted over. It muſt be [n] certain, or *that* which may be reduced to a Certainty; and may be of *Hens*, *Pepper*, *Attendance*, &c. as well as Money.

For a farther Enquiry into the Nature of *Rents* it may be needful to conſider, 1. How *Rents* are *divided*. 2. The *Payment* of *Rents*. 3. The *Acceptance* of *Rent*. 4. *Demand* and *Tender* of it. 5. *Diſtreſſes* for Non-payment. 6. The *Apportionment* and *Extinguiſhment* of *Rents*.

1. How *Rents* are *divided*. There are [o] *three* Sorts of *Rent*. Rent-*Service*, Rent-*Charge*, and Rent-*Seck*. *Rent-Service* (ſo called, becauſe it is ever accompanied with ſome corporal Service, as Fealty at leaſt) is where one upon a Gift in Tail, or Leaſe for Life or Years, does reſerve to himſelf a certain *Rent*, while the Reverſion of the Lands and Tenements continues in him. Therefore if a Termor grants all his Term, rendering *Rent*, he cannot diſtrain for it [p]. This is a moſt certain to Mark to know it to be a *Rent*-Service. But the *Rent*, tho' it be incident to the Reverſion, yet it is not [a] inſeparably Incident; for one may grant the *Reverſion* and not the *Rent*. If *Rent-Service* is behind at the Day on which it ought to be paid, the Landlord may diſtrain for it by the [b] Common Law, without any particular Agreement or Proviſion; tho' a Clauſe of Diſtreſs is uſually added in a Leaſe in Writing. It cannot be reſerved out of any Inheritance, but ſuch as is manurable, whereunto the Landlord may enter and take a Diſtreſs; as out of Lands and Tenements, Reverſions, Remainders; but not out of Inheritances incorporeal, except in caſe of the King.

A Rent-*Charge* [c] is where a Man by Deed maketh his Eſtate over to another in Fee, or by Gift in Tail, the Remainder over in Fee; or a Leaſe for Life, Remainder over in Fee; or any other Grant where the *whole* Eſtate paſſeth, and by the ſame Deed *reſerveth* to him and his Heirs a certain *Rent*, and that if the *Rent* be behind, it ſhall be lawful for him and his Heirs to diſtrain. *Such a Rent* is called a Rent-*Charge*, becauſe ſuch Lands are charged with ſuch *Diſtreſs* by Force of the *Writing* only, and not by Common Law, as in the Caſe of a Rent-*Service*. It muſt be a Conveyance in Fee either in Poſſeſſion, or Remainder, or a Grant of the whole Eſtate, to make a Rent-*Charge*; for the Reverſion is not to be in the Feoffor, as is requiſite in a Rent-*Service*. Alſo, if one ſeiſed of Land [d] *grants* by Deed an yearly *Rent* iſſuing out of it to another, in Fee, Fee-tail, for Term of Life, or Years, with a Clauſe of Diſtreſs, ſuch Rent is a Rent-*Charge*. And if one ſeiſed of Lands in Fee binds his [e] Goods and Lands for the Payment of an yearly *Rent*, this is a good Rent-*Charge*, with Power to diſtrain. So that a Rent-*Charge* may be either by *Reſervation* or *Grant*.

Rent-Seck [f] (*Redditus Siccus*) is where a Man by Deed maketh over his Eſtate to another, and *reſerveth* to him and his Heirs a certain Rent, or *granteth* a Rent iſſuing out of his Eſtate in Fee, Fee-tail, for Life, or Years, without any Clauſe of Diſtreſs in the Deed. Now he cannot

[i] 1 Inſt. 47. a.

[k] 1 Inſt. 143. b. 213. b.

[l] 1 Inſt. 47. a. 142. a. 144. a. 213. a. & b.

[m] 1 Inſt. 292. b.

[n] 1 Inſt. 96. a. 142. a. 2 Black. Com. 41, 42, 57, 299.

[o] Lit. 213, 214, 215. 1 Inſt. 87. b. 141. b. 142. a.

[p] 2 Wilſon 375.

[a] 1 Inſt. 143. a.

[b] Lit. 213. 1 Inſt. 142. a. 147. a.

[c] Lit. 217. 2 Black. Com. 42. 1 Inſt. 143. b.

[d] Lit. 218. 1 Inſt. 144. a.

[e] 1 Inſt. 147. a.

[f] Lit. 217, 218, 233, 235, 236. 2 Black. Com. 42.

not diſtrain, becauſe no Diſtreſs is incident to it; but he may have other Remedy when he hath had Seiſin of it. And becauſe he cannot have a Diſtreſs, it is called a *dry* Rent; there being no Reverſion, or particular Charge to enable him to diſtrain for it. But if the King [g] hath a Rent-*Seck*, he may diſtrain for it. [See 4 *Geo.* 2. *ch.* 28. which gives Remedy by Diſtreſs for all Rents, that have been paid within twenty Years next before the making of the Statute, or that ſhall be afterwards created.]

[g] Kelw. 104. a.

To theſe three Sorts of Rent may be added a Rent reſerved upon a Leaſe at Will, called [h] *Rent diſtrainable of Common Right*. Alſo a Man may have a Rent iſſuing out of Land by [i] *Preſcription*. And there are [k] other Rents (tho' not properly called Rents) reſerved by Contract or Deed, which creates them with Clauſe of Diſtreſs without a Tenure, againſt the natural Courſe of the Law, as in Common Practice. Such Rent is rather a Penalty of an annual Sum in Groſs. But *Note*, That in all Caſes by late Statutes hereafter-mentioned, a Landlord may diſtrain for his Rent upon any *Contract*. So that I do not underſtand the great Uſe now to be made by diſtinguiſhing upon theſe ſeveral Kinds of Rent as to Diſtreſſes.

[h] 1 Inſt. 141. b.
[i] 1 Inſt. 144. a.
[k] Lit. 345.
1 Inſt. 213. a. & b.

You will often hear of *Fee-Farm* Rent, *Quit*-Rent, *Rack*-Rent, *Old*-Rent and *Improved*-Rent. [a] A *Fee*-Farm Rent (*Feodi Firma*) is where Land is held of another in *Fee*, for ſo much Rent as it is reaſonably worth, or at leaſt to the fourth Part of the Value. *Quit-Rent* (or *White*-Rent, becauſe paid in Silver; or *Quiet*-Rent, becauſe upon Payment the Tenure is quiet, quit and free for that Time) is a certain *ſmall* Rent, payable yearly by the Tenant to his Landlord. The Tenants of moſt Manors pay ſuch a ſmall yearly Rent. *Rack-Rent* is ſuppoſed to be the full yearly Value of the Land, payable by the Tenant for Life, Years, &c. *Old-Rent* is that yearly Rent, which was always paid, neither more nor leſs, the Tenant being ſuppoſed to have a good Bargain. *Improved Rent* is where the old Rent has been raiſed, or where an Improvement has been made of the Rent. Here Purchaſers are more cautious, than where Lands are let at the *old Rent*.

2 Black. Com. 43.
[a] F.N.B. 210.
10 Rep. 58.
1 Inſt. 143. b.
2 Inſt. 19, 44.

2. Concerning Payment of Rent, it is to be obſerved, that Money given as Parcel of the Rent by way of Seiſin ſhall not be [b] abated out of the Rent; or that if Money is given as Payment of the Rent, or as Parcel of it, it ſhall not be applied to the Payment of any other Debt, as for Wares ſold, &c. by the Receiver; for the Payment is to be in that [c] Manner, which one would pay it; and not according to the Words of the Receiver how he would accept it; that is, if the Debtor ſignify for what Purpoſe he pays it; [d] for otherwiſe it is *ad modum recipientis*.

3 Black. Com. 230.
[b] 1 Inſt. 315. a.
[c] 5 Rep. 117.
1 Cro. 68.
[d] Bramſton v. Bolas in Chan. 25 April 1755.

If one ſeiſed of Lands in Fee maketh a Leaſe of the ſame Land for ten Years, yielding to him and his Heirs a yearly Rent of twenty Pounds at the Feaſt of St. *Michael*, or [e] *within one Month after*; if the Leſſor dieth between the Feaſt of St. *Michael* and the End of the Month, the Rent muſt be paid to the Heir as incident to the Reverſion, (and not to the Executors as where Rent is due and behind,) becauſe this was not due until the End of the Month. So the Rent muſt be paid to the Heir, if the Leſſor dies before any fix'd Day of Payment. If the Leſſor dies upon the Day of Payment, if the Rent is unpaid, the Heir ſhall have it: For the Rent is not due till the laſt Minute of the natural Day. [f] But if it be paid that Morning, before the Leſſor dies, his Executor ſhall retain it againſt the Heir, but not againſt the King: [It ſeems to be the better Opinion,

[e] 10 Rep. 127.
1 Saund. 287.
2 Salk. 578.
[f] 10 Rep. 127.
1 Inſt. 212. a. & b.

Opinion, that if the Leſſor dies before Sun-ſet on the Day of Payment, the Rent unreceived does not belong to his Executor, but to his Heir, or to him who takes the Eſtate; but if he dies after Sun-ſet, tho' before twelve at Night, the Executor ſhall have it, as having become due and payable in the Teſtator's Life-time[g].] If the Leſſor lives to the Day of Payment, a Payment before the Day appointed, is in Law, a Payment at the Day; and a Payment at another Place is as good, as if received at the Place limited in the Condition. If one ſeiſed in Fee lets Lands for certain Years, and reſerves a Rent to *himſelf*, not to him and his Heirs, the Rent ſhall determine by his Death, if he dies within the Term. If he reſerves a Rent[h] generally without ſhewing to whom it ſhall go, it ſhall go to his *Heirs*. If he reſerves it to himſelf *or* his Heirs, it is void as to the Heir. If he reſerves a Rent to him and his *Aſſigns*, the Rent ſhall determine by his Death, becauſe the Reſervation is good only during his Life. So if he reſerves a Rent to him and his Executors, it ſhall End by his Death; becauſe the Heir hath the Reverſion, and the Rent is incident to the Reverſion. But it has been reſolved, that a Rent reſerved to the Leſſor, and his Executors and Aſſigns, *during the Term*, ſhall go to the Heir, becauſe the Rent after the Deceaſe of the Leſſor comes in Lieu of the Land, which had deſcended to the Heir. [a] But if the Rent is reſerved to the Leſſor, his Heirs and Aſſigns, then the Aſſignees of the Reverſion ſhall enjoy it, for the Rent is incident to the Inheritance.

If a Leaſe is made for Years, yielding a yearly Rent at the Feaſts of *St. Michael*, and the *Annunciation* of our Lady, or within twelve Days after every of the ſaid Feaſts, upon Condition, that if the ſaid Rent be not paid within twelve Days after any of the ſaid Feaſts[b], *or Days of Payment* thereof, that then the ſaid Leaſe ſhall be void; the Tenant or Leſſee, as to the Preſervation of his Leaſe, has twelve Days after the twelve Days to pay the ſaid Rent; for the twelfth Day after the Feaſt was the *Day of Payment*. But if the Clauſe in the Leaſe had been, that if the Rent is behind for the Space of twelve Days next after either of the ſaid Feaſt-days of Payment, that then, *&c.* here the Tenant hath but twelve Days allowed him.

If a Tenant for *Life* lets a Leaſe for a certain Number of Years, if *he ſhall ſo long live*, the Rent to be paid at the four moſt uſual Feaſts in the Year; if the Tenant for Life dieth before a Quarter-Day, or Day of Payment, [c] the Tenant is diſcharged of the Rent for that Quarter by the Act of God. And Equity would not apportion it. So a Parſon made a Leaſe for Years, rendering Rent at the Feaſt of *St. Michael*, or within one Month after, and the Parſon died ten Days after the Feaſt of *St. Michael*, and was barred of his whole Rent, becauſe he died before the Rent was due. If a Tenant for Life dies but an Hour before the Day of Payment, there can be no Rent due to him. Therefore, thoſe that have Eſtates only for Life, would do well to divide the Rent, and make it payable weekly or monthly, tho' they receive it but Half-yearly, *&c.* or elſe let them have a Covenant in their Leaſes, to oblige their Tenants to pay to their Executors for ſo much of the Profits as they ſhall receive, in Proportion to the whole Rent, in Caſe the Landlord or Leſſor ſhould die before any Day of Payment. There can be but little Loſs by a weekly or monthly Reſervation. Otherwiſe without this Care the Tenant may receive the Profits of the Eſtate, and detain the Rent too, by quitting the Eſtate upon the Death of his Landlord, who did not live till the Rent was due; by this Way barring thoſe in Remainder and Reverſion of the Rent, becauſe he hath taken Care not to be their Tenant at the Day of Payment. This has been often done by the Tenants of Biſhops, Deans, Archdeacons, Prebendaries, Parſons, Vicars, Widows endowed by Common Law, or having Jointures in lieu of Dower according to the Statute, for want of due Care and Foreſight.

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[g] Pr. Ch. 555. 1 Wms. 179.

[h] 2 Inſt. 47. a. 214. a. 5 Rep. 111. 2 Saund. 371. 1 Ventr. 161. 2 Lev. 13.

[a] Plowd. 167. 1 Inſt. 47. a.

[b] 10 Rep. 129.

10 Rep. 127, 129. 1 Wms. 392, 179. Prec. Ch. 555.

But now theſe Inconveniencies are remedied; for by 11 *Geo.* 2. *ch.* 19. *Where any Tenant for Life happens to die before or on the Day on which any Rent was reſerved or made payable upon any Demiſe or Leaſe, which determined on the Death of ſuch Tenant for Life; the Executors or Adminiſtrators of ſuch Tenant for Life may, in an Action on the Caſe, recover from the Under-tenant, if ſuch Tenant for Life dies on the Day of Payment, the Whole, or if before ſuch Day then a Proportion, of ſuch Rent, according to the Time ſuch Tenant for Life lived of the laſt Year, or Quarter of a Year or other Time in which the ſaid Rent was growing due, making juſt Allowances.*

[a] If a Rent is reſerved upon a Leaſe for Years of Lands at the four uſual Feaſts in the Year, the Leſſor ſhall have an *Action* of *Debt* after the firſt Day of Failure, becauſe the ſame is accounted in Law a Reſervation of Parcel of the Profits of Land. So that every Quarter's Rent is a [b] ſeveral Debt. [c] Thus on a *Covenant*, or *Promiſe* or *Recognizance* to pay a hundred Pounds at five ſeveral Days, an Action lies after the firſt Default. Yet if one leaſeth a Stock of Cattle, or other [d] perſonal Goods, and the Rent is to be paid at ſeveral Days, the Leſſor muſt tarry until all the Days are expired, becauſe it is all but one perſonal Contract. And ſo it is of a Bond or Contract for Payment of [e] ſeveral Sums of Money. *Note*, a Diverſity between real and perſonal Contracts, and between *Debts* [f] and *Covenants* or *Promiſes*.

When one is to pay Rent at a certain Day, he hath all *that* Day until Night to pay it, [g] but ſo that the Receiver may ſee to tell it. And when a common Perſon appoints [h] no *Place* of *Payment* of his Rent, the Law appoints it to be upon the Land; but in Caſe of the King, the Payment muſt be at the *Exchequer*, or to his Receiver. If a Man is bound in an Obligation to pay his Rent at a *Day*, [i] he muſt ſeek out his Landlord to pay him.

[a] 5 Rep. 81. 10 Rep. 128. 1 Inſt. 47. b. 292. b.

[b] 1 Ventr. 129.

[c] 4 Rep. 94. 10 Rep. 128. 1 Inſt. 292 b. 2 Inſt. 395, 471.

[d] 4 Rep. 94. 5 Rep. 81.

[e] 1 Inſt. 47. b. 292. b. 5 Rep. 81. 10 Rep. 128.

[f] See of Obligations, ch. 3. poſt. And of Actions, B. 4. ch. 4 poſt.

[g] 5 Rep 114. 1 Inſt. 202. a.

[h] 4 Rep. 72, 73. 1 Inſt. 201. b.

[i] Noy's Max. 79.

By 8 An. ch. 14. *An Action of Debt may be brought for Rent reſerved upon a Leaſe for Life or Lives, in the ſame Manner as in the Caſe of Rent reſerved upon a Leaſe for Years.*

[See 18 *El. ch.* 6. *Concerning Rent in Corn payable to Colleges*, &c. See alſo of an *Aquittance*, *poſt*, *ch.* 3.]

3. *Acceptance*, is as it were an Agreement unto ſome Act done before, which might have been avoided, if ſuch Agreement had not been. So *Acceptance* of a next Rent due at a Day [k] afterwards, ſhall bar one to enter for a Condition broken before by Reaſon of the Non-payment of the Rent, becauſe he now affirmeth the Leaſe to have Continuance, which he might have avoided, had he not accepted the Rent. So a *Diſtreſs* affirmeth the Continuance of the Rent in ſuch Caſe. But if the Rent was due before, and thereby the Condition broken, one may receive that Rent, and yet re-enter. And if he accepteth [l] Part of the Rent, he may enter for a Condition broken, and retain the Land until he hath the whole Rent. If there is a Leaſe for Years rendring Rent with Condition, that, if the Leſſee *aſſigns* his Term, the Leſſor may re-enter, the Leſſee aſſigneth, and the Leſſor receiveth the Rent of the Leſſee, not

[k] 3 Rep. 64, 65. 2 Inſt. 211. b. 1 Cro, 528.

[l] 1 Inſt. 203. a.

[m] 3 Rep. 65. 1 Cro. 553, 572. 2 Cro. 334, 398.

hearing of the Aſſignment, [m] or not having Notice of it, he may re-enter, notwithſtanding the Acceptance of the Rent.

[n] 1 Inſt. 212.b. 5 Rep. 117. 9 Rep. 78, 79. B. 4. ch. 3. ſ. 3. poſt.

[n] If a leſs Sum is paid in Satisfaction of the Whole, this cannot be Satisfaction for the Whole, unleſs acknowledged to be ſo by *Acquittance* under Seal. And ſo when a Contract is made by Writing to do any collateral Act, it cannot be altered without Writing.

[a] 1 Inſt, 45. b. 214. b. 215. a. 341. b. 3 Rep. 59, 60, 64, 65. 11 Rep. 79.

But Note, that where an Eſtate or Leaſe for *Years* is [a] *ipſo facto void* by the Condition or Limitation, no *Acceptance* of the Rent afterwards can make it have a Continuance: Otherwiſe, if it is an Eſtate only *voidable* by Entry, tho' it is ſaid, it ſhall be *ipſo facto void*, as if it be a Leaſe for *Life*, or an Eſtate of *Freehold*; for an Eſtate of Freehold cannot begin or end without Ceremony. Here Acceptance of the Rent due at a Day afterwards, ſhall bar the Leſſor of his Entry. For this *voidable* Leaſe may be affirmed by Acceptance of the Rent, and neglecting to re-enter. But as no Entry is required upon a Leaſe for Years, it is utterly void, *if ſuch is the Condition*, and cannot be made good by Acceptance of the Rent. So if a Parſon, Vicar or Prebendary, makes a Leaſe for Years rendring Rent, and dieth, tho' the Succeſſor accepteth the Rent, it is not good; for the Leaſe was *void* by his Death: Otherwiſe of a Leaſe for Life. The Acceptance of Rent by the Maſter of an aggregate Body, ſhall not hurt the aggregate Body where the Leaſe is *void*. If Tenant for Life leaſeth Lands for Years and dies, the Leaſe is *void*. And tho' he in Remainder accepts the Rent, it is *void*. So if Tenant in Dower leaſeth for Years and dies, and the Heir accepts the Rent. [b] But if a man and his Wife, ſeiſed of Land in Right of the Wife, make a Leaſe by Deed reſerving Rent, and the Huſband dieth, yet if the Wife accepts the Rent, after the ſame was due to her, the Leaſe is thereby affirmed.

See of Leaſes, ch. 3. poſt.

[b] Terms of Law, v. Acceptance.

4. Of *Demand* and *Tender* of Rent.

[c] 1 Inſt. 201. b. 202. a. Noy's Max. 81.

It behoveth all Perſons that would *re-enter* upon their Tenants, to make a [c] *Demand* of their Rent, and it behoveth Tenants to *tender* their Rent to prevent the *Re-entry*.

[d] 8 Rep. 153, 154. 1 Inſt, 291. b.

[e] Lit. 233. 1 Inſt. 153. a. 201. b.

[f] 7 Rep. 28, 29. 1 Inſt. 144. a. 153 a. & b. 201. b.

[g] 1 Inſt. 201. b. 202. a. 4 Rep. 73.

1. A *Demand* is a Calling upon a Man for any Thing due. It is [d] twofold, *expreſs* or *implied*. *Expreſs* when one bringeth an Action for his Rent, *&c.* *Implied*, is done without any Words, as by Entry into the Land, Diſtreſs for the Rent, *&c.* A *Demand* muſt be in Perſon, or by lawful Attorney, in the Preſence of Witneſſes. If one is to bring an Aſſiſe, or *diſtrain* for Rent, after Demand to be made, he ought to demand the Rent upon the [e] *Lands* out of which the Rent is iſſuing. But if there is a Houſe and Land, a Demand at the Houſe or Land is ſufficient; and it need not be demanded at the very [f] *Time* it is due, but at any Time after, whether the Tenant be preſent or no. But obſerve that in Caſe of *Re entry* for Breach of a Condition tending to the Deſtruction of the Eſtate, [g] he that would enter for ſuch Breach, muſt, 1. Demand the Rent. 2. Upon the Land, if there is no Houſe. 3. If there is a Houſe, at the Fore-Door, the moſt notorious Place. It is not material whether any Perſon be in the Houſe or no. So if a Feoffment is of Wood only, the Demand muſt be at the Gate of the Wood, or other moſt notorious Place. 4. If the Appointment is at any other Place from the Land, the Demand muſt be at that Place. 5. The *Time* of Demand muſt be certain, that the Tenant may be there to pay the Rent. The laſt Time of Demand of the Rent, is ſuch a convenient Time before the Sun-ſetting of the laſt Day of Payment, as that the Money

may be numbered. The Leſſor, or his ſufficient Attorney, muſt remain upon the Land the laſt Day on which the Rent due is to be paid, until it be ſo dark that he cannot ſee to tell the Money. [h] And if the Money is not paid (whether the Tenant is abſent or preſent) this is a Denial in Law, tho' there are no Words of Denial. [a] One may reſerve a Rent on Condition, that if the Rent is behind he ſhall re-enter, and hold the Land till he is ſatisfied or paid the Rent behind. In this Caſe if the Rent is behind, or all or Part unpaid at the Day, he may re-enter. But when the Feoffee pays or tenders on the Land all the Arrears, he may enter again. For the Feoffor has only an Intereſt, not the Freehold, to take the Profits in the Nature of a Diſtreſs. Here the Profits ſhall not go in Part of Satisfaction of the Rent. Otherwiſe, if he was to hold the Land till he was paid by the Profits *thereof*.

[h] Lit. 233. 1 Inſt. 153. b.

[a] Lit. 327. 1 Inſt. 203. a.

In the Caſe of the [b] King a Demand is not neceſſary. But if the King grants over the Reverſion of his Leaſe to a common Perſon and his Heirs, he in the Reverſion ought to make a Demand upon the Land, *&c.*

[b] 4 Rep. 73. 5 Rep. 56.

[By 4 Geo. 2. ch. 28. *The Landlord, who hath Right of Re-entry for Non-payment, may, in Caſe of Half a Year's Rent being in Arrear, deliver a Declaration in Ejectment without any actual Demand or Re-entry.*]

A Demand of Rent cannot be made by a Bailiff upon Condition of Re-entry. When any Sum is to be forfeited [c] *Nomine Pœnæ* for Non-payment of the Rent at the Time, *&c.* the Demand of the Rent ought to be preciſely at the Day in reſpect of the Penalty: And if there is a general Obligation for the Performance of Covenants [d], it doth not alter the Nature of the Rent; but it ought to be demanded, notwithſtanding the Obligation.

[c] 7 Rep. 28. 2 Inſt. 89. Hob 82, 133.

[d] 3 Cro. 76, 77. 1 Roll. Abr. 443.

2. A [e] *Tender* is an Offer to pay the Rent. [f] It may be of Money in a Purſe or Bag, without telling the ſame. For it is the Duty of him who is to receive it, to put it out and tell it. But a Tender of Rent muſt be of the whole Rent without Deduction of Taxes, *&c.* (for Stoppage is no Payment) unleſs it is agreed to be otherwiſe. [g] A Tender upon any Part of the *Land* or at any *Time* of the laſt Day of Payment, ſaveth the Condition for that Time, tho' the Landlord refuſeth it.

[e] 1 Inſt. 211. a.

[f] 1 Inſt. 208. a.

[g] 1 Inſt. 202. a.

This is the ſtrict Law concerning *Demand* and *Tender* of Rent. But by Agreement theſe Niceties are uſually prevented, either by Covenant to pay on Demand in Writing left at ſuch a Place, or abſolutely by Covenant to pay at ſuch a *Place*, on ſuch a *Day*, [h] without Demand.

[h] 5 Rep. 40.

5. There may be a *Diſtreſs* for Non-payment of Rent. Therefore enquire, 1. What is a *Diſtreſs*. 2. For *what* one may diſtrain. 3. What *Things* may be diſtrained or not. 4. *How* it may be made. 5. Of *Replevin* and *Reſcous*.

1. [i] A *Diſtreſs* (*Diſtrictio*) is a Thing found upon the ſame Land, and taken for Rent behind, or other Duty, or for Damage-feaſant, (*i. e.*) Damage done, tho' the Property of the Thing belongeth to a Stranger. [k] A Diſtreſs is either *finite* or *infinite*. *Finite* is *that* which is limited by Law how often it ſhall be made, to bring the Party to Trial of the Action, as once or twice. *Infinite* is without Limitation, until the Party appears; as againſt a Juror that refuſeth to appear. *&c.* But I am ſpeaking of a Diſtreſs for Rent. Therefore,

[i] Terms of the Law, v. Diſtreſs. 1 Inſt. 96. a. But ſee below, 11 Geo. 2. chap. 19.

[k] Terms of the Law, v. Diſtrictus.

2. For *what* may one diſtrain?

A Landlord may diſtrain of [l] *common Right* for Rent-Service, and all Manner of Services certain, or for a Rent reſerved upon a Gift in Tail, Leaſe for Life, or Years, or at Will, tho' there be no Clauſe of Diſtreſs

[l] Dr. & Stud. Dial. 2 ch. 9. Lit. 72, 331. 1 Inſt. 57. b. 205. a.

in the Leaſe, provided that he reſerves the Reverſion to himſelf. And tho' the Diſtreſs is reſerved, if the Rent is *behind or unpaid* for ten Days, after the Day of Payment, yet the Leſſor may diſtrain the next Day after it is due. For the Words are affirmative, and cannot reſtrain *that* which is of common Right. But a Man may not diſtrain for Rent after the Leaſe is expired [a]. One cannot diſtrain upon a Feoffment in Fee for Rent, unleſs a Diſtreſs is expreſly reſerved in the Deed; nor for [b] Debt, Treſpaſs, *&c.*

If Leſſee for Years aſſigns his Term, he cannot diſtrain for Rent; there are two Ways of creating a Rent; the Owner of the Land either grants a Rent out of it; or grants the Land and reſerves the Rent. There is no ſuch Thing as a Rent-ſeck, Rent-ſervice, or Rent-charge iſſuing out of a Term for Years.

3. A *Diſtreſs* may be of ſeveral *Things*, but not of all *Things*. A *Diſtreſs* taken [c] for Rent muſt be, 1. Of a Thing whereof a *valuable Property* is in ſome Body, either *general* or *ſpecial* [d], therefore Dogs, Conies, and Things *Feræ Naturæ* cannot be diſtrained. But, 2. When one is riding on a Horſe, or hath an Ax in his Hand cutting down Wood, or when one carries any Thing about him, theſe cannot be diſtrained. But a Horſe with the Rider on it may be diſtrained *Damage-feaſant*, and led to the Pound with the [e] Rider upon him. *Quære.* 3. Valuable *Things* that are in [f] *Trade*, ſhall not be diſtrained for Rent; as a Horſe that is ſhoeing in a Smith's ſhop ſhall not be diſtrained for the Rent of the Shop, nor a Horſe in an Inn, nor Materials in a Weaver's or Taylor's Shop for making Cloth or a Garment, nor Sacks of Corn or Meal in a Mill, for the Rent thereof. For the common Preſumption is, that ſuch Things belong not to the Smith, *&c.* but to others. For this Reaſon a Horſe, *&c.* put out to Paſture by Way of Agiſtment (becauſe it is preſumed to belong to the Owner of the Ground) may be diſtrained. If he is put in but for a Night by [g] Leave of the Leſſor and Leſſee, yet the Leſſor may diſtrain him. Goods in Fair or Market ſhall not be diſtrained, for they are brought thither for the Good of the Publick. But if they are driving to Market, and by the Way they are put into Paſture, otherwiſe. Utenſils and Inſtruments of Trade, or Tools of one's Profeſſion, cannot be diſtrained. 4. [h] Nothing ſhall be diſtrained for Rent, that cannot be rendered again in as good a Plight, as it was at the Time of the Diſtreſs taken. So Victuals cannot be diſtrained, and formerly (until 11 *G.* 2. *ch.* 19.) Sheaves or Shocks of Corn, or Corn growing. But for *Damage-feaſant* they may be diſtrained. Carts with Corn may be diſtrained, for they may be ſafely reſtored. For this Reaſon Money in a Bag ſealed may be diſtrained, not if out of a Bag. 5. *Beaſts* belonging to the *Plough*, or *Beaſts* of *Huſbandry* (*Averia Carucæ*) or Sheep, or [i] Horſes joined to a Cart with a Man upon it, (but both Cart and Horſes may, if a Man is not upon the Cart, and the Horſes may be ſevered from the Cart loaden with Corn) ought not to be diſtrained; if there are other Beaſts or Things beſides which may be diſtrained. But for *Damage-feaſant* all theſe may be diſtrained. And indeed this Order is ſeldom obſerved; for Tenants are forced to ſubmit to the Pleaſure of their Landlords, becauſe the Remedy would be worſe than the Diſeaſe. 6. [k] Furnaces, *&c.* fixed to the *Freehold* (tho' the Tenant might remove them as his own during the Term) Doors upon the Hinges, the Windows of the Houſe, cannot be diſtrained. 7. [l] Beaſts of a *Stranger* that

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[a] But ſee below, 11 Geo. 2. ch. 19.

[b] Dr. & Stud. Dial. 2. ch. 9. 2 Wilſ. 375. Bro. Dette pl. 39.

Law of diſtreſſes, &c per. Gilbert 34. &c.

[c] 1 Inſt. 47. a. & b. 1 Roll. Abr. 666, 667.

[d] See ch. 5. poſt.

[e] 1 Sid. 422. 440.

[f] 1 Inſt. 47. a. & b.

[g] 1 Ventr. 50. 2 Danv. Abr. 639, 640, 641, 642.

[h] 1 Inſt. 47. a. & b. 1 Roll. Abr. 664.

[i] 1 Ventr. 36. 1 Sid. 440. 1 Ld. Raym. 385.

[k] 1 Inſt. 47. a. & b.

[l] 2 Saund. 290. Hob. 265.

eſcape into the Landlord's Ground may be diſtrained for Rent, tho' they have not been *Levant* and *Couchant*, i. e. tho' they have not been in the Ground for a good Space of Time, or ſo long as to have *laid* down and *roſe* up again to Feed. [*Qu.*] Otherwiſe if the Tenant of the Land is in Fault, in not keeping up his Mounds, by Reaſon whereof the Beaſts come upon the Land.

1 Ld. Raym. 169, 308. contra.

By 7 Ann. ch. 12. *The Goods of an Embaſſador or other publick Miniſter, or of his Servants, ſhall not be diſtrained: If ſo, the Diſtreſs is void,* [But this Act does not relate to Diſtreſſes for Rent, and does not ſay the Diſtreſs ſhall be void, but that all Writs and Proceſſes, whereby their Goods may be diſtrained, ſeized, &c. ſhall be void.]

4. How muſt a *Diſtreſs* be made?

A *Diſtreſs* muſt be made on the *Land* or *Premiſſes*, not when the Goods are removed from the Premiſſes. [But ſee the Statutes *infra.*]

If Lands let by one Demiſe lie in [a] ſeveral Counties, one may diſtrain in one County for the whole Rent. But where the Demiſes are diſtinct [b] there can't be a joint Diſtreſs for both Rents. One cannot break open [c] Gates, or throw down an Incloſure, to take a Diſtreſs. He may enter the Tenant's Houſe, if the Doors are open, otherwiſe not.

[a] 1 Inſt. 153. b. 154. a.
[b] 2 Str. 1040.
[c] 1 Inſt. 161. a. 5 Rep. 90. cont. by Stat. 11 Geo. 2. below.

A Diſtreſs muſt be made in this *Manner*. A Diſtreſs taken by one or his Bailiff or Servant, of [d] *live Cattle* for Rent arrear, &c. may be brought to a *common Pound* within three Miles in the ſame County; or the Landlord may keep it in an open Place in his own Ground, or the Ground of another by his Conſent [e]. If the Cattle are kept in a *common Pound*, the Landlord need not give Notice to the Owner to feed them, but the Owner is to take Notice at his Peril. If they are kept in any other open Place, he muſt give Notice to the Owner, that he may give them Food; and then if the Cattle die for want of Food, he that was diſtrained ſhall bear the Loſs, and the Landlord may diſtrain again for the ſame Rent or Duty. Both theſe are Pounds *overt* or open, tho' there is a Difference as to Notice of giving the Cattle Food. One may alſo impound Cattle in a Pound *covert* or cloſe, as in ſome Part of one's own Houſe, &c. but then the Cattle are to be fed at the Peril of the Landlord without any Satisfaction for it. He that diſtraineth Cattle cannot [f] work them, or uſe them, unleſs for the Benefit of the Owner; as by milking a Cow diſtrained, &c. for he hath no Property in them. But Cattle taken in *Withernam* may be uſed [g].

[d] 1 Inſt. 47. b. 96. a.
[e] See 11 G. 2. below.
[f] 2 Cro. 148.
[g] See B. 4. ch. 4. ſ. 9. poſt.

When one takes a Diſtreſs of *dead* or [h] inanimate Things, as Houſhold Goods, &c. They muſt be impounded in a Houſe, or other Pound *Covert* within three Miles in the ſame County. For if they are put in a Pound *overt*, and damaged or ſtolen, the Landlord muſt anſwer for them; as he muſt anſwer, if he himſelf doth any Harm to them, or to any other Diſtreſs [i].

[h] 1 Inſt. 47. b.
[i] But ſee the ſeveral Statutes below.

A Diſtreſs for Rent cannot be in the [k] Night; otherwiſe for Damage-feaſant, leſt the Beaſts eſcape before they are taken. [See 9 *Ed.* 2. *ch.* 9.]

[k] 1 Inſt. 142. a. 7 Rep. 7.

5. Of *Replevin* and *Reſcous*.

1. A *Replevin*, (*Replegiare*, *à Re* and *Plegiare*; [l] to re-deliver upon Pledges or Sureties) is grounded and granted upon a Diſtreſs, and is a Re-deliverance of it, that the Thing diſtrained may remain with the firſt Poſſeſſor, upon Security given by him, to try the Right with the Diſtrainer, and to anſwer him in a Courſe of Law.

[l] 1 Inſt. 145 b. 161. a. See Gilbert's Law of Diſtreſſes and Replevin. See B. 4. ch. 4. ſ. 9. poſt.

2. [a] *Reſcous* (from *Reſcourrer*, *Recuperare*) is a Reſiſtance and a Reſcuing of any Thing (or of a Perſon arreſted) and procuring an Eſcape againſt

[a] 1 Inſt. 160. b. 3 Black. Com, 146, 12, 170.

againſt Law. There muſt be a Diſtreſs or an Arreſt, or elſe there cannot be a *Reſcous*. If a Diſtreſs is taken [b] without *Cauſe*, as where no Rent is due, or where one diſtrains out of his Fee; or (if in his Fee) in the Highway; or diſtrains *Averia Carucæ*, where there is a ſufficient Diſtreſs beſides; or if the Landlord diſtrains any Thing, that is not diſtrainable, one may make *Reſcous*. This may be done by the Tenant, when any Thing of his is wrongfully diſtrained; or by a Stranger, when his Goods are diſtrain'd without Cauſe, *&c.* If the Diſtreſs was made upon [c] good Cauſe, the Owner cannot reſcue them, as they are going to the Pound. And tho' the Diſtreſs was without Cauſe, yet if it is impounded, the Owner cannot break the Pound and take away the Diſtreſs. If he doth, the Party diſtraining may have his Action, and re-take the Diſtreſs where-ever he finds it, and impound it again. But in *Damage-Feaſant*, if the Pound Door is unlock'd, the Owner may take them out. If the Cattle diſtrained, as they are driving to the Pound, go into the [d] Houſe of the Owner, and the Owner do not deliver them upon Demand, it is a *Reſcous* in Law, for there is a *Reſcous* in *Law* as well as in *Deed*. If the Landlord comes to diſtrain Cattle, which he ſeeth upon the Ground, and the Tenant, or any other (to prevent the Landlord from Diſtraining) drives the Cattle off the Ground; yet the Landlord may make freſh Purſuit, and diſtrain them. [See 8 *Ann. ch.* 17. and 11 *Geo.* 2. *ch.* 19. *poſt.*] Otherwiſe for *Damage-Feaſant*; for the Diſtreſs muſt be while *Damage-Feaſant*.

[b] 1 Inſt. 47. b. 160 b. 161. a. 4 Rep. 11.

[c] 1 Inſt. 47. b.

[d] 1 Inſt. 161. a. 9 Rep. 22.

If the Owner of the Cattle [e] before Diſtreſs *tenders* his Rent, if a Diſtreſs is afterwards taken, it is wrongful, and he may make *Reſcous*. But if he tender after Diſtreſs, and before the Impounding, the Owner cannot reſcue them; for the Taking was lawful, tho' the Detainer is wrongful. A Tender after the Impounding, makes neither the one nor the other wrongful; for then it cometh too late. The ſame Law for *Damage-Feaſant*, if before the Diſtreſs there is a Tender of ſufficient Amends. [f] And in *Damage-Feaſant* the Party may tender Amends, before the Cattle are impounded; and then the Detainer is unlawful. [See 21 *Ja.* 1. *ch.* 25. For Relief of Patentees, *&c.* of Crown Lands and Dutchy Lands, *&c.* in Caſes of Default for Non-payment of Rent, *&c.*]

[e] 1 Inſt. 160. b. 2 Inſt. 107. 8 Rep. 147.

[f] 5 Rep. 76. 8 Rep. 147. 2 Inſt. 107.

A Tender of Amends to a Bailiff is not good, for he cannot deliver the Diſtreſs once taken. [See 2 *W.* & *M. ch.* 5. *infra.*]

5 Rep. 76.

[g] If a Landlord diſtrains two or three Oxen, *&c.* for twelve Pence or ſuch ſmall Sum, and the Owner brings a Replevin, and the Landlord avows the Taking of them for the Twelve-pence, *&c.* the Landlord ſhall be fined, and the Party may have his Action on the Statute; provided there was other Diſtreſs upon the Land holden of leſs Value. [See 52 *H.* 3. *ch.* 4. againſt unreaſonable Diſtreſſes.]

[g] 1 Inſt 56. b. 2 Inſt. 107. 2 Str. 851.

By 52 H. 3 ch. 15. *None* (*except the King*) *ſhall take a Diſtreſs out of his Fee, or in the King's Highway, or in the common Street.* See 3 *Ed.* 1. *ch.* 16. and 17.]

See 32 *H.* 8. *ch.* 37. For Recovery of Arrearages of Rents by *Executors* and *Adminiſtrators*; and by the *Huſband* for Rent due in the Right and Life-time of his Wife; and the Remedy for Rent, where the Eſtate was for the Life of another, that is dead. For the Expoſition of this Act, 1 *Inſt.* 162. *a.* & *b.*

By 1 & 2 Ph. & M. ch. 12. *No Diſtreſs of Cattle ſhall be driven out of the Hundred where it is taken, except to a Pound-Overt within the ſame Shire,* *not above three Miles diſtant from the Place, where it was taken, nor ſhall it be impounded in ſeveral Places, in Pain of five Pounds and treble Damages. And no Perſon ſhall take above four Pence for Impounding, under the like Penalty, any Preſcription notwithſtanding.*

See 22 *Car.* 2. *ch.* 6. 22 & 23 *Car.* 2. *ch.* 24. 10 *Ann. ch.* 18. concerning *Fee-Farm* Rents ſold by the Crown.

Thus the Matter of Diſtreſſes ſtood at the Common Law, and under the old Acts of Parliament. But now there are four excellent Statutes for Recovery of Rents by Diſtreſſes, (*viz.*) 2 *W.* & *M. Seſſ.* 1. *ch.* 5. 8 *Ann. ch.* 14. 4 *Geo.* 2. *ch.* 28. *and* 11 *Geo.* 2. *ch.* 19. which have greatly altered the Common Law, and have regulated the Method of taking Diſtreſſes.

At the Common Law no Sheaves or Cocks of Corn, or Corn looſe, or in the Straw, or Hay in any Barn or Granary, or upon any Hovel, Stack or Rick, could be diſtrained for Rent. But,

By 2 W. & M. ch. 5. *It ſhall be lawful to diſtrain for Rent arrear any ſuch Sheaves,* &c. *and to lock up and detain the ſame in the Place,* (for they cannot by Virtue of this Statute be removed, but muſt be ſecured upon the Land) *where they ſhall be found. And,*

By 11 Geo. 2. ch. 19. *It ſhall be lawful to take and ſeize as a Diſtreſs, for Rent, any Cattle or Stock of the Tenant feeding upon any Common, any ways belonging to all or any Part of the Premiſſes demiſed; and alſo all Sorts of Corn, Graſs, Hops, Roots, Fruits, Pulſe, or other Product, growing on any Part of the Eſtate demiſed; and the ſame to cut, gather, make, cure, carry, and lay up when ripe, in the Barns or other proper Place on the demiſed Premiſſes; and if no ſuch Place there, then in any other which the Landlord ſhall procure, as near as may be to the Premiſſes, and in convenient Time appraiſe and ſell the ſame towards Satisfaction of the Rent, and Charges of Diſtreſs, Appraiſement and Sale, in the ſame Manner as other Goods. The Appraiſement to be taken when cut and cured, and not before. Provided that Notice of the Place where the Goods are lodged ſhall within a Week after the Lodging thereof be given to the Tenant, or left at the laſt Place of his Abode; and that if after Diſtreſs of ſuch Corn, or other Product growing, and before the ſame be ripe and cut, cured or gathered, the Tenant ſhall pay the whole Rent in Arrear, together with the full Coſts and Charges of making ſuch Diſtreſs; then upon ſuch Payment, or lawful Tender thereof actually made, ſuch Diſtreſs and every Part thereof ſhall ceaſe; and the Corn, or other Product ſo diſtrained, ſhall be delivered up to the Tenant.*

At the Common Law Diſtreſſes were not to be ſold, but only detained as Pledges for inforcing Payment of the Rent; but now, by 2 *W.* & *M. ch.* 5. *If a Tenant or Owner of Goods ſhall not within five Days after Diſtreſs for Rent due upon any Demiſe, Leaſe, or* Contract, *whatſoever, and Notice of the Cauſe thereof, left at the moſt notorius Place on the Premiſſes, replevy the ſame with ſufficient Security to be given to the Sheriff, according to Law, the Perſon diſtraining may with the Sheriff, Under-Sheriff, or Conſtable of the Hundred or Place where,* &c. *cauſe the Diſtreſs to be appraiſed by two Appraiſers, to be ſworn by ſuch Sheriff or Conſtable to appraiſe the ſame truly; and then ſell the ſame towards Satisfaction of the Rent and Charges of the Diſtreſs and Appraiſement; leaving the Overplus in the Officer's Hands for the Owner's Uſe. And in Caſe of any Pound-breach or Reſcous,* 1 Lutw. 213, &c.
the Party grieved may, upon a ſpecial Action on the Caſe, recover treble 4 Mod. 390,
Damages &c.

Damages and Coſts againſt the Offender, or Owner of the Goods, if the ſame afterwards came to his Uſe. But if any Diſtreſs and Sale ſhall be made where there is no Rent due, the Owner of the Goods deſtrained may recover double the Value with full Coſts.

IF a Landlord comes into a Houſe and ſeizes upon ſome Goods, as a Diſtreſs, in the Name of all the Goods in the Houſe, that is a good Seizure of all. But the Goods were to be removed immediately, except Corn or Hay, tho' the Appraiſement and Sale was not by that Statute to be until after five Days, which was attended with great Difficulties; and therefore now,

By 11 Geo. 2. ch. 19. *Any Perſon lawfully taking any Diſtreſs for any Kind of Rent, may impound or ſecure the Diſtreſs of what Kind ſoever, in ſuch Place, or on ſuch Part of the Premiſſes chargeable with the Rent, as ſhall be moſt fit and convenient for the Impounding and Securing ſuch Diſtreſs; and may appraiſe, ſell, and diſpoſe of the ſame upon the Premiſſes, in like Manner as any Perſon taking a Diſtreſs for Rent may do off the Premiſſes by Virtue of* 2 W. & M. ch. 5. *or of* 4 Geo. 2. ch. 28. [*By which Statute the Remedies by Diſtreſs, Impounding and Sale, in Caſe of Rent reſerved upon Leaſe, are extended to Rents Seck, Rents of Aſſize, and Chief Rents.*] *And any Perſon may come and go, to and from ſuch Place, where the Diſtreſs is impounded, to view, appraiſe, buy, and carry off the ſame, on Account of the Purchaſer. In Caſe of Pound-breach or Reſcous of ſuch Goods, the Perſons aggrieved ſhall have like Remedy as in caſes of Pound-breach, or Reſcous, under or by the former Act.*

At Common Law the Tenant's Goods could not be diſtrained when removed off the demiſed Premiſſes. But now,

By 8 Ann. ch 14. *If any Tenant for Life, Years, at Will, or otherwiſe, fraudulently* removes *his Goods from the demiſed Premiſſes, with Intent to prevent the Landlord from Diſtraining, the Landlord may within five Days* [*within thirty Days by* 11 Geo. 2. ch. 19. §. 1.] *take and ſeize ſuch Goods, wherever they ſhall be found, as a Diſtreſs for the Arrears of Rent, and may diſpoſe of and ſell the ſame, as if ſuch Goods had been diſtrained upon the demiſed Premiſſes. Provided the ſaid Goods were not ſold* Bona Fide *for valuable Conſideration before ſuch Seizure* [*to any Perſon not privy to ſuch Fraud, by* 11 Geo. 2. ch. 19. §. 2.] *And,*

By 11 Geo. 2. ch. 19. *Where any Goods or Chattels, fraudulently or clandeſtinely carried away by any Tenant, his Servant, Agent, or other Perſon aiding therein, are kept in any Houſe or Place lock'd up, faſtened or ſecured, ſo as to prevent ſuch Goods from being taken and ſeized as a Diſtreſs for Arrears of Rent, the Landlord, or any Perſon impowered by him, (firſt calling to his Aſſiſtance the Peace-Officer of the Hundred, or Place where the ſame are ſuſpected to be concealed, who are required to aid and aſſiſt therein; and in Caſe of a Dwelling-Houſe, Oath being alſo firſt made before ſome Juſtice of a reaſonable Ground to ſuſpect that ſuch Goods or Chattels are therein) may in the Day-time break open and enter into ſuch Houſe or Place, and take and ſeize ſuch Goods, for the ſaid Arrears of Rent, as they might have done by Virtue of this or any former Act, if ſuch Goods had been put in any open Field or Place.*

And if any ſuch Tenant ſhall fraudulently remove his Goods as aforeſaid, or if any Perſon ſhall wilfully and knowingly aid and aſſiſt any Tenant in ſuch fraudulent Conveying away any Part of his Goods, or Concealing the ſame, every Perſon ſo offending ſhall forfeit and pay to the Landlord, from *whoſe Eſtate ſuch Goods were ſo carried off, double the Value of the Goods by him her or them, reſpectively carried off or concealed; to be recovered by Action in the Courts of Record at* Weſtminſter, *or of Seſſion in* Cheſhire, Lancaſhire, Durham, *or* Wales. *And,*

Where the Goods ſo fraudulently removed exceed not the Value of fifty Pounds, the Landlord from whoſe Eſtate the ſame were removed, his Bailiff, Servant or Agent, in his Behalf, may exhibit a Complaint in Writing againſt ſuch Offender, before two or more Juſtices of the Peace of the ſame County, Riding or Diviſion, reſiding near the Place whence ſuch Goods were removed, or near the Place where the ſame were found, not being intereſted in the Lands or Tenements whence ſuch Goods were removed, who may ſummon the Parties concerned, examine the Fact, and all proper Witneſſes upon Oath, or Quakers *upon Affirmation, and in a ſummary Way determine whether ſuch Perſon be guilty of the Offence, and inquire in like Manner of the Value of the Goods ſo fraudulently carried away or concealed; and upon full Proof of the Offence, by Order under their Hands and Seals, the ſaid Juſtices ſhall adjudge the Offenders, to pay double the Value of the ſaid Goods to ſuch Landlord, his Bailiff, Servant or Agent, at ſuch Time as the ſaid Juſtices ſhall appoint: And in Caſe ſuch Offender, having Notice of ſuch Order, refuſe or neglect ſo to do, ſhall by Warrant under their Hands and Seals levy the ſame by Diſtreſs and Sale of the Goods of the Offender; and for Want of ſuch Diſtreſs may commit him to the Houſe of Correction, there to be kept to hard Labour, without Bail or Mainprize, for the Space of ſix Months, unleſs the Money ſo ordered to be paid ſhall be ſooner ſatisfied. The Party may appeal to the next General or Quarter-Seſſions; whoſe Determination ſhall be final: And in the mean Time the Order ſhall not be executed on the Appellant in caſe he ſhall enter into a Recognizance, with ſufficient Surety in double the Sum ordered to be paid, to appear at ſuch ſeſſions.*

At Common Law a Diſtreſs for Rent reſerved on Leaſe could be made only during the Continuance of ſuch Leaſe. But now,

By 8 Ann. ch. 14. *Any Perſon having any Rent in Arrear, or due upon any Leaſe determined, may within ſix Calendar Months after the Determination of ſuch Leaſe, during the Continuance of ſuch Landlord's Title, and of ſuch Tenant's Poſſeſſion, diſtrain for ſuch Arrears in the ſame Manner as he might have done if ſuch Leaſe had not been determined.*

After the making of the Statute of 2 *W. & M.* directing the Sale of Goods diſtrained for Rent, it often happened that there was ſome Irregularity in the Diſpoſal of the Diſtreſs, which made the Party diſtraining a Treſpaſſer *ab initio*, and the Tenant recovered the full Value of the Rent for which the Diſtreſs was made. Therefore,

By 11 Geo. 2. ch. 19. *Where any Diſtreſs is made for any Kind of Rent juſtly due, and any irregular or unlawful Act is afterwards done by the Party diſtraining, or his Agent, the Diſtreſs itſelf ſhall not be therefore deemed unlawful, nor the Party a Treſpaſſer* ab initio; *but the Party aggrieved by ſuch unlawful Act ſhall recover full Satisfaction for the ſpecial Damage thereby ſuſtained, and no more, in an Action of Treſpaſs, or on the Caſe, at his Election; and, if he recover in ſuch Action, ſhall alſo have full Coſts of Suit. But the Tenant ſhall not recover in any ſuch Action if Tender of Amends hath been made by the Party diſtraining, or his Agent, before ſuch Action brought.*

And in all Actions of Treſpaſs, or on the Caſe, brought againſt any Perſon intitled to any kind of Rent or Service, or his Bailiff or other Perſon, relating to any Entry by Virtue of this Act, or otherwiſe, upon the Premiſſes

miſſes chargeable with ſuch Rent or Service, or to any Diſtreſs or Seizure, or Sale or Diſpoſal of any Goods thereupon, the Defendant may plead the general Iſſue, and give the ſpecial Matter in Evidence; and if the Plaintiff be nonſuited, diſcontinue, or have Judgment againſt him, the Defendant ſhall recover double Coſts of Suit.

And for the further Relief and Aſſiſtance of Landlords, as to recovering their Rents and Poſſeſſion,

Str. 97, 212. 643, 787, 1024. 2 Wilſon. 140. *By* 8 Ann. ch. 14. *No Goods or Chattels being on any Meſſuages, Lands or Tenements, leaſed for Life or Lives, Term of Years, at Will or otherwiſe, ſhall be taken by Virtue of any* Execution, *unleſs the Party, at whoſe Suit the ſaid Execution is ſued out, ſhall before the Removal of ſuch Goods pay the Landlord one Year's Rent, or leſs, if due. And the Sheriff is to levy and pay the Plaintiff, as well the Money ſo paid for Rent, as the Execution-Money. But nothing in this Act ſhall extend to prejudice the King in levying Debts, Fines,* &c. *due to the King.*

By 11 Geo. 2. ch. 19. which recites, *That great Inconveniencies may happen to Landlords, whoſe Tenants have Power to determine their Leaſes by giving Notice to quit the Premiſſes, and yet refuſing to deliver up the Poſſeſſion when the Landlord has agreed with another Tenant for the ſame;* It is enacted, *That in Caſe any Tenant ſhall give Notice of his Intention to quit the Premiſſes by him holden, at a Time mentioned in ſuch Notice, and ſhall not accordingly deliver up the Poſſeſſion at the Time, he ſhall from thenceforward pay double the Rent which he ſhould otherwiſe have paid; to be recovered as, before ſuch Notice, the ſingle Rent might be: Such double Rent to continue to be paid during all the Time ſuch Tenant continues in Poſſeſſion.*

And if any Tenant holding at a Rack-Rent, or where the Rent reſerved ſhall be full three Fourths of the yearly Value of the demiſed Premiſſes, who ſhall be in Arrear for one Year's Rent, ſhall deſert the demiſed Premiſſes, and leave the ſame uncultivated or unoccupied, ſo as no ſufficient Diſtreſs can be had to countervail the Arrears of Rent; two or more Juſtices of the Peace of the County or Place, (having no Intereſt in the demiſed Premiſſes) at the Requeſt of the Landlord, or his Bailiff or Receiver, may go upon and view the Premiſſes, and affix, or cauſe to be affixed, on the moſt notorious Part thereof, Notice in Writing, what Day (at the Diſtance of fourteen Days at leaſt) they will return to take a ſecond View; and if upon ſuch ſecond View, the Tenant, or ſome Perſon on his Behalf, ſhall not appear and pay the Rent in Arrear, or there ſhall not be ſufficient Diſtreſs upon the Premiſſes, the Juſtices may put the Landlord into the Poſſeſſion of the Premiſſes, and the Leaſe thereof to ſuch Tenant, as to any Demiſe therein contained only, ſhall from thenceforth become void.

Provided that ſuch Proceedings of the Juſtices ſhall be examinable into, in a ſummary Way, by the next Judges of Aſſize in the County where the Premiſſes lie; if in London *or* Middleſex, *by the Judges of the King's Bench or Common Pleas; if in* Cheſter, Lancaſter *or* Durham, *before the Judges thereof; if in* Wales, *before the Courts of Grand Seſſions reſpectively: Who may order Reſtitution to the Tenant, together with Expences and Coſts to be paid by the Landlord; or if they affirm the Act of the Juſtices, may award Coſts, not exceeding five Pounds, for the frivolous Appeal.*

6. There may be an *Apportionment* and an *Extinguiſhment* of Rent.

a 1 Inſt. 147. b. 148. a. & b. 149. a. 2 Inſt. 503. 1 Roll. Abr. 234, 235, 236. 1. An [a] *Apportionment* (from *Portio, quaſi partio*) is a Partition or Diviſion of the Rent, which is dividable, as the Thing out of which it is to be paid is divided by Purchaſe in Fee, Grant, Recovery, Surrender, Forfeiture of Part, *&c.* Regularly a Rent-Charge cannot be apportion'd, or Things that are entire.

Concerning the Apportionment of Rents, there is a Difference betwixt the *Grant* and *Reſervation* of a Rent. For if a Man is ſeiſed of two Acres, one in Fee-ſimple, the other in Fee-tail, and by Deed *grants* a Rent out of both, and dieth; the Land in Tail is diſcharged, and the Land in Fee remains charged with the whole Rent. For againſt his own Grant he ſhall not take Advantage. But if in this Caſe he had *reſerved* a Rent, the Rent ſhould be apportioned; for it is not fit, the Donee or Leſſee ſhould be charged with the whole Rent. [See *Weſt.* 3. or 18 *Ed.* 1. *ch.* 2.]

If Land is [b] *evicted* (recovered by Law) or if the Leaſe determines before the legal Time of Payment, no Rent ſhall be paid. For it ſhall not be apportion'd in Reſpect of *Part* of the *Time,* as it ſhall be upon Eviction of *Part* of the *Land.*

[b] 10 Rep 128.

But Apportionment of *Rent* is uſually ſettled by Covenants.

2. [c] *Extinguiſhment* is where one hath an Highway Appendant, Common Appendant, Rent or Service going out of the Land, and he purchaſes the Land, to which it is Appendant, or out of which the Rent or Service iſſueth. So then *Extinguiſhment* of Rent is a deſtroying of a Rent by Purchaſe of the Land. For no one can have a Rent going out of his own Land. Where he hath as high and perdurable an Eſtate in the Land as in the Rent iſſuing out of the ſame Land, there the Rent is extinct; otherwiſe not.

[c] Terms of the Law, v. Extinguiſhment. 1 Inſt. 147. b. 4 Rep. 38. Vaugh. 39.

[a] If one hath a *Rent-Charge* to him and his Heirs, iſſuing out of certain Land, if he purchaſes any Parcel of the Land to him and his Heirs, all the Rent-Charge is extinct: For the Rent is entire and againſt Common Right, and iſſuing out of every Part of the Land. But if the Rent-Charge be determined by Act of *God* or the *Law,* the Grantee may have a Writ of Annuity. However, if the Grantee of a Rent-Charge purchaſes Parcel of the Land, and the Grantor by his Deed, reciting the ſaid Purchaſe of Part, [b] granteth that he may diſtrain for the ſame Rent in the Reſidue of the Land, this amounteth to a new Grant. But if one that hath a [c] *Rent-Service* purchaſeth *Parcel* of the Land, out of which the Rent is iſſuing, this ſhall not extinguiſh all, but for that Parcel. For in ſuch Caſe a Rent-Service may be apportion'd cording to the Value of the Land.

[a] Lit. 222. 1 Inſt. 148. a.

[b] 1 Inſt. 147. b. 148. a.

[c] Lit. 222. 1 Inſt. 148. a. & b. See of entire Services, p. 130. ante.

If a Leſſor enters upon a Leſſee for Life or Years into Part, and puts out the Leſſee wrongfully; the Rent is ſuſpended in the Whole, and ſhall not be apportion'd for any Part.

1 Inſt. 148. b.

When one commits [d] *Waſte* on Part of the Land, the Rent ſhall not be extinct by the *Forfeiture* of Part, but apportion'd; for no Man ſhall take Advantage of his own Wrong.

[d] 1 Inſt. 148. a.

Hitherto of *Tenures* and *Services,* (*viz.*) Grand *Serjeanty, Frankalmoign, Fealty, Socage* and *Rents.*

V. An [e] *Annuity* is a yearly Payment of a certain Sum of Money, granted to another in Fee-ſimple, Fee-tail, for Life or Years, charging the *Perſon* of the Grantor only. And not only the Grantee, but his Heirs, and his and their Grantee in Fee ſhall have a Writ of Annuity. But if a Rent-Charge is granted to one and his Heirs, he ſhall not have a Writ of Annuity againſt the Heir of the Grantor, tho' he hath

Of an Annuity.

[e] F.N.B. 152. Finch 161. 1 Inſt. 144. b. 145. a. 1 Roll. Abr. 226, 227.

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[d] *Nullus commodum capere poteſt de injuria ſua propria.* 1 Inſt. 148. b.

Aſſets;

[f] 1 Inſt. 20. a. Dr. & Stud. Dial. 1. ch. 30.

Aſſets; unleſs the Grant is for him and his Heirs. It may be granted by a Corporation. [f] No Freehold is charged therewith; which ſhews the Difference betwixt an Annuity and a Rent-Charge. Therefore a Rent-Charge is preferable to a Grant of an Annuity.

[g] Plowd. 456

If one Grants an Annuity for Term of Life of the Grantee, as a Phyſician or Lawyer, [g] *pro Conſilio impendendo* to the Grantor, and the Grantor dieth, the Annuity does not ceaſe; tho' no Advice or Counſel can be given to the Grantor that is dead.

2 Wilſon 221.

If one Grants an Annuity for Term of Life of the Grantee, in Conſideration of faithful Service, (if the ſame Annuity be perſonally demanded;) in an Action of Debt for this Annuity, the Demand is not traverſable.

[h] 1 Inſt. 2. b.
[i] 1 Inſt. 20. a.
[k] Dr. & Stud. Dial. 1. ch. 30.

An Annuity granted to a Corporation is not [h] Mortmain; cannot be [i] entailed; ſhall not be [k] Aſſets in the Hands of the Heir, to whom it deſcends; ſhall not be taken in Execution upon a Statute-Merchant, Staple or *Elegit*, as a Rent may.

[l] 1 Inſt. 292. b.

A Releaſe of all Actions, [l] before the Annuity is behind, ſhall not releaſe the Annuity.

For Recovery of an Annuity no Action lieth but a Writ of Annuity.

Of Common.
[m] Finch. 157.

VI. [m] *Common* (becauſe it is common to many) is a Profit that a Man hath in the Land of another. It is either Common of *Paſture*, *Piſcary*, *Turbary*, or *Eſtovers*.

1. Of Common of *Paſture*; and of the *Intereſt* of the *Lord* and *Commoner* therein.

Common of *Paſture* is a Right of putting Beaſts to Paſture in another Man's Soil.

[a] 1 Inſt. 122 a.
2 Black. Com. 32, 33, &c.
2 Inſt. 85, 86.
4 Rep. 37, 38, 39.
6 Rep. 60.
[b] 1 Ld. Ray. 405.

Of which there are [a] *four* Kinds, (*viz*) Common *Appendant*, *Appurtenant*, *Pur Cauſe de Vicinage*, and *in Groſs*. There can be no other Sort of Common of Paſture. as by Reaſon of being an Inhabitant in the Town [b], *&c.* 1. Common *Appendant* is a Right belonging to one's *arable* Land, of putting Beaſts commonable into another's Ground to feed there. The Commencement of Common Appendant was thus; when a Lord enfeoff'd another with arable Land to hold of him in Socage (*i. e.* by Service of the Plough) the Feoffee for the Maintenance of his Service had of Courſe, as implied in the Feoffment, Common in the Lord's Waſtes for his Cattle, which ploughed and manured his Land. This was for the Maintenance and Advancement of Tillage, which is much reſpected and favoured in Law. So that *commonable* Beaſts are thoſe which are employed for the Maintenance of the Plough, as Horſe or Ox, Kine and Sheep to compoſt the Land. It is of *Common Right*, and one needs not to preſcribe for it, tho' it muſt be by Uſage Time out of Mind; but then it is ſufficient to ſay, that it is appendant to antient arable Land; and is only for Cattle to manure the Land. It cannot be appendant to a Houſe, Meadow or Paſture, unleſs the Houſe is built on the Land, and the Meadow or Paſture was arable at the Beginning. For tho' it is Meadow or Paſture, yet it is eſteemed as Arable, becauſe it may be ploughed. [c] This Sort of Common may be throughought the Year; or limited to a certain *Time*, or on *Condition*; to a certain Number of Beaſts by Uſage; tho' it is in its own Nature without Number, becauſe one muſt have ſufficient Paſture for his Beaſts *; and *Meaſureable* according to the Quality and Quantity of the Freehold, to which one claims Common Appendant. Regularly this Commoner may

[c] 1 Roll. Abr. 397, 398.

* 3 Black. Com. 239.
2 Wilſon, 274.
1 Burr. 265 to 268 & 320.

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[a] *Argumentum a diviſione eſt fortiſſimum in jure.* 6 Rep. 60.

not Uſe the Common, but with his own proper Beaſts, that are *Levant* and *Couchant* on the Land. He may not *agiſt* the Beaſts of a Stranger, but he may put in the Beaſts of a Stranger, if he hath any temporary or ſpecial Property in them; as if he borrows or hires them, to compoſt the Land. 2. Common [d] *Appurtenant* is a Common belonging to an Eſtate for all Manner of Beaſts commonable, or not commonable, as Hogs, Goats, (not Geeſe), &c. If he that hath ſuch Common, put in the Beaſts of another, if he has not a temporary Property in them, and they are not *Levant* and *Couchant* on his Land or Meſſuage, &c. he is a Treſpaſſer. Common Appendant and Appurtenant are often confounded, but they differ in ſeveral Particulars. Common *Appurtenant* may be to a [e] Houſe, Cottage, Meadow, Paſture, as well as to arable Land; and ought to be *preſcribed for by ſpecial Words*, as againſt Common Right; altho' it may be created at this Day by *Grant*; and the Common may be ſevered from the Land, to which it is Appurtenant. By [f] purchaſing Part of the Land, this Common cannot be apportioned; otherwiſe by Alienation of Part. Now Common *Appendant* (as hath been ſaid) belongs only to arable Land; for commonable Beaſts only; is of Common Right; cannot be created at this Day; may be apportion'd. 3. Common, by Reaſon of *Vicinage* (becauſe of *Neighbourhood*) is a Sort of Common appendant, and is where the Tenants of two Lords (which are ſeiſed of two Towns lying next to one another) have uſed Time out of Mind, to have Common promiſcuouſly and [a] proportionably to their Extent of Common on both Sides for all Manner of Beaſts commonable. No Man can put his Beaſts therein; but they muſt *eſcape* of themſelves from one Field to another, by reaſon of the Neighbourhood. And this the Law ſuffers, to prevent Suits in open Countries. Now this Sort of Common, being but an [b] Excuſe for Treſpaſs, one Town or Manor, where the Waſtes of two Lords lie together, may incloſe againſt the other. [For *Shack Common in the County of* Norfolk, See 7 *Rep*. 5.] 4. Common *in* [c] *Groſs* is a Liberty of Commoning conveyed alone (without Land) by *Deed*, or gained by *Uſage* Time out of Mind. So that Common appendant cannot be Common in Groſs.

[d] Terms of the Law, v. Common, 1 Inſt 122.a. 2 Saund. 327. Plowd. 161.

[e] 4 Rep. 37. 1 Roll. Abr. 399, 400, 401. 2 Ld. Ray. 1015.

[f] 1 Inſt. 122 a. 4 Rep. 37, 30. 8 Rep. 136. 137, 138, 78, 79.

1 Inſt. 122. a.

[a] 7 Rep. 5.

[b] 1 Inſt. 222. a. 4 Rep. 38.

[c] 1 Inſt 122.a 4 Rep. 38. 1 Roll. Abr. 403.

Of Common *Appendant*, *Appurtenant*, and in *Groſs*, ſome are for a *certain* Number of Beaſts, directly (as for ten Cows, or by Conſequence (*viz.*) for ſuch as are Levant and Couchant on the Land. Some *uncertain*, as Common *Sans Number* in Groſs; and yet the Tenant of the Land may have common there alſo. This Common cannot be divided or apportioned, nor give a Woman Title of Dower. Common appendant by [d] Uſage may be limited to a certain Number. But common appurtenant muſt always be for thoſe that are *Levant* and *Couchant*. It is called Common *Sans Number*, becauſe it is uncertain how many there are to be; there being more in ſome Years than others. [[e] But if it ſhould ſeem that Levancy and Couchancy is not material in Common for a certain Number, whether it be Common appendant or appurtenant.]

1 Inſt. 32. a.

[d] 1 Inſt. 122 a. 1 Roll. Abr. 398.

[e] 1 Ld. Lay. 726.

[f] New erected Cottages, tho' they have four Acres of Ground laid to them, ought not to have Common in the Waſte of the Lord. [But a Man may preſcribe for Common for Cattle Levant and Couchant upon a Cottage [g] as well as upon a Meſſuage.]

[f] 2 Inſt. 740.

[g] 2 Ld. Ray. 1015.

Further, in Common of *Paſture*, there is an *Intereſt* of the *Lord*, and an *Intereſt* of the *Commoner*.

1. As to the *Intereſt* of the *Lord*. [h] The Lord of a Mannor ſeiſed of the Waſtes, in which the Tenants have Common, may depaſture

[h] 1 Inſt. 122 a.

i 1 Roll. Ab. 396, 399.
k 1 Saund. 345.
l 8 Rep. 113.

there of Common Right. A Preſcription to exclude him is againſt Law. His Right is implied in the firſt Grant, tho' one may preſcribe againſt the Lord or Owner of the Soil, from ſuch a Day to ſuch a Day, or in ſuch a particular Place, and ſo exclude the Owner. [i] If the Lord grants Common *Sans Number*, yet there muſt be left ſufficient Common for the Lord's own Beaſts. If a Commoner [k] ſurchargeth the Common, *i. e.* if he puts in more Beaſts than he ought, the Lord may diſtrain. He may make a Pond on the Common, if there is ſufficient Common left. [l] He may have an Action for Treſpaſs done in the Waſte or Common, be it little or great.

By Stat. Merton, 20 H. 3. ch. 4. *The Lord may* approve *againſt his Tenants,* (i. e. *the Lord may incloſe Part of the Waſte, Woods and Paſtures, for himſelf, and diſcharge it from being Common) if he leaves Common ſufficient.*

a 2 Inſt. 86. 87, 474, 475.

[a] But there is no Approvement by this Act againſt a Common *in Groſs, &c.* For the Words of the Act are, *That they ſhall have as much Paſture as ſufficeth for their Tenements.*

By 13 Ed. 1. ch. 46. *The Statute of* Merton *ſhall not only bind the Lord's Tenants, but Neighbours alſo, which claim Common of Paſture, as appendant or appurtenant to their Tenements. And none ſhall be aggrieved by Writ from Common of Paſture, by Occaſion of a Wind-mill, Sheep-cote, Dairy, enlarging of a Court neceſſary, or Curtilage.*

b 2 Inſt. 476.
3 Inſt. 204.

[b] This the Lord may do; and if the Lord hath Common in a Tenant's Ground, the Tenant may approve, for the Lord is a Neighbour.

A Cow-houſe, a Houſe for Dwelling of a Beaſt-keeper, for the ſafe Cuſtody of the Beaſts feeding there, *&c.* is within the Equity of the Statute, tho' ſufficient Common is not left.

2 Inſt. 474.

The Act ſays further, *If any upon juſt Title of Approvement) do make a Ditch or Hedge for that Purpoſe, which afterwards is thrown down by Perſons unknown, the Towns adjoining may be diſtrained, to make ſuch Ditch or Hedge at their own Coſts, and to yield Damages.* [See 1 *Geo.* 1. *St.* 2. *ch.* 48. 6 *Geo.* 1. *ch.* 16.]

Theſe Statutes are confirmed by 3 & 4 *Ed.* 6. *ch.* 3 and *treble Damages given.*

8 Rep. 136, &c.

[See 22 *Ed.* 4. *ch.* 7. 35 *H.* 8. *ch.* 17. 13 *El. ch.* 25. §. 18. Concerning the Incloſure of Woods in Foreſts and Chaſes; and alſo 29 G. 2. ch. 36. and 31 Geo. 2. ch. 41. *For the Incloſing, by the mutual Conſent of the Lords and Tenants, Part of any Common, for the Purpoſe of planting and preſerving Trees fit for Timber or Under-wood, and for more effectually preventing the unlawful Deſtruction of Trees*; and 12 Ann. Seſſ. 1. ch. 4. *For making Incloſures of Part of Commons in the* Weſt-Riding *of* Yorkſhire *for the Endowment of poor Vicarages.*]

c 1 Roll. Abr. 406.
d 2 Inſt. 88.
2 Mod. 65.
e 1 Roll. Abr. 406.
f 2 Cro. 271, 272.
Yelv. 201.
g 1 Roll. Abr. 90, 405.

2. The *Intereſt* of the *Commoner* appears in theſe Particulars following with reſpect to the *Lord*, a *Stranger*, and other *Commoners*. 1. As to the *Lord*; tho' it is not the Commoner's Common, [c] until his Cattle hath taken the Graſs with their Mouths; yet he may [d] break down an Incloſure, if the Lord doth incloſe Part, and leaves not ſufficient Common in the Reſidue. [e] If the Lord plows the Land and ſows it, yet the Commoner may put in his Cattle, and juſtify the ſame, becauſe the Lord hath begun to do Wrong. If the Lord erects a [f] Rick of Hay in the Common, and the Commoner's Beaſts eat the Hay it is juſtifiable. Neither can the Lord chaſe the Beaſts for the Wrong done by himſelf. By the ſame Reaſon that the Lord may erect one Stack, he may erect twenty, and ſo defeat his own Grant. If the Lord makes [g] Coney-

Boroughs in the Common, and ſtores them with Conies, altho' he had no Warren, the Commoners cannot juſtify the killing of them; but each Commoner may bring his Action for the Damage. If the Lord [h] ſurcharges the Common, the Commoner may not diſtrain them *Damage-Feaſant* in his own Soil, unleſs by Cuſtom; but he may have an Action. The Lord may not dig [i] Pits for Gravel or Coal; for the Statutes aforeſaid allow *Improvement* only by *Incloſure*. The Lord [k] cannot without Preſcription agiſt the Cattle of a Stranger. 2. As to *Strangers*. A Commoner may diſtrain their Beaſts [l] *Damage-Feaſant* in his own Name; or every Commoner may have an Action of the Caſe; for the Beaſts may be gone, before they can be taken *Damage-Feaſant*. He ſhall not have an Action for every ſmall Treſpaſs; but for ſuch, whereby he hath loſt his Common. If a Stranger comes and takes away the [a] Turf, the Lord only has an Action; but the Commoner may have his Action, for entering with Horſes and Carts, and thereby impairing his Common. A Commoner may licence a Stranger to feed in the Common with ſuch a Number of Beaſts, as he himſelf might have done, to manure his Land [b]; but he cannot agiſt, to take in the Beaſts of a Stranger for Money. 3. As to other *Commoners*; [c] If any Commoner incloſes the Common, or builds a Houſe on the Common, every Commoner hath his Action for his private Damage. [d] No one can maintain an Action on the Caſe for incloſing Common, but they who have a particular Right, or ſhew ſpecial Damage; and tho' a Man hath ſpecial Damage, he hath no Right to his Demand without alledging a Preſcription. A Preſentment in the Leet for ſuch an Incloſure, to the common Nuſance of the Inhabitants, is void; for it is no publick or common Nuſance. If a Commoner hath Common for ten Beaſts, and he puts in more; the Surpluſage beyond the ten may be taken, and impounded for *Damage-Faiſance* by any other Commoner. [*Qu.* If the Remedy ought not to be by Preſentment in the Court-Baron, or by Action of the Caſe?] It is certain, that where there is a Colour of Right, one cannot diſtrain the Cattle of another Commoner. [See 13 *Ed.* 1. *ch.* 46. Concerning *Approvement*. And *for the Intereſt and Power of a Commoner more at large*, See *Bridg.* 10, 11. *Godb.* 123, 124. 2 *Leon.* 201, 202. 1 *Roll. Abr.* 405. 1 *Burr.* 265 *to* 268, *and* 320.]

The Writ of Admeaſurement of Paſture is diſuſed; and the Commoners uſually ſue one another by Diſtreſſes, Actions on the Caſe, *&c.*

The *Apportionment* of *Common*, as well as of *Rents*, is uſually ſettled by Agreement, and ſo is *Extinguiſhment* of *Common* (as by Purchaſe of Part of the Land) prevented by Covenants. [e] But if there are no Covenants, Common Appendant ſhall be *Apportioned* of Courſe (not extinguiſhed) upon *Purchaſe* of Part of the Land, becauſe it is of common Right: But no other Common upon Purchaſe, without particular Agreement. Common appendant and appurtenant ſhall both be apportioned by *Alienation* of Part of the Land, to which Common is appendant or appurtenant. A *Releaſe* of Common in one Acre, is an *Extinguiſhment* of the whole Common. *Unity of Poſſeſſion* of the *whole* Land to which, *&c.* and of the whole Land in which, *&c.* makes an *Extinguiſhment* of a Common appendant.

There may be Drifts of Commons by Cuſtom [f], and they may be made tho' in Fact there is no Surcharge; for till the Drift is made, it is not poſſible to know whether there be a Surcharge, and the Intent of the Drift is to diſcover the Surcharge.

See 32 *H.* 8. *ch.* 13. Concerning the putting Stone-Horſes and Scabbed-Horſes in Commons, and the driving of Foreſts, Chaſes, Commons, *&c.*

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1 Burr. 265 to 268 & 320.

[h] F N.B. 125. 9 Rep. 112.

[i] 1 Sid. 106.

[k] 1 Roll. Abr. 396.

[l] 6 Rep. 112, 113. 3 Lev. 104. 1 Roll. Abr. 405

[a] 1 Roll. Abr. 89.

[b] 1 Roll. Abr. 398, 402.

[c] 9 Rep. 113.

[d] Com. 341.

[e] 4 Rep. 37, 33. 8 Rep. 136, 137, 138. 1 Inſt. 122. a. Show. Rep. 350.

[f] 2 Ld. Raym. 1188.

2 Wilſon. 98.

every Year; and 8 *El. ch.* 8. which excepts Stone-Horſes above thirteen Hands high in the Fen-Grounds, *&c* and 21 *Ja.* 1. *ch.* 28. *ſ.* 10. which enacts, that 32 *H.* 8. ſhall not extend to the County of *Cornwall*; and 22 *Ed.* 4. *ch.* 17. 35 *H.* 8. *ch.* 17. 13 *El. ch.* 25. *ſ.* 18. For Preſervation of Woods.

Thus of Common of *Paſture*.

2 Black. Com. 34.
[a] 1 Inſt. 122. a.
5 Rep. 34.
1 Ventr. 391.
1 Saund. 251.
2 Saund. 326.
[b] 1 Inſt. 4. b.
[c] 1 Inſt. 164. b.

2. Common of *Piſcary* is a Liberty of fiſhing in another Man's Waters. And if one claims to have a Common of *Piſcary* or *Free Fiſhing* to himſelf, it is againſt Law, and the [a] Owner ſhall fiſh there. But one may preſcribe to have a ſeparate Right of fiſhing in ſuch a Water, and the Owner of the Soil may there be excluded. And if one does grant [b] *Separalem Piſcariam*, the Soil doth not paſs, nor the Water, but only a particular Right of fiſhing. And if one grants his *Water*, the Soil doth not paſs, but the *Piſcary* within the Water doth. A *Piſcary* [c] incertain (as a Common *Sans Number*) cannot be divided amongſt Coparceners [d].

[e] 2 Inſt. 38, 100, 199.
10 Rep. 138.

[e] Any Man may make *Fiſh-Ponds* (*Vivers* or *Viviers*) in his own Ground, becauſe it is Matter of Profit, and for Increaſe of Victuals. [See *Weſt.* 1. or 3 *Ed.* 1. *ch.* 20. 5 *El. ch.* 21. 22 & 23 *Car.* 2. *ch.* 25. 4 & 5 *W. & M. ch.* 23. 7 & 8 *W.* 3. *ch.* 14. 9 *An. ch.* 26. 1 *Geo.* 1. *ch.* 16. *Concerning the Deſtruction of Fiſh in ſeveral Waters*, &c. But *Kidels* or open *Wears* are forbid by the Common Law. [See *Mag. Char. ch.* 23.]

2 Black. Com. 34.
[f] 4 Rep. 37.
[g] 1 Inſt. 4. b.

3. Common of *Turbary* (from *Turba*, an old *Latin* Word for *Turf*) is a Licence to dig Turf upon another's Ground, or in the Lord's Waſte. The Owner of the Soil cannot be excluded. It muſt be *appendant* to an [f] *Houſe* not to *Land*; for Turfs are to be ſpent or burnt in a Houſe. It alſo may be *appurtenant*, or in *groſs*. [g] But this Right of digging Turf does not convey the Land, nor the Trees, Mines, *&c.* There is alſo a Common or Liberty of digging Coals, Gravel, Sand, *&c.* which may be eaſily underſtood, by what has been already ſaid concerning Turbary.

[h] 1 Inſt. 41. b.
2 Inſt. 18.
2 Black. Com. 35.

4. [h] Common of *Eſtovers*, when reſtrained to Woods, is a Right of taking Wood out of another's Woods for Houſe-bote, Plough-bote, and Hay-bote. *Eſtovers* in the *French*, and *Bote* in the *Saxon* Language, in this Caſe denote Allowance, Compenſation or Satisfaction for theſe three Purpoſes. Hence comes our common Phraſe to give to *Boot*. *Houſe-bote*, is a Right of taking Timber, to build or to repair the Houſe, or of taking Wood, to burn in the Houſe, which is alſo called *Fire-bote*. *Plough-bote* is a Right to take Wood, to repair Ploughs, Carts, Harrows; and for making Rakes, Forks, *&c.* *Hay-bote* or *Hedge-bote* is a Right to take Wood, to repair Hedges, Pales, Gates and Stiles, to ſecure Incloſures.

[i] 4 Rep. 87, 88.

[i] If I grant to one *Eſtovers*, to burn in his Houſe, or if he hath it by Preſcription, and he only alters the Rooms and Chambers of his Houſe at his own Coſt, without making new Chimneys, by which no Prejudice accrues to the Owner of the Wood, and tho' he builds new Chimneys, or maketh a new Addition to his old Houſe, he ſhall not loſe his Preſcription. But he cannot ſpend any of the *Eſtovers* in the new Chimneys, or in the Part newly added. When a Houſe has *Eſtovers* appendant or appurtenant to it, and the Houſe is overthrown by Wind, or by any other Act of God, or by Default of the Owner, if the Owner re-builds it in the ſame Place, and in the ſame Manner, as it ſtood before, he ſhall have the ſame *Eſtovers* continued, becauſe the Land, the Foundation of the Houſe, doth continue.

VII. A *Way* (*Chimin*) here is a Right of going over another Man's Ground.

Ways may be *divided* into *Private*, *Common*, and the King's *Highway*. 1. [a] A *Private* Way is a *private* Paſſage leading from one certain Place to another, as from a Houſe to Church, to a private Houſe or Village, or to the Fields. This is to be repaired by the Village or Hamlet, or ſometimes by a particular Perſon. [b] And if it is ſtraitned, or if a Bridge, which another ought to repair, is decay'd, an Action of the Caſe lieth here, but not an Indictment. One or more may have a Liberty, to paſs there by *Preſcription* or by *Covenant*. And this may be a Way in groſs, or appendant to a Houſe or Land. 2. A *Common* Highway, is that, which leadeth from a Village into the Fields. The Freehold and the Profits are in him that hath the Land next adjoining. And if it be ſtopped, I have no Remedy, but by Preſentment or Indictment. An Indictment will alſo lie, if it is a common [c] Footway. 3. The *King's* Highway is that which leadeth from Village to Village, or from Town to Town, and is a Way for all Travellers, and doth communicate with a great Road [d].

Of a Way. 2 Black. Com. 35.

[a] 1 Vent. 189.

[b] 1 Inſt. 56. a. 1 Roll. Abr. 391. 1 Ventr. 208.

[c] 1 Ventr. 208.

[d] See p. 99. ante.

VIII. The *Multure* of a *Mill*, (*Molitura*) is the Toll, that a Miller takes for grinding Corn. This Toll ought to be according to the Standard.

Of the Multure of a Mill. See B. 3 ch. 3. poſt.

IX. A [e] *Corrody* is an Allowance of Meat and Drink, Clothing, Lodging, &c. for neceſſary Suſtenance. *Some* Corrodies are of *common Right*, and might be aſſigned by every Founder of a Religious Houſe in the ſame Houſe, when they were ſtanding, to any Perſon that he ſhould appoint. But Tenure in Frankalmoign was diſcharged of all Corrodies. Some began by *Grant* by one Man to another for Life, Years in Tail or in Fee. [f] A Chamber may be Part of a Corrody: And he that hath the Corrody, hath but his Habitation in the Chamber; as a Fellow of a College hath but an Habitation in his Chamber.

[g] Of common Right *Penſions* [h] are due to the King out of every Biſhoprick.

Corrodies are turned into *Penſions* and Money at this Day. [See Statute of *Circumſpecte agatis*, 13 *Ed.* 1 and 34 & 35 *H.* 8. *ch.* 19.]

Of Corrodies and Penſions.

[e] Terms of the Law, v. Corrody. Finch. 162.

[f] 1 Inſt. 122. a.

[g] F.N B. 230.

[h] See p. 171. ante.

X. 1. Of an *Office*, and its Nature. 2. Who is *capable* of an Office. 3. Where Offices may be executed by *Deputy*. 4. Where Officers may be *ouſted*. 5. Where Offices may be *forfeited*.

1. An Office is a Function, by Virtue whereof a Man hath ſome Employment under the King, or under a common Perſon or Subject. Such an Office may be of Inheritance in Fee-ſimple or Fee-tail, or it may be for Life, Years, or at Will. [i] But an Office of Truſt, which concerns the Adminiſtration of Juſtice, cannot be granted for Years; for then it would go to the Executors or Adminiſtrators. If a [k] Houſe or Land belong to an Office, by Grant of the Office by Deed, the Houſe and Land paſſeth without Livery and Seiſin, as belonging thereunto.

2. The [l] *King* is *capable* of an Office, not to uſe but to grant. [m] But he cannot by Letters Patent erect new Offices with new Fees, or grant new Fees to old Offices.

Every *Subject* is *capable* of an Office. But the Grant is [a] void, if he is inexpert in ſome Sort of Offices, as thoſe that concern the Adminiſtration or Execution of Juſtice. [See 12 *Ri.* 2. *ch.* 2.] No Man tho' ever

Of Offices. 3 Black. Com. 36. 1 Burr. 221 to 226.

[i] 9 Rep 97. 3 Cro. 587.

[k] 1 Inſt. 49. a.

[l] 1 Inſt. 3. b. 8 Rep. 55.

[m] 2 Inſt. 533, 534, 540.

[a] 1 Inſt. 3. b. 3 Cro. 65. 2 Roll. Abr. 286.

[b] 11 Rep. 4.
1 Inſt. 3. b.

[c] 1 Ld. Ray. 49.
[d] 4 Inſt. 160. 310.
Crompt. Jur. 91.
3 Cro. 138.
[e] 4 Inſt. 75, 87, 146.
[f] 4 Inſt. 267.
[g] 1 Inſt. 3. b.
1 Cro. 637.
3 Cro. 556. contra.
2 Danv. Abr. 774.

ever ſo ſkilful, is capable of a *judicial* Office in [b] *Reverſion.* Therefore Stewardſhips of Courts-Leet cannot be granted in Reverſion, becauſe Stewards of Courts-Leet are judicial Officers. But Stewardſhips of Courts-Baron may be granted in Reverſion; becauſe thoſe Stewards are not judicial Officers in all Things, that relate to the Court-Baron. *Miniſterial* Offices may be granted in Reverſion [c]. [d] Where one Officer is under the Correction of another, both Offices ought not to be granted to the ſame Perſon. [e] Antient Offices muſt be granted in ſuch Form, and in ſuch Manner, as they uſed to be; unleſs the Alteration is by Act of Parliament. [f] An Officer that is conſtituted by Statute, hath no more Authority than the Statute gives him; for he cannot preſcribe, as an Officer at Common Law may. An [g] Infant or Minor is not capable of an Office of Stewardſhip of the Court of a Manor, either in Poſſeſſion or Reverſion. [But *Quære.*] [See 5 & 6 *Ed.* 6. *ch.* 16. *infra.*]

See 6 *Ri.* 2. *ch.* 9. 3 *H.* 8. *ch.* 8. Concerning Victuallers.

By 12 & 13 W. 3. ch. 2. *and* 1 Geo. 1. St. 2. ch. 4. *Aliens, tho' made Denizens or naturalized, are incapable of any Office of Truſt, either civil or military.*

[h] Lit. 379.
Perk. Tit. Grants, ſ. 100, 101.
9 Rep. 47, 48, 49.
3 Cro. 279.

3. Offices may be executed by [h] *Deputy,* where the Office may be granted to one, to execute by himſelf or Deputy, or the Deputy of his Deputy. A *Deputy* is he, that exerciſes the Office in another Man's Right. There is a Difference betwixt a *Deputy* and an *Aſſignee* of an Office. For an *Aſſignee* hath an Eſtate or Intereſt in the Office itſelf, and doth all Things in his own Name; for whom the Grantor of the Office ſhall not anſwer, except in ſpecial Caſes. And when an Officer hath Power to make an Aſſignee, he may of Courſe make Deputies. Alſo when an Office deſcendeth to an Infant, Idiot, *&c.* he may of Courſe make a Deputy. But the ſuperior Officers muſt [i] anſwer for their Deputies in civil Actions. And the Deputies are ſubject to criminal Proſecutions. [See of *Under-Sheriff, B.* 1. *ch.* 7. and of a *Steward* of a *Court-Baron, B.* 4. *ch.* 1. and *what Officers may make Deputies.* 2 Roll. Ab. 154.]

[i] Dr. & Stud. Dial. 2. ch. 42.
2 Inſt. 191, 466.
4 Inſt. 114.

By 1 H. 4. ch. 13 *and* 4 H. 4. ch. 20. *Cuſtomers and Controllers in every Port of* England *ſhall be reſident upon their Offices in proper Perſon, without making any Deputy.*

By 4 H. 4. ch. 21. *Searchers in the Ports of* England *ſhall not Act by Deputy.*

By 2 H. 6. *ch.* 10. *Patent Officers in the King's Courts, who have uſed to appoint Clerks and Miniſters under them, ſhall be charged and ſworn to appoint ſuch as be ſufficient, faithful, and attending, and for whom they will anſwer.*

By 1 W & M. Seſſ. 1. ch. 18. Diſſenters *from the Church of* England *choſen to any Parochial or Ward Office, who ſcruple the taking of the Oaths, may execute the Office by a* Deputy, *to be allowed as the Officer ſhould have been.*

[a] 1 Inſt. 233. a. & b.
3 Cro. 59, 60.

4. The Grantor may lawfully [a] *ouſt* and *diſcharge* his Officer at Pleaſure, where he hath no other Profit, but a *collateral* certain Fee; as Bailiff, Receiver, Surveyor, Auditor, and the like, the Exerciſes of which are but Labour and Charge to them. Yet he muſt have his Fee after ſuch *Ouſter.* But where the Fees are to be taken out of the Profits ap-

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[b] *Officia judicialia non concedantur antequam vacent.* 11 Rep. 4.

pertaining to the Grantor within his Office, and where the *Office* itſelf is profitable to them, there the Grantor cannot diſcharge the Officer of his Service. As if a Man doth grant to another the Office of the Stewardſhip of the Courts of his Manors, even with a certain Fee, he cannot diſcharge him at Pleaſure, becauſe he hath other Fees and Profits belonging to his Office. So it is as to the Office of the Keeper of a Park; for he hath not only his certain Fee, but Profits and Avails in Reſpect of his Office, as Deer-Skins, *&c.* And no Man ſhall make void his own Grant to the Prejudice of the Grantee. But if Bailiffs, Receivers, *&c.* that have only a collateral Fee, have their Offices granted by Patent for Life or Years, they cannot be removed at Pleaſure; much leſs can Stewards of Courts, if they hold their Offices by Patent. [b] But as to private Offices granted by Deed, the Grantor or his Heirs may lawfully turn out the Grantee, if he doth not well and truly execute the Office. For the Eſtate which he hath in the Office is upon a Condition in Law, (*viz.*) To do his Duty in it.

b Lit. 378.

5. Offices may be *forfeited* by Common Law, and by Statute.

1. By *Common* Law, as

By [c] *Non-uſer* of *publick* Offices, which concern the Adminiſtration of Juſtice or the Commonwealth. Here a *Non-uſer* is a Cauſe of Forfeiture. But *Non-uſer* of itſelf, without ſome ſpecial Damage, is no Forfeiture of *private* Offices. But a *Refuſal* to execute the Office upon Requeſt, is a Forfeiture.

c 9 Rep. 50. 1 Inſt. 233. a. Coke's Compl. Cop. ſ. 45.

By [d] *Miſ-uſer*, as if a Keeper of a Park kills any Deer without Warrant, or cuts down any Trees to his own Uſe, it is a Forfeiture of his Office. For this and ſuch like Offices are founded upon Skill and Confidence, and Conditions are annexed to them by the Law. And thus a [e] Deputy by his Miſdemeanour may make his Officer loſe his Office. But the Miſdemeanour of the Grantee for Life, ſhall not affect him who hath the Reverſion, for he ſhall forfeit only his own Eſtate. Thus if a Steward burns the Court-Rolls, taketh a Bribe, *&c.* he forfeits his Office by this *Miſ-uſer.* [f] Where the Condition in Law requires Skill and Confidence, as in Caſe of Offices, an Infant or Feme Covert not obſerving it, forfeit their Intereſt, whether they come to the Office by Grant or Deſcent. But if an Infant or Feme Covert break a Condition in Law, that requires no Skill or Confidence, this is no abſolute Forfeiture. Yet a Condition in Deed binds them.

d Lit. 378. 379. 1 Inſt. 233. b.

e Kitch. 287. 2 Roll. Abr. 155.

f 1 Inſt. 333. b. 8 Rep. 44.

2. By *Statute.*

By 5 & 6 Ed. 6. ch. 16. *None ſhall ſell any* Office *or* Deputation *of the ſame, or any Part thereof, or take any Reward, or Profit, or any Promiſe or Aſſurance of any Reward for the ſame, directly or indirectly, if the Office ſhall concern the* Adminiſtration, *or* Execution *of Juſtice, or Clerkſhip in any Courts of Record, or concerning the King's Revenue, Account, Cuſtoms, or any Attendance in any Cuſtom-Houſe, Aulnage, Auditorſhip, Surveyor of the King's Lands, or the keeping of any of his Majeſty's Caſtles, or Forts; in Pain that the Seller of ſuch Office or Deputation ſhall not only loſe and forfeit his Right and Eſtate therein, and the Gift or Nomination to the ſaid Office, or Deputation thereof, but that the Buyer ſhall immediately be diſabled to enjoy the ſaid Office or Deputation. Provided, that this Act ſhall not extend to any Office of Inheritance, or to any Office*

See of Bribery B. 3. ch. 3. poſt.

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[f] *In quo quis delinquit, in eo jure eſt puniendus.* 1 Inſt. 233. *b.*

for the Keeping of a Foreſt, Chaſe, Park, Houſe, Manor, Garden, nor to any Office granted by the two Chief Juſtices, or Juſtices of Aſſiſe, but that they may grant Offices as before. Alſo all Acts done by any Officer removable by Force of this Act ſhall be good in Law, until he be removed. [See alſo 12 *Ri.* 2. *ch.* 2.]

[a] 2 Ventr. 188. 213, 267.

[b] 8 Rep. 47.

[a] It hath been reſolved, that the Office of Regiſter to an Archdeacon being forfeited by this Statute, the Right of nominating and appointing a Regiſter did devolve to the Crown by Forfeiture, and not to the Biſhop of the Dioceſe. [b] Such Offices (as to the Right) are determinable at Common Law.

By 13 Ca. 2. St. 2. ch. 1. *and* 5 Geo. 1. ch. 6. *No Perſons ſhall be elected into any Office or Place, relating to the Government of any City, Corporation, Borough, or Port Town, who ſhall not have taken the Sacrament according to the Rites of the Church of* England, *within one Year before ſuch Election; but a Removal, or Proſecution on Account of ſuch Omiſſion, muſt be within ſix Months after Election. Every Perſon ſo elected muſt take the Oaths of Allegiance and Supremacy at the ſame Time that he takes the Oath of Office.*

By 25 Ca. 2. ch. 2. *Every Perſon having any Office civil or military, or any Place of Truſt or Command under the King, or under any Grant from him, ſhall take the Sacrament according to the Uſage of the Church of* England, *within three Months after his Admiſſion to ſuch Office.*

And by 9. Geo. 2. Ch. 26. *Every ſuch Perſon muſt ſubſcribe the Declaration againſt Tranſubſtantiation, contained in* 25 Ca. 2. ch. 2. *and alſo take the Oaths preſcribed by* 1 Geo. 1. St. 2. ch. 13. (*which may by Virtue of that Statute be taken and ſubſcribed by the lawful Deputies of ſuch as enjoy Offices of Inheritance, inſtead of the Officers themſelves*) *at any of the King's Courts at* Weſtminſter, *or at the General or Quarter Seſſions, within ſix Months after he ſhall enter upon ſuch Office, or within ſix Months after his Return to* England, *if then abroad, and at the ſame Time muſt produce a Certificate of his having received the Sacrament, under the Hands of the Miniſter and Churchwardens, atteſted by two Witneſſes.*

By 1 Ann. ch. 8. *No Office civil or military ſhall be void by the Death of the King. But ſhall continue ſix Months, unleſs ſuperſeded, or made void by the next Succeſſor.*

See 9 *An. ch.* 20. for the more eaſy trying the Rights of Offices.

Of Franchiſes. 2 Black. Com. 37.

XI. Of *Franchiſes*; wherein I ſhall ſhew, 1. What is a *Franchiſe*. 2. Their ſeveral *Kinds*. 3. What *Franchiſes* ought to have *Allowance*, and what not. 4. How *Franchiſes* may be *forfeited*.

1. What is a Franchiſe?

[c] Finck. 164.

[a] F.N.B. 230.

[b] 2 Inſt. 221.

A [c] *Franchiſe* or a Liberty is a Royal Privilege in the Hands of a Subject, either by Charter of Letters Patent or Preſcription. All Liberties are derived from the Crown; and therefore they are extinguiſhed, if they come to the Crown again by *Eſcheat*, *Forfeiture*, &c. [a] A Franchiſe or Liberty may be veſted in Bodies politic or Corporations, aggregate or ſole, or in many Perſons that are [b] not Corporations, (as Counties, Boroughs, Towns,) or in a ſingle Perſon. One Liberty cannot be granted to the Prejudice of another, that was granted before: For Priority of Grant is to be regarded.

2. They are of different *Kinds*. The Chief of them are the *Principality of Wales*, the Counties *Palatine* of *Lancaſter*, *Durham*, *Cheſter*. Next, *Counties*, *Hundreds*, *Cinque Ports*, *Ports of the Sea*. Then there

is a Liberty of having a *Leet*, *Manor* or *Lordſhip*, a Liberty to *make* a *Corporation*, to have a *Coroner*, to *hold* Pleas, and to have *Cognizance* of Pleas, *Gaols*, *Baliwicks* of Liberties, and *Return* of *Writs*, the Liberty of a *Foreſt*, *Chaſe*, *Park*, *Warren*, *Fairs* and *Markets*, *Felons* Goods, Goods of *Fugitives*, of thoſe put in the *Exigent*, *Deodands*, *Treaſure-Trove*, *Waifs*, *Eſtrays*, *Wreck* of the Sea.

Of the *Principality* of *Wales*, and the *Counties* Palatine, I ſhall ſay ſomething hereafter in the Fourth *Book*, *chap.* 2. I have mentioned *Counties* and *Hundreds* in the *Introduction*. *Cinque Ports* ſhall be ſpoken of too in the Fourth *Book*. Of *Gaols* and *Coroners*, ſee *Book* 1. *chap.* 7. Of *Corporations*, *chap.* 8. Of *Manors* and *Lordſhips*, ſee *Book* 2. *chap.* 1. *Book* 4. *chap.* 1. and of *Leets*, *Book* 4. *chap.* 1.

It is neceſſary to ſpeak here only of Liberties to *hold Pleas*, and to have *Cognizance* of *Pleas*, of *Bailiwicks* of Liberties, and *Return of Writs*, of the Liberties of *Foreſt*, *Chaſe*, *Park*, *Warren*, *Fairs* and *Markets*, *Goods of Felons, and Fugitives*, of thoſe put in the *Exigent*, of *Deodands*, *Treaſure-Trove*, *Waifs*, *Strays*, *Wreck* of the Sea; which are Liberties uſually drawn into Queſtion.

1. The Liberty [c] to *hold Pleas* (*Tenere Placita*) is to have a Court of one's own, and to hold it before a Mayor, Bailiff, *&c.* in ſuch a Place, according to the Courſe of the Common Law. Herein one may preſcribe: But the Cauſes here may be removed to the higher Courts. Such are the Courts in Corporations, which are merely concurrent Juriſdictions.

[c] Finch. 166. 1 Inſt. 114. b. 2 Inſt. 71. 4 Inſt. 87. 224. 2 Danv Abr. 161. 2 Ld. Ray. 836

2. To have [d] *Cognizance* of *Pleas*, (*Cognitionem Placitorum*) is to have Power to draw Cauſes out of the King's Courts into one's own, with an excluſive Juriſdiction. This lieth not in Preſcription, but in Demand of the Lord; and is always of Record, and claimed by Charter.

The *Principality* of *Wales*, the *Counties Palatine*, the *Cinque Ports*, and the *Univerſities*, are Juriſdictions exempt, and have Cognizance of Pleas. But [e] theſe particular Juriſdictions, derogating from the Juriſdiction of the general Courts of the Common Law, are always to be taken ſtrictly. 2 *Wilſon*, 406.

[d] 1 Inſt. 71 b. 114. a. 2 Inſt. 140. 8 Rep. 118. 9 Rep. 29. 2 Cro. 543, 692. 2 Danv. Abr. 163, 164. 2 Ld. Raym. 836. 2 Str. 810.

[e] 2 Inſt 548.

3. A *Bailiwick* is that Liberty, which is exempted from the Sheriff of the County, over which the Lord of the Liberty appointeth a Bailiff, to do ſuch Offices within his Precinct, as an Under-Sheriff doth at large under the High-Sheriff in the County. Such is the Bailiff of *Weſtminſter*, of the *Dean* and *Chapter* of *St. Paul*'s &c. [See for his Oath 27 *El. ch.* 12.]

Theſe *Bailiffs* of *Liberties* cannot arreſt a Man without a Warrant from the Sheriff of the County. And yet the Sheriff cannot enter the Liberty himſelf at the Suit of a Subject [f] without this Clauſe in his Writ, *(viz.) Non Ommittas Propter Aliquam Libertatem*, *&c.* [See *Weſt.* 2. or 13 *Ed.* 1. *ch.* 39.] Yet he may arreſt in any ſuch Franchiſe upon a *Quo Minus* or *Capias Utlagatum*, and in all Writs whatſoever at the King's Suit. If the Sheriff doth enter the Liberty without ſuch Power, the Lord of the Liberty ſhall have an Action againſt him, tho' the Execution of the Writ may ſtand good. [See 27 *H.* 8. *ch.* 24.]

[f] 1 Ventr 406. 2 Inſt. 453.

4. Some Franchiſes (which are not Counties by themſelves) have *Return of Writs* (*i. e.*) they may make Certificate or Anſwer to the Courts above of that which is done by their Bailiffs, to whom Mandates are directed to execute Writs. [a] This Liberty may be by Grant or Preſcription, when the Bailiff returns his Precept, he muſt ſet his Name to it.

[a] 2 Inſt. 452, 453. 1 Ventr. 405. 497.

[b] Fines or Amerciaments for inſufficient Return of Writs, or other Proceſs made by the Stewards or Bailiffs of Liberties, ſhall be laid upon the Stewards or Bailiffs, and not upon the Sheriff or Lord of the Franchiſe. But the Lord ſhall anſwer for the Bailiff, if he is inſufficient. [See 1 *Ed.* 3. *ch.* 5. 27 *H.* 8. *ch.* 24.]

5. [c] A *Foreſt* (*Ferarum Statio*) is a certain Territory of woody Ground and fruitful Paſtures, privileged for Beaſts of *Venary* (not *Venery*) or thoſe that are gotten by Hunting, or for Fowls of Foreſt, Chaſe and Warren, to reſt and abide there in Safety. [d] The King may make a Forreſt in his own Ground at this Day, but not in the Ground of Subjects without their Conſent. This Territory of Ground ſo privileged is meted and bounded, and known to be ſo, either by Matter of *Record* (by Writ iſſued to the Sheriff of the County, who ſhall take an Inqueſt of the Place and Bounds, and return it into *Chancery*, &c.) or by *Preſcription*. [e] By Preſcription it may be good in the Grounds of other Men. The King may grant a Foreſt to a [f] Subject; but in the Hands of a Subject it is not properly a Foreſt, but rather a Chaſe. By the Grant of a Foreſt, not only the Privilege, but the [g] Land itſelf paſſeth.

A Foreſt doth conſiſt of [h] *eight* Things, (*viz.*) Of *Soil*, *Covert*, *Laws*, *Courts* of Record, *Judges* and *Officers* of Record, *Game*, and certain *Bounds*.

A [i] *Purlieu*, (from *Pure* clear and exempt. and *lieu* a Place) containeth ſuch Grounds, which *Hen.* 2. *Ri.* 1. or King *John* added to their ancient Foreſts over other Men's Grounds, which were afterwards diſafforeſted by the Statute of *Charta de Foreſta*, *ch.* 1. & 3. The Owner may lawfully hunt there, fell Timber, *&c.* as if they had never been afforeſted.

6. A *Chaſe* (from *Chaſſer* to chaſe) is a privileged Place for the Receipt of Deer and Beaſts of the Foreſt, being of a middle Nature betwixt a Foreſt and a Park. [k] It is commonly leſs than a Foreſt, and not endowed with ſo many Liberties; as Officers, Laws, Courts, *&c.* and yet it is of a larger Compaſs than a Park, having more Officers and Game than a Park. Every Foreſt is a Chaſe, but every Chaſe is not a Foreſt. It differeth from a Park in that it is not incloſed. For if it is incloſed, it is a good Cauſe of Forfeiture; [l] tho' it muſt have certain Metes and Bounds. But it may be in other Men's Grounds as well as in one's own. It is not Lawful to make a Chaſe, Park or Warren, without [m] Licence under the Broad Seal. For this would be to appropriate Beaſts, that are *Feræ Naturæ*, to one's own Uſe.

A Chaſe is governed by the [n] Common Law. One may have [o] Common in a Chaſe as well as in a Foreſt; and the Owners of Woods there may cut down Timber or Wood without any Licence.

Chaſes that were never Foreſts, cannot have any [a] *Purlieu*.

7. A [b] *Park* (from *Parquer* to incloſe) is a great Quantity of Ground, incloſed and privileged, for wild Beaſts of Chaſe by the King's Grant or by Preſcription. No Man now can erect a Park without a Licence under the Broad Seal. For the Common Law does not encourage Matters of Pleaſure, which bring no Profit to the Common-wealth. The Beaſts of Park or Chaſe properly extend to the Buck, Doe, *&c.* but in a common and legal Senſe to all the Beaſts of the Foreſt. A Park muſt be incloſed. For if it lies open, it is a good Cauſe of Seiſure into the King's Hands as a Thing forfeited. And the Owner cannot have an Action againſt thoſe that hunt in his Park, if it lies open. [*Qu.*]

To

[b] Dr & Stud Dial. 2. ch. 42. 1 Ventr. 399. See p. 74. 75. ante.

[c] 1 Inſt. 233. a. 4 Inſt. 316. 8 Rep. 138. Manw. ch. 1. num. 1. c 1 2 num. 2.

[d] 4 Inſt. 300. 301. 2 Black. Com. 38.

[e] 4 Inſt. 301.

[f] 1 Inſt. 1. b. 2. a. 233. a. 4 Inſt. 314, 315.

[g] 1 Inſt. 5 b.

[h] 4 Inſt. 289. 298. See of the Foreſt Courts. B. 4. ch. 1. poſt. 4 Inſt. 299, 300.

[i] 4 Inſt. 303.

2 Black. Com. 38.

[k] 1 Inſt. 233. a.

[l] 4 Inſt. 317, 318.

[m] 11 Rep. 87. 2 Inſt. 199.

[n] 4 Inſt. 314, 315.

[o] 4 Inſt. 298.

[a] 4 Inſt. 303.

[b] 1 Inſt. 233 a. 2 Inſt. 199. 3 Cro. 60. 2 Black. Com. 38, 416.

To a lawful Park *three* Things are required. 1. A Grant or Preſcription. 2. Incloſures by Pale, Wall or Hedge. 3. Beaſts of a Park.

2 Inſt. 199.

There are Parks in Uſe and Reputation, erected without lawful Warrant, and yet are called Parks. I do not ſpeak of theſe nominal Parks; tho' the Owner of ſuch a Park may have an Action for killing his Deer.

[c] Parks as well as Chaſes are ſubject to the Common Law; and are not to be ruled by the Foreſt Laws.

[c] 4 Inſt. 314.

[See 5 *Geo.* 1. *ch.* 15. Of the Puniſhment of Keepers of Foreſts, Chaſes and Parks, *&c.* for taking or killing Deer without Conſent of the Owner. And *Weſt.* 1. or 3 *Ed.* 1. *ch.* 20. 3 *Ja.* 1. *ch.* 13. 7 *Ja.* 1. *ch.* 13. 13 *Cha.* 2. *St.* 1. *ch.* 10. 3 *&* 4 *W.* *&* *M.* *ch.* 10. 5 *Geo.* 1. *ch.* 15, 28. 8 *Geo.* 1. *ch.* 19. 9 *Geo.* 1. *ch.* 22. 10 *Geo.* 2. *ch.* 32 24 *Geo.* 2. *ch.* 57. For the more effectual Diſcovery and Puniſment of Deer-Stealers. And 43 *El.* *ch.* 7. 22 *&* 23 *Cha.* 2. *ch.* 7. 3 *&* 4 *W.* *&* *M.* *ch.* 10. and 5 *Geo.* 1. *ch.* 15. 6 *Geo.* 1. *ch.* 16. For breaking down Pales and other Fences.]

8. A [d] *Warren* is a Liberty by *Grant* of the King, or by *Preſcription*, for Preſervation of Beaſts and Fowls of the Warren. *Beaſts*, as Hares, Conies, *&c.* *Fowls*, as Partridge, Pheaſant, Quail, Rail, Woodcock; or Water-Fowl, as Mallard, Hern, *&c.* [e] A Chaſe, Park or Warren, are collateral Inheritances, and not iſſuing out of the Soil as *Common* doth. A free Warren may lie open, for there is no Neceſſity of incloſing it. One may have a Warren in another's Land; for the Grantee may alien the Land and reſerve the Franchiſe. [f] But no one can make a Warren, and appropriate thoſe *Creatures* that are *Feræ Naturæ*, without the King's Licence, as before obſerved. [g] No Action lies if Conies eat up another Man's Corn, *&c.* But the Owner of the Corn may kill them. For no one hath Property in them.

[d] Terms of the Law, v. Warren, 1 Inſt. 233. a. 8 Rep. 138.
[e] 4 Inſt. 318. 2 Black. Com. 38.
[f] 11 Rep. 87. 2 Inſt. 199.

[See 22 *&* 23 *Car.* 2. *ch.* 25. 4 *&* 5 *W.* *&* *M.* *ch.* 23. 5 *An.* *ch.* 14. 9 *An.* *ch.* 25. 3 *Geo.* 1. *ch.* 11. 8 *Geo.* 1. *ch.* 19. 26 *Geo.* 2. *ch.* 2. 28 *Geo.* 2. *ch.* 12. 30 *Geo.* 2. *ch.* 6. § 47. *For the better Preſervation of the Game*, and the *Statutes* relating to the *Deſtroying of the Game*, *B.* 3. *ch.* 3. *poſt.*]

[g] 5 Rep. 104. 1 Cro. 548.

9. Of *Fairs* and *Market*. 1. What is a *Fair* or *Market*? 2. Of *Toll* in Fairs and Markets. 3. How *Property* is *altered* by *Sale* in Fairs and Markets?

1. What is a *Fair* or *Market*?

1 Black. Com. 274.

A [a] *Fair* (from *Forum* or *Feriæ*) is a great Sort of Market, granted to any Town, *&c.* for Buying and Selling, and for the more ſpeedy and commodious Proviſion of ſuch Things, as the Subject needeth. It is uſually kept once or twice in the Year. A *Mart* (*à Merce* or *Mercando*) is a great Fair holden every Year.

3 Black. Com. 218.
[a] 2 Inſt. 220, 221, 713.

A Market (from *Mercando*, Buying and Selling) is leſs than a Fair, and granted to a Town, *&c.* for the like Purpoſes; but chiefly for the Proviſion of ſuch *Victuals*, as the Subject wanteth. This is uſually kept once or twice in the Week. So that every Fair is a Market, but every Market is not a Fair. [b] There may be a Market without an Owner. Where there is an Owner, a Butcher cannot preſcribe to ſell Meat in his own Houſe upon a Market-Day; for the Market muſt be in an open *Place*, where the Owner may have the Benefit of it.

[b] 4 Inſt. 272.
2 Roll. Abr. 123.

[c] Every one that hath a Fair or Market, ought to have it by *Grant*, or by *Preſcription*, which ſuppoſes a Grant or Charter. And if the King grants to one a Fair or Market, he ſhall have of Courſe a Court of Record, called a *Court* of Pie-Powder [d] as incident thereunto. In common

[c] 2 Inſt. 220, 221. 281.
[d] See B. 4. ch. 1. poſt.

e 2 Inſt. 406.
1 Rep. 49.
2 Saund. 872.
See p. 106. ante.

Speech the Fair or Market is taken for the Place where it is kept. If one hath a Fair or Market by Charter or Preſcription, and another obtains a Market near it to the Nuſance of the former Fair or Market, [e] he may avoid it. For there are always theſe Words in the Grant, *(viz) Ita Quod non ſit ad Nocumentum Alterius Mercati.*

Every one, that hath a Market ought to have Pillory, Tumbrel, *&c.* to puniſh Offenders.

By 13 Ed. 1. St. 2. ch. 6. *Fairs and Markets ſhall not be kept in Church-yards.*

By 2 Ed. 3. ch. 15. *Every Lord at the Beginning of his Fair muſt cry and publiſh how long it ſhall endure, and the Fair ſhall not hold longer than its due Time.*

By 27 H. 6. ch. 5. *All Fairs and Markets are forbidden to be kept on a* Sunday, *&c.*

2. Of *Toll* in Fairs and Markets. In moſt Fairs and Markets *Toll* is paid to the Owner.

f 2 Inſt. 220.
2 Str. 1239.
1 Wilſon. 109.
g 2 Inſt. 221.
h 2 Inſt. 220.

[f] *Toll* (or *Tolne*) is properly a reaſonable Sum of Money or Payment to the Owner of the Fair or Market upon Sale of Things tollable within the Fair or Market, or for Stallage, Pickage, *&c.* It is always to be paid by the [g] Buyer not the Seller, unleſs there is a Cuſtom to the contrary. Nothing is tollable of Common Right before the Sale. In ancient Fairs and Markets *Toll* may be paid by Cuſtom for the Standing in the Fair or Market, tho' nothing is ſold. Such a Cuſtom muſt be Time out of Mind; which Cuſtom no one can challenge, that claims the Fair or Market by Grant within the Time of Memory, (*viz.*) ſince the Reign of *Ri.* 1. So that it is better to have a Fair or Market by Preſcription than Grant. *Toll* was firſt [h] invented, that Contracts might be made openly and before Witneſſes.

i 2 Inſt. 222.
k 2 Inſt. 220.
a 2 Inſt. 219.
b 2 Ld. Ray. 1171.
c 1 Roll. Abr. 666.
1 Ld. Ray. 386.
2 Ld. Ray. 1591.

At this Day there is not any [i] certain Toll taken; but if that which is taken be unreaſonable, it is puniſhable by 3 *Ed.* 1. *ch.* 31. Of which the Judges ſhall determine, if it comes judicially before them. Toll may be ſaid to be [k] *outrageous*, where a reaſonable Toll is due, and exceſſive Toll is taken; or where no Toll is due, and Toll is taken and unjuſtly uſurped. The King cannot grant an outrageous Toll. [a] Outrageous Toll diſcourages Men from Furniſhing Fairs and Markets. If the King doth not grant Toll with the Fair or Market, the Patentee ſhall have no Toll: For it is not incident to a Fair or Market by a general Grant [b]. But ſuch a Fair or Market is a *free* Fair or Market. [See 10 & 11 *W.* 3. *ch.* 24.] Toll in *Fairs* is generally taken upon the Sale of Cattle, as Horſes, *&c.* but in *Markets* for Grain only. [c] And the Lord may ſeize until Satisfaction.

d 2 Inſt. 221.
2 Roll. Abr. 198.
e See p. 137. ante.
f F.N.B. 227.

The [d] King ſhall pay no Toll for any of his Goods; and a Man may be diſcharged from the Payment of Toll by the King's Grant, either generally, or ſpecially in the King's own Fairs and Markets; and of the Toll which together with any Fair or Market is granted after ſuch Grant of Diſcharge; but the King's Grant cannot diſcharge Toll formerly due to Subjects either by Grant or Preſcription. * Priority of Grant is to be regarded. Tenants in ancient Demeſne [e] are exempted and diſcharged of Toll for Things coming of thoſe Lands. If Toll is demanded of them, they may ſue to have [f] Letters Patents under the King's Seal, directed to all Officers to ſuffer them to be Toll-Free, or they may have the Writ *De Eſſend' quiet' De Tolonio.*

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* *Qui prior eſt tempore, potior eſt in jure.* 4 Rep. 30. 1 Inſt. 347. b.

By 3 Ed. 1. ch. 31. *If exceſſive Toll be taken in a Market-Town by the Lord's Conſent, the Franchiſe ſhall be ſeiſed. If by other Officer, he ſhall pay double Damages, and ſuffer forty Days Impriſonment.*

2 Inſt. 219, &c.

By 2 & 3 Ph. & M. ch. 7. *Every Owner of a Fair or Market ſhall appoint a Toll-taker, where Toll is to be taken, or a Book-keeper where no Toll is paid, to ſit there from ten of the Clock in the Morning until Sun-ſet, in Pain of Forty Shillings for every Default.*

[g] There are divers other Sorts of Tolls, as *Turn-Toll*, where Toll is paid for Beaſts that are driven to be ſold at Market, and do return unſold; *Toll-Travers*, where one claimeth to have Toll for every Beaſt driven over his Ground; *Through-Toll*, where a Town preſcribes to have a Toll for ſuch Beaſts as go through the Town, or over a Ferry or Bridge maintained at their Coſt. There is alſo *Tronage* for a Beam with which Things are to be weigh'd; *Pontage*, *Paviage*, *Cranage*, *Wharfage*, *Anchorage*, *Stallage*, *Pickage*, &c.

[g] 8 Rep. 46. 2 Wilſon. 296.

3. [h] *Property* is *altered* and *diveſted by Sale* in Fairs and Markets Overt. For all Contracts of any Thing vendible there ſhall bind the Parties, and thoſe that have Right. But this Rule extends only to Sales, not to pawning [i]. This Rule hath *twelve* Exceptions. 1. It ſhall not bind the King; tho' it ſhall bind Infants, Feme-Coverts, Idiots, Men beyond Sea and in Priſon that have Right. 2. The Sale muſt be in a Place that is open, ſo that any one that paſſeth by may ſee it; not in a Back-Room, Warehouſe, *&c.* 3. It muſt be in an open and proper Place, and proper to the Trade of him in whoſe Shop it is ſold; as Plate muſt be ſold in a Goldſmith's Shop not in a Scrivener's, *&c.* for no one will ſearch there for ſuch Things. 4. It muſt be a Sale, not a Free-Gift without any valuable Conſideration. 5. The Buyer muſt not know that the Seller hath wrongful Poſſeſſion. 6. The Sale muſt not be fraudulent betwixt two, on Purpoſe to bar him that hath Right. 7. If the Seller acquireth the Goods again, he that hath Right may take them. 8. There muſt be a Sale and Contract. Therefore a Sale to a Man of his own Goods, or a Sale by an Infant known to the Buyer to be ſuch, or by a Feme Covert known to be a Feme Covert (unleſs for ſuch Things as ſhe uſually trades for, or by Conſent of her Huſband) bindeth not. 9. * The Contract muſt be originally and wholly made in the Market Overt, and not have Inception out of the Market, and Conſummation in it. 10. The Property is not altered if Toll is not paid, where the Statutes require it. [See 2 & 3 *P. & M. ch.* 7. 31 *El. ch.* 12.] Though by the Common Law the Property was altered, tho' no Toll paid. 11. The Sale muſt not be in the Night, but between Sun and Sun, that is by Day-light; tho' the Sale that is made in the Night is good betwixt the Parties, but not to bind a Stranger that hath Right. 12. If the Party robbed purſues his Suit freſhly, and convicts the Felon, tho' the King's Officer, or any other that ſeized the Goods, ſelleth them in Market Overt, the King or the other ſhall make Reſtitution of his Goods. For the Goods were in the Cuſtody of the Law, and therefore the Property could not be altered by Sale in Market Overt. [See 21 *H.* 8. *ch.* 11. and of *Bankrupts*, *ch.* 4. *poſt.* Concerning Sale of their Goods in Market Overt.]

[h] 2 Inſt. 713. 5 Rep. 83. 1 Wilſon. 8.

[i] 2 Str. 1187.

* Dyer. 99.

[a] In *London* every Day except *Sunday* is a Market Overt, and the Sales in Shops there for valuable Conſideration are good; but the Court cannot take Notice of this Cuſtom of *London*, unleſs it be found.

[a] 5 Rep. 83. 2 Str. 1187. 1 Wilſon. 8.

[b] Moore. 360.

[b] But in the Country where Things are ſold in diſtinct Places in a Fair or Market, the Goods muſt be ſold in the uſual Place appointed for the Sale thereof; otherwiſe the Property is not altered.

Sale upon a *Sunday*, tho' in a Fair or Market, ſhall not alter the Property.

By 34 & 35 H. 8. ch. 26. *No Sale of Goods and Cattle ſtolen in* Wales, *or ſold in any Fair or Market there, ſhall alter the Property thereof.*

2 Inſt. 715, &c.

By 2 & 3 Ph. & Mar. ch. 7. *The Sale of* Horſes *in Market Overt ſhall not alter the Property therein, unleſs the Horſe be rid, or led about, or ſtand in the open Part of the Market, (not in any Houſe, Yard or ſecret Place) for one Hour between ten in the Morning and Sun-ſet, and all the Parties contracting for the Horſe come and enter their Names and Places of Abode, and the Colour and ſome ſpecial Mark of the Horſe, with the Toll-taker or Book-keeper, and pay the Toll, or elſe one Penny for the Entry where no Toll due. And*

2 Inſt. 716, &c.

By 31 El. ch. 12. *The Seller muſt bring to the Toll-taker, Bailiff or Owner of the Market a credible Perſon to vouch for him, that he knoweth him and his Place of Abode and Employment, unleſs ſuch Toll-taker,* &c. *will take it of his own Knowledge; the Price for which the Horſe is ſold ſhall be alſo entered in his Book, and the Toll-taker is to give the Buyer a true Note in Writing of the Entry, if required, upon Payment of Two Pence. But notwithſtanding theſe Requiſites are obſerved, the Owner of a ſtolen Horſe may redeem within ſix Months, upon Payment of the Price. And if any Horſe that is ſtolen ſhall not be ſold, given or exchanged according to the Tenour of theſe Statutes, the Owner may take again the ſaid Horſe where-ever he finds him, or have an Action of* Detinue *or* Replevin *for the ſame.*

See 5 & 6 *Ed.* 6. *ch.* 14. Againſt Engroſſers, Foreſtallers and Regrators; and of theſe Offences; *B.* 3. *ch.* 3. *poſt.*

2 Lev. 89.

See 1 & 2 *Ph. & M. ch.* 7. An Act, that Perſons dwelling in the Country ſhall not ſell divers Wares in the Cities or Towns Corporate by Retail, but in open Fairs.

19. There are Liberties of ſeiſing Goods and Chattels of *Felons*, *Fugitives*, and of thoſe put in *Exigent*. Alſo Liberties of ſeiſing *Deodands*, *Treaſure-Trove*, *Waifs*, *Eſtrays*, and *Wreck* of the Sea.

[a] 1 Inſt. 114. a. & b. 2 Inſt. 281. 3 Inſt. 54, 55, 227. 5 Rep. 110. 9 Rep. 24. 1 Saund. 274.

1. Goods and Chattels of [a] *Felons* may be forfeited by Conviction, and ſometimes without Conviction. But the Forfeiture ought always to appear of *Record*. So the Goods of one *Felo de ſe* are not forfeited until preſented, or found of Record. Therefore the Goods of *Felons*, or of *Felons* of themſelves, cannot be claimed by Preſcription. If the King grants the Goods and Chattels of Felons, the Goods and Chattels of Felons of themſelves do not paſs.

[b] 5 Rep. 109. 2 Inſt. 281.

2. The Goods and Chattels of [b] *Fugitives*, are the proper Goods of him that flieth for a Felony; and are forfeited to the Lord of the Franchiſe, when the Flight is found of *Record*, either by Indictment upon the Death of a Man before the Coroner, or by Verdict upon Acquittal, if it be found that he fled for the Felony. For tho' one be found Not guilty, yet he may forfeit his Goods by *flying*.

See B. 4 ch. 5. poſt.

[c] 5 Rep. 110, 111. 3 Inſt. 232. [d] See B. 4. ch. 5. poſt.

3. The Goods of thoſe put in [c] *Exigent* are forfeited, when one appealed or indicted of Felony withdraweth himſelf ſo long, that a Writ of *Exigent* in order to an Outlawry [d] is awarded againſt him; This Withdrawing is a Flight in Law. And this Forfeiture ſhall ſtand, tho' he renders himſelf upon the *Exigent*, and afterwards is found Not guilty. If the Party was impriſon'd, or beyond Sea, *&c.* the Party, his

Executors or Adminiſtrators, ſhall have a Writ of Error reciting the ſpecial Caſe to reverſe the Award of the *Exigent*.

4. A[e] *Deodand* (*Deo Dandum*) is when any moveable Thing inanimate, or Beaſt animate, doth cauſe or occaſion the untimely Death of any Man by Miſchance, (without the Fault of himſelf or other Perſon) in any County of *England*, (but not upon the Sea or Salt Water) and that Thing, and every Thing moving with it, is forfeited to the King or Grantee of the Crown, if he dies within a Year and a Day after. As when a Cart-wheel runneth over a Man, and killeth him, the Cart-wheel, Cart and Horſes are given to the Lord of the Liberty, to be diſtributed amongſt the Poor, for the Appeaſing of God's Wrath. If the Forfeiture is to the Crown, the Almoner diſpoſes of it. If one under the Age of fourteen *falls* from a Cart, Horſe, *&c.* there is no Deodand. But if a Horſe, *&c.* kills any one within the Age of Diſcretion, (*i. e.* under fourteen) it is a Deodand. Things fixed to the Freehold cannot be Deodands, as the Wheel of a Mill, [a] a Bell hanging in a Steeple, *&c.* unleſs ſevered from the Freehold before the Accident happened. If *A.* killeth a Man with the Sword of *B.* the Sword is a Deodand. If one falls out of a Veſſel in freſh Water, the Veſſel is a Deodand, but not if he falls out of a Veſſel in ſalt Water; tho' the Arm of the Sea is in the Body of a County; becauſe Perſons at Sea are continually expoſed to ſuch Accidents from Storms.

e 3 Inſt. 57. 5 Rep. 110. Keilw. 68. b. 1 Black. Com. 300. Foſter. 265 to 267. & 287, 288.

[a] 1 Sid. 204.

The Jury, who find or preſent the Death by ſuch Miſadventure, ought alſo to find and appraiſe the Deodand. For the Goods are not forfeited in theſe Caſes until the Matter is found of *Record*; and therefore cannot be claim'd by Preſcription. But the following *Franchiſes* may be claim'd by *Grant* or *Preſcription*. As,

See of the Coroner, B 4. ch. 1. poſt.

b 5 Rep. 110. 1 Inſt. 114. a. & b. 2 Inſt. 281.

5. c *Treaſure-Trove* (or *Treaſure Found*) which is Treaſure found hid in the Earth, or in the Roofs or Walls of Houſes or Ruins, (not lying upon the Earth or hid in the Sea) and which for want of a true Owner belongs to the Lord of the Liberty by ſpecial *Grant* or *Preſcription*. But if the Owner may any Ways be known, then it does not belong to the King, or Lord of the Liberty under him. Nothing is ſaid to be *Treaſure-Trove* but Gold and Silver. To conceal it, is Fine and Impriſonment.

c 3 Inſt. 132, 133. 5 Rep. 109. Kitch. 80. 1 Black. Com. 295 4 Burn. Juſt. 294, 295.

6. d *Waifs* (*Bona Waviata*) are Goods which are ſtolen and waived by the Thief in his Flight, and upon that Account forfeited to the Lord of the Manor; if the Owner does not make freſh Purſuit, and apprehend and attaint the Offender. The Reaſon of this Forfeiture is as a Puniſhment of the Owner of the Goods, for not purſuing and bringing the Thief to be attainted. If the Thief had not the Goods in Poſſeſſion in his Flight there is no Forfeiture; and then the Owner may ſeize them where he finds them, without any freſh Purſuit. [See 21 *H.* 8. *ch.* 11.]

d 5 Rep. 109. Kitch 81, 82. 1 Burn Juſt. 470 to 473. 1 Black. Com. 296.

7. e *Eſtrays* (*Extrahuræ*) are Cattle that ſtray into another Man's Ground, and not own'd by any Man. In this Caſe, if they are proclaimed on *two* Market-Days in two ſeveral Towns next adjoining, and the Owner doth not claim them within a Year and a Day, they belong to the Lord of the Liberty. If a Lord (who claims under the King) keeps a Stray three-quarters of a Year, and within the Year it ſtrayeth again, and another Lord getteth it, the firſt Lord cannot retake it; for

e Finch. 177. Kitch 80, 81. Bacon's Elem. 76, 77. 1 Burn Juſt. 470 to 473. 1 Black. Com. 297. 2 Black. Com. 14.

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[e] *Omnia quæ movent ad mortem, ſunt Deo danda.* 5 Rep. 110. 2 Inſt. 57.

until the Year and a Day are paſt, and Proclamation made as aforeſaid, he hath no Property; and therefore the Poſſeſſion of the ſecond Lord is good againſt him. If the Owner claims the Stray within the Year and Day, he muſt pay for the [f] Keeping. But in the mean Time the Lord cannot uſe it unleſs in caſe of Neceſſity, and for the Benefit of the Owner; and therefore he may milk a ſtray Cow within the Year. If the Cattle were never proclaim'd, the Owner may take them at any Time. No Fowl can be Strays but [g] Swans; and then Proclamation muſt be made as in other Caſes. The Cattle of the [h] *King* cannot be Strays, or forfeited as ſuch to the Lord of the Manor.

[f] 1 Roll. Abr. 879. 2 Cro. 148.

[g] 7 Rep. 16, 17. 4 Inſt. 280.

[h] 1 Roll. Abr. 878.

8. A [i] *Wreck* (*Wreccum Maris*) is applied to ſuch Goods as after a Shipwreck are caſt upon the Land by the Sea, and left there within ſome County. None of thoſe Goods which are called *Jetſam* (from being *Caſt* into the Sea while the Ship is in Danger, and after periſheth,) or thoſe called *Flotſam* (from *Floating* upon the Sea after Shipwreck) or thoſe called *Lagan* or *Ligan* (Goods ſunk in the Sea, but *tied* to a Buoy, *&c.* that they may be found again after Shipwreck) are to be eſteemed Wreck, ſo long as they remain upon the Sea, and are not caſt upon the Land by the Sea. If any of them are caſt upon the Land by the Sea, they are Wreck. A Wreck muſt be within ſome County, whereof the Common Law taketh Cognizance, and not where the Admiral hath Juriſdiction. [a] *Wreck*, *Jetſam*, *Flotſam* and *Ligan*, may be gained by *Grant* or *Preſcription*, as well as *Treaſure-Trove*, *Waifs*, and *Eſtrays*. If there is no *Grant* or *Preſcription*, they belong to the King. For where no Man can claim Property in Goods, the King ſhall have them by his Prerogative.

[i] 5 Rep. 106. 2 Inſt. 167. 1 Black. Com. 219. 2 Black. Com. 14. 3 Black. Com. 106. 4 Burn. Juſt. 418.

[a] 5 Rep. 107, 109. 2 Inſt. 167, 168, 281.

By 3 Ed. 1. ch. 4. *Where a Man, Cat, or Dog, eſcape alive out of a Ship, whereby the Owner of the Goods may be known, neither the Veſſel nor any Thing therein ſhall be adjudged Wreck; but ſhall be reſtored to the Owner, if he claims within a Year and a Day.*

A Man, Cat or Dog, are only put for Examples; but all other living Things are to be underſtood.

2 Inſt. 166, &c.

The Year and Day ſhall be counted from the *Seizure*. Yet if the Owner dies within the Year, his Executors or Adminiſtrators may make Proof. But if the King's Goods are wrecked, and caſt upon Ground, where a Subject hath Wreck of Sea, the King is not confined to any Time to make Proof as a Subject is.

If the Goods are *Bona Peritura*, the Sheriff may ſell ſuch Goods within the Year.

If the Goods are not ſeized by the Lord of the Liberty, but taken away by Wrong-doers, the Owner may have his Action; and if the Wrong-doers are unknown, he may have a Commiſſion to enquire, *&c.*

By, 17 Ed. 2. ch. 11. *The King ſhall have Wreck of the Sea, Whales and great Sturgeons taken in the Sea, and elſewhere throughout the whole Realm; except in Places privileged by the King.*

[See 12 *Ann. Seſſ.* 2. *ch.* 18 and 26 G. 2. *ch.* 19. For preſerving *Ships* and *Goods*, which ſhall happen to be ſtranded.]

3. What Franchiſes ought to have *Allowance*, and What not?

I have ſaid that ſome Franchiſes lie in Point of *Charter*, and cannot be claimed by Preſcription; and that ſome lie in *Preſcription* and *Uſage*, without the Help of any Charter. Now if the Franchiſes that depend on *Charter* were granted [b] before Time of Memory, (*viz.* before the Reign of *Rich.* 1.) they are not any Records *pleadable*, if they have not the Aid of ſome Matter of Record within Time of Memory, or ſince the Beginning of the Reign of *Rich.* 1. as *Allowance* before the Juſtices in

[b] 9 Rep. 27, 28, 29. 2 Inſt. 281, 294, 495, 496. 1 Ld. Ray. 427, 475.

Eyre, Juſtices of the *King's Bench* or the *Common Pleas*, or before the Barons of the *Exchequer*, or by Force of ſome *Confirmation* by Charter of ſome King within Time of Memory. Theſe are ſufficient without ſhewing the Charter, to ſupport the Franchiſes.

3 Black. Com. 57. 4 Black. Com. 415, 416.

But if the Charters were granted within Time of Memory, they are *pleadable* without ſhewing any Allowance or Confirmation. Yet if they have been allowed or confirmed as aforeſaid, the Franchiſes may be claimed by Force of the Allowance or Confirmation, without ſhewing the Charter. [See 3 & 4 *Ed.* 6. *ch.* 4. 13 *El. ch.* 6. and 6 & 18 *Ed.* 1 *Stat. de quo Warranto*, and the Expoſition thereof, 2 *Inſt.* 279, &c.] Uſage may uphold ſuch Franchiſes, as may be claimed only by *Preſcription* without Record either of Creation, Allowance or Confirmation. Neither doth a Grant or Confirmation by Charter deſtroy ſuch Preſcription.

5 Rep. 52, 53.

4. How *Franchiſes* may be *forfeited?* [a] Franchiſes and Liberties may be *forfeited* by *Miſ-uſer* or *Non-uſer*. 1. By *Miſ-uſer*, as by keeping a Fair or Market otherwiſe than it is granted; as by keeping a Fair on two Days, when one only is granted; or by keeping a Market upon a *Monday*, when it is granted to be kept on a *Wedneſday*; or for extorting Fees, where none are due, &c. [b] A *Miſ-uſer* of any Point, where there are many in one Franchiſe, is a Forfeiture of all of them, which depend upon one another; but not of thoſe Franchiſes which are ſeveral. When one claimeth or uſeth Franchiſes and Liberties, which he ought not to have, it is ſaid to be an *Uſurpation* upon the King; and the King ſhall have a Writ of *Quo Warranto* for that as well as upon a *Miſ-uſer*. 2. [c] By *Non-uſer*; for if one hath Liberties and doth not uſe them within Memory, they are loſt. *Non-uſer* of a Market is no Forfeiture. But not to exerciſe the Office of Clerk of the Market, &c. is a Cauſe of Seizing, and a Forfeiture by *Non-uſer*; becauſe it is a neceſſary Office, and for the Good of the Commonwealth. So they may be loſt by *Non-claim*.

[a] Finch, ch. 14. p. 164, 165. Kitch. 65.

[b] 2 Roll. Abr. 124.

[c] 9 Rep. 50. 2 Inſt. 282. Kitch. 65. 1 Ld. Ray. 499.

For *Statutes* concerning *Franchiſes* and *Liberties*, ſee 9 *H.* 3. *ch* 9. 37. 3 *Ed.* 1. *ch.* 9. 6 & 18 *Ed.* 1. *De Quo Warranto*, and Stat. *De Tallagio non concedendo*, or 34 *Ed.* 1. *St.* 4. *ch.* 4.—1 *Ed.* 3. *St.* 1. *ch.* 1. 14 *Ed.* 3. *St.* 1. *ch.* 1. 13 *H.* 4. *ch.* 1. 27 *H.* 8. *ch.* 24. 32 *H.* 8. *ch.* 20.—2 *W.* & *M. S.* 1. *ch.* 8. Concerning the Rights of *London*. 4 & 5 *W.* & *M. ch.* 22 and 9 *Ann. ch.* 20. For the more eaſy trying Rights and Franchiſes in Corporations and Boroughs.

XII. [d] A *Privilege* is a private Law, allowed to a private Man or Corporation, to be exempted from the Rigour of the Common Law. It is ſometimes uſed for a *Place*, that hath a ſpecial Immunity. Therefore, A Privilege is either *perſonal* or *real*. *Perſonal*, as of a *Member* of Parliament and Convocation, and of their Servants, not to be arreſted ſitting the Parliament or Convocation, &c. *Real*, as that which is granted to a *Place*, as to the King's Palaces, to the Courts at *Weſtminſter*, to the Univerſities, that their Members or Officers muſt be ſued within their own Precincts or Courts and not in other Courts.

[d] Cowel's Interp. v. Privilege. 2 Roll. Abr. 272, 273, 274, 275, 276. Finch 321. 1 Black. Com. 164. 3 Black. Com. 289.

And now having ſpoken of the two *Diviſons* of Eſtates in Lands, Tenements or Hereditaments, it will be proper to ſhew how Lands, Tenements or Hereditaments, may be *acquired* or *conveyed* from one to another.

See of Writs B. 4. ch. 4. poſt.

CHAP. III.

How Lands, Tenements *or* Hereditaments *may be* Acquired, (*viz.*) 1. *By* Occupancy. 2. *By* Deſcent. 3. *By* Purchaſe, (*wherein of* Deeds, *and the ſeveral Sorts of* Conveyances, *as* Feoffment, Fine, Recovery, Indentures to lead Uſes, Covenants to ſtand ſeiſed to Uſes, Bargain and Sale, Grant, Leaſes, Leaſe and Releaſe, Confirmation, Aſſignment, Exchange, Surrender, Revocation, *and* New Declaration, Statutes, Obligations, Defeaſances, Deviſe.) 4. *By* Preſcription. 5. *By* Eſcheat.

How Lands, &c. are acquired or conveyed.

PRoperty in *Lands*, *Tenements*, or *Hereditaments*, may be *acquired* either, 1. By *Occupancy*. 2. By *Deſcent*. 3. By *Purchaſe*. 4. By *Preſcription*. Or, 5. By *Eſcheat*.

By Occupancy.
[a] 1 Inſt. 41. b. 388. a.
2 Roll. Abr. 150, 151, 152.
2 Black. Com. 258.

I. By [a] *Occupancy*, where the Title accrues by the firſt Entry. As when Tenant for Term of another's Life dieth, while he for whoſe Life the Leaſe is made is living, he that firſt entereth ſhall hold the Land during the other Man's Life, and ſhall be ſubject to the Payment of the Rent reſerved, *&c.* and is called *general* Occupant. There can be no ſuch Occupant againſt the King, nor of any Thing that lieth in Grant, as of incorporeal Rights or Eſtates. But to prevent general Occupancy, at the making of the Grant it is adviſeable to add theſe Words, (*viz.*) *To have and to hold to him and his Heirs*, during the Life of *Ceſtuy que Vie*, or of him for whoſe Life the Leaſe was made; for then it is in the Nature of a deſcendible Freehold, and the Heir takes as *Special* Occupant; or elſe the Tenant or Grantee (if he hath the Eſtate without the Word *Heirs*) may aſſign the Eſtate over to divers Men and their Heirs in Truſt for him and his Heirs during the Life of *Ceſtuy que Vie*. And at Common Law there could be no general Occupant of a Rent. But it is otherwiſe now, For,

3 Wms. 264, 265, 266, 368.

See p. 124. ante, and ch 6. ſ. 6. poſt.
3 Wms. 264.

By 29 Car. 2. ch. 3. *Any eſtate* pur auter vie *may be deviſed by Will atteſted by three Witneſſes. And if the Leſſee deviſe not the Eſtate, and his Heir becomes ſpecial Occupant, it ſhall be chargeable in his Hands as* Aſſets *by Deſcent to pay Debts, as Lands in Fee-ſimple, and if there be no ſpecial Occupant thereof, it ſhall go to the Executors or Adminiſtrators of the Leſſee and be Aſſets in their Hands, and after Payment of Debts, by* 14 Geo. 2. ch. 20. ſ. 9. *the Surplus ſhall be diſtributed as perſonal Eſtate.*

1 Roll. Abr. 511.
2 Ld. Raym. 1000.

There cannot be a general Occupant of a Copyhold Eſtate *pur auter vie*; becauſe of the Prejudice it would be to the Lord; but upon the Death of the Tenant for Life, living *Ceſtue que vie*, the Lord ſhall enter.

By Deſcent.
2 Black. Com. 200 to 241.
[b] 1 Inſt. 13. b. 237. a. & b.
[a] 1 Ventr. 415, 416.
[b] See p. 65. ante.

II. By *Deſcent*, or hereditary Succeſſion, Property in Lands, *&c.* may be acquired. [b] *Deſcent* (*Deſcenſus*) is a Means, whereby one doth derive his Title to certain Lands as Heir, and by Right of Blood, to ſome of his Anceſtors; [a] unleſs hindred by Illegitimation [b], Half-Blood, Attainder or Corruption of Blood, or by being an Alien, or by Act of

Parliament. [See 11 & 12 *W*. 3. *ch*. 4. *ſ*. 4. Concerning Papiſts]. This is the nobleſt and worthieſt Means whereby Lands, *&c.* are acquired.

A Deſcent is either by *Common Law*, *Cuſtom*, or *Statute*.

1. By *Common Law*, as where one hath Land of Inheritance in Fee-ſimple, and dieth without diſpoſing thereof in his Life-time, and the Land goes to his Heir of Courſe. This Deſcent is either [c] *lineal* or *collateral*. *Lineal* is a Deſcent downwards in a Right Line, as from Grandfather to Father and Grandſon. The *lineal* Heirs *in infinitum* muſt firſt inherit. *Collateral* is a Deſcent, which ſpringeth out of the Side of the whole Blood; as Grandfather's Brother, Father's Brother, *&c.* Therefore [d] if a Man purchaſeth Land in Fee-ſimple, and dies without Iſſue, there, for Default of the Right Line, he who *is next of Kin*, either perſonally, or *jure repræſentationis* [e] (tho' never ſo remote) in the *collateral* Line of the whole Blood, comes in by Deſcent as Heir to him. [f] For there is a *Next of Kin* by Right of *Repreſentation*, and by Right of *Propinquity*, or Nearneſs of Blood. He that is inheritable, is accounted in Law next of Blood with Reſpect to Inheritances. As when a Man hath two Sons, *A.* and *B.* and dieth. *B.* hath two Sons *C.* and *D.* and dieth. *C.* the Eldeſt hath Iſſue and dieth. And then *A.* having purchaſed Lands in Fee-ſimple dieth without Iſſue. Now tho' *D.* is neareſt of Blood to *A.* he ſhall not inherit, but the Iſſue of *C.* who repreſents the Perſon of *C.* who, if he had lived, had been legally next of Blood to *A.* But yet there is a Diverſity betwixt next of Blood inheritable by *Deſcent*, and next of Blood capable by *Purchaſe*. For where Lands are limited to the next of Blood by Conveyance, or come otherwiſe than by Deſcent, the next of Blood by Right of Propinquity (as was *D.*) ſhall firſt take; tho' he was not legally next, to take as Heir by Deſcent.

[c] 1 Inſt. 10. b. 11. b. 1 Ventr. 415.
[d] Lit. 2.
[e] 1 Wms. 64.
[f] 1 Inſt. 10. b. 3 Rep. 40. 41.

Inheritances may lineally [g] deſcend, but not aſcend. So the Father can never come to the Lands which his Son has purchaſed in Fee-ſimple by lineal Aſcent, tho' he may by collateral Aſcent; as when the Son's Lands come to his Uncle (as Lands may aſcend in the collateral Line) they may afterwards come to his Father as Heir to the Uncle. [h] The Uncle in this Caſe is Heir, but not abſolutely Heir. For if, after the Deſcent to the Uncle, the Father hath Iſſue another Son or Daughter, that Iſſue ſhall enter upon the Uncle, and take the Eſtate from him. [It hath been held, that if the lineal Anceſtor, as Father or Mother, happens to be alſo Couſin to the Son and is, as ſuch, his Heir, he or ſhe may take in the Capacity of Couſin [i].]

[g] Lit. 3. 3 Rep. 40. See 1 Black. Com. 208. the firſt rule as to deſcent of Inheritances.
[h] 1 Inſt. 11. b.
[i] 2 Wms. (614.)

One muſt be Heir to him that was laſt [k] *actually* ſeiſed, or that hath actually entered on the Lands. For if a Tenant in Fee-ſimple hath a Son and Daughter by one *Venter*, and a Son by another, and dies ſeiſed, and the elder Son dies without Iſſue before actual Seiſin, (or what is equivalent thereto in *incorporeal* Inheritances,) the younger Brother is Heir to the Father. But if the Elder Brother had entered, the Siſter ſhould have been Heir to him. A Seiſin in Fee-tail is not ſufficient altho' he hath alſo a Fee-ſimple expectant upon it. If the Father Tenant in Fee-ſimple had made a Leaſe for *Years* rendering Rent, and died;

[k] Lit. 8. 1 Inſt. 11. b. 14 b. 15. a. & b. 3 Rep. 41. 2 Black. Com. 208.

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[c] *Linea recta ſemper præfertur tranſverſali.* 1 Inſt. 10. b. *Propinquior excludit propinquum, et propinquus remotum, et remotus remotiorem.* Ibid. *Quod non valet in magis propinquo, non valebit in magis remoto.* 8 Rep. 78.

[k] *Poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem.* Lit. 8. 3 Rep. 41, 42. 1 Inſt. 15. b.

tho' the elder Brother had died before he had received the Rent, yet the actual Poſſeſſion of the Leſſee for Years was the Poſſeſſion of the elder Brother, to make the Siſter Heir. But not if the Father had made a Leaſe for Life or Gift in Tail, and died, and the elder Son had died in the Life of Tenant for Life or Tenant in Tail; for then the younger Brother would be Heir to the Father, becauſe the eldeſt Brother was never ſeiſed of the Freehold, but the Tenant for Life or Tenant in Tail: But it ſeemeth otherwiſe, if a Rent [a] was reſerved on ſuch Leaſe, and the elder Son had before his Death received the Rent, for the Rent iſſueth out of the Land and is in Lieu thereof.

[a] 1 Roll. Abr. 628.

None can inherit any Lands as Heir, but only the Blood of the [b] *firſt Purchaſer*. As if the Father purchaſes, the Blood of the Mother ſhall never inherit. But if a Son purchaſes, and there is no Heir on the Part of the Father, then the Lands ſhall go to the Heirs on the Part of the Mother. For they are of the Blood of the Son, the firſt Purchaſer. And the Relations on the Father's Side are admitted *in infinitum* before thoſe on the Mother's Side; for in collateral Inheritances the Male Stock ſhall be preferred to the Female. But where Lands do [*] *deſcend* from the Part of the Mother, the Heirs of the Part of the Father ſhall never inherit. So on the contrary. Obſerve then the Difference where the Son *purchaſeth* Lands in Fee-ſimple and where he cometh to them by *Deſcent* on the Part of the Mother, or on the Part of the Father.

[b] Lit. 4. 1 Inſt. 12. a. & b.

None ſhall have Land in Fee-ſimple by Deſcent as Heir to any Man, unleſs he is Heir of the [c] *whole* Blood. As if a Man has two Sons by divers *Venters*, and the Elder purchaſeth Lands in Fee-ſimple, and dies without Iſſue, the younger Brother ſhall not inherit, but the Uncle of the elder Brother, or ſome other his next of Kin of the whole Blood. A Siſter of the whole Blood ſhall be preferred before the younger Brother of the Half-Blood. But the younger Brother may be Heir to his Father or Uncle, for he is of the whole Blood to them. [d] Half-Blood is no Impediment of Deſcent as to Fee-ſimple Lands of the *Crown*, or to *Dignities*. Neither is it reſpected in Eſtates in *Tail*; becauſe the Iſſues do come in by Deſcent *per Formam Doni*; and the Iſſue in Tail is ever of the whole Blood to the Donee.

[c] Lit 6, 7, 8. 3 Rep 41, 42.

[d] 1 Inſt. 10. a. 15. b. 3 Rep. 41, 42.

As to the Deſcent betwixt *Brethren*, and their Deſcendants, [e] the Eldeſt and his Iſſue muſt inherit, for he is moſt worthy of Blood. As if there be three Brethren, and the Middle or Youngeſt purchaſeth Lands in Fee-ſimple, and dies without Iſſue, the elder Brother ſhall have the Lands by Deſcent. And ſo wherever there are are two or more Males in equal Degree, the Eldeſt only ſhall inherit; but the Females all together as one Heir and as Coparceners [f].

[e] Lit. 5. 1 Inſt. 263. b.

[f] See p. 143. ante. 1 Inſt. 194. a. & b. Blackſtone on Deſcents p. 28. 1 Wms. 64.

The *lineal* Deſcendants *in infinitum* of any Perſon deceaſed ſhall repreſent their Anceſtor, that is, ſhall ſtand in the ſame Place as the Perſon himſelf would have ſtood, had he been living, and take juſt as much of the Inheritance as their Anceſtor would have taken. Thus the Child, Grandchild or Great Grandchild, either Male or Female of the eldeſt Son ſucceeds before the youngeſt Son, and ſo *in infinitum*; and if the Father dies leaving Iſſue only a Daughter and Grand-daughters by another Daughter, the Daughter ſhall take one Moiety, and the Granddaughters the other Moiety, which their Mother, if living, would have taken.

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[*] *Paterna paternis, materna maternis.* 1 Inſt. 13. a.

[a] *Note*, That an Heir ſhall never enter and take as a Purchaſer, if he is named only to take by way of Limitation of Eſtate in Courſe of Deſcent.

[a] 1 Inſt. 50. b.

In ſhort, Lands and Tenements in Fee-ſimple deſcend, *1ſt*, To the eldeſt Son as Heir, and to his Iſſue; the Sons firſt in Order of Birth; and for Want of Sons to all the Daughters equally. *2dly*, If the eldeſt Son has no Iſſue, then to his next eldeſt Brother of the whole Blood, and his Iſſue, and for want of a Brother to a Siſter or Siſters of the whole Blood, and to her and their Iſſue. *3dly*, For want of Brother or Siſter, to an Uncle and his Iſſue; or for want of an Uncle to an Aunt or Aunts, and her and their Iſſue. *4thly*, For want of Uncle, or Aunt to the next of Kin, either perſonally or *jure Repreſentationis*, in the collateral Line.

Thus Lands in Fee-ſimple will deſcend by the Common Law, if there is no Settlement to the contrary by Conveyance or Teſtament. [b] But you muſt underſtand, that the *Jus Coronæ* differeth in many Things as to Deſcents from the General Law concerning the Subject.

[b] 1 Inſt. 15. b.

There was a great Deal of nice Learning touching *Deſcents* (from one dying ſeiſed) of corporeal Eſtates in Fee-ſimple, or Fee-tail, which take away *Entries*; and *continual Claim* (which is an Entry in Law) of Diſſeiſees, and force the Perſon diſſeiſed to an Action; becauſe by Intendment of Law, the Heir of the Diſſeiſor cannot have the true State of his Title. But this is now of very little Uſe. For,

By 32 H. 8. ch. 33. *Where a Diſſeiſor dieth ſeiſed of Lands, the Deſcent ſhall not take away the Entry of the Diſſeiſee, or his Heir, unleſs the Diſſeiſor had peaceable Poſſeſſion thereof* five *Years next after ſuch Diſſeiſin committed, without Entry or continual Claim by or of ſuch Perſon who hath lawful Title thereto.*

This Statute extends to a Diſſeiſin [c] without Force as well as to a Diſſeiſin with Force, and to Succeſſors whoſe Predeceſſors were diſſeiſed, tho' it only ſpeaks of the Diſſeiſee and his Heirs. After the five Years, the Diſſeiſee muſt make continual Claim, as before the Statute. It is ſaid, that Abators and Intruders are out of this Statute, becauſe the Statute is penal, and extends to a Diſſeiſin that was the moſt * common Miſchief. The Feoffee of a Diſſeiſor [d] is alſo out of the Statute, and remains as at the Common Law. And,

[c] 1 Inſt. 238.

[d] See ch. 4. ſ. 7. & B. 4. ch. 3. ſ. 2. poſt.

By 4. An. ch. 16. *No Claim or Entry* [a] *ſhall be of Avail, to avoid any Fine with Proclamations, or be a ſufficient Entry or Claim within the Statute of Limitations, unleſs an Action be brought upon it in one Year, and proſecuted with Effect.*

[a] 1 Str. 1086.

2. By *Cuſtom* in *Fee-ſimple*.

Deſcents of Fee-ſimple [b] by *Cuſtom* are of ſeveral Kinds. Sometimes to all the Sons, or to all the Brothers, where one Brother dieth without Iſſue; as in *Gavelkind:* Sometimes to the youngeſt Son, as in *Burrough Engliſh*. Sometimes to the eldeſt Daughter, or to the Youngeſt.

[b] Dr. & Stud. Dial. 1. ch. 10. Lit. 210, 211. 1 Inſt. 110. b. 140. a. & b. 175. b.

3. By *Statute* in *Fee-tail* according to the Statute of *Weſt*. 2. or 13 *Ed*. 1. *ch*. 1. Theſe Deſcents of Eſtates in *Fee-tail* are directed by the Manner of the Settlement or Limitation.

See p. 6. ante.

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* *Ad ea quæ frequentius, accidunt, jura adaptantur.* 1 Inſt. 238. a. 5 Rep. 127. 6 Rep. 77.

By Purchaſe.
[c] Lit. 12.
2 Black. Com. 241.
1 Wilſon 72.
1 Inſt 18 a. & b.
[d] 1 Inſt. 3 b. 18. b.
[e] 1 Inſt. 18. b.
[f] Dr. & Stud. Dial. 2 ch. 24.

III. [c] A *Purchaſe* (*Acquiſitum*, *Perquiſitum*) is when a Man acquires Poſſeſſion of Lands, *&c.* by Deed or Agreement; and unto which Poſſeſſion he cometh not by Deſcent. [d] One cometh in by *Purchaſe*, when he cometh to Lands by legal Conveyance, and when he hath a lawful Eſtate; and not when he hath it by Wrong, as Diſſeiſin, Abatement, Intruſion, Uſurpation, which are not in Law Purchaſes but Injury and Oppreſſion. A Purchaſe is always intended by [e] Title, either for ſome *Conſideration*, or by *Gift*. For a Gift is in Law a Purchaſe; whereas Deſcent (as hath been ſaid) cometh of Courſe by Act of Law. [f] All *Contracts* are comprehended under this Word *Purchaſe*. For it is not much argued in the Laws of *England* (as in the *Civil Law*) what Difference there is betwixt a Contract, Promiſe, Gift, Loan, or a Pledge, a Bargain, a Covenant, *&c.* ſince the Intent of the Law is to have the Effect of the Matter argued, not the Terms. [See my *New Inſtitute of the Civil Law*, &c. *Book* 3.]

Let us therefore forthwith proceed to ſhew, 1. *Who* may *purchaſe* or *convey*. 2. *How* one may *purchaſe* or *convey*, (*viz.*) by *Deed*. 3. The ſeveral formal *Parts* of a Deed of Conveyance. 4. The ſeveral *Sorts* of Conveyances by Deed. 5. How Deeds are made void.

1. Who may *purchaſe* or *convey*?

[g] 1 Inſt. 15. b. 16. a. 51. a.
11 Rep. 92.
[h] 1 Inſt. 2. a. 3. b.
11 Rep. 77.
[i] 1 Inſt. 2. b. 3. a.
7 Rep. 17, 18, in Calvin's Caſe.
[k] See p. 25. ante.
[l] See ch. 4. ſ. 2. poſt.
[m] 1 Roll. Abr. 731.
2 Cro. 320.
[n] 4 Rep. 126.
Hob. 204.

The [g] *King* may *purchaſe* to him and his Heirs; but he is ſeiſed thereof *in Jure Coronæ*. [h] *Natural* Perſons, Incorporate *Perſons*, (ſole or aggregate) *Idiots*, *Madmen*, *Deaf*, *Dumb*, and *Blind*, *Minors*, and all other reaſonable Creatures may alſo purchaſe, except as hereafter is excepted. [i] But ſome have only Capacity to purchaſe, not to hold; as Aliens[k], [See 32 *H.* 8. *ch.* 16.] Felons after Felony committed, who then purchaſe, and are afterwards attainted: In this Caſe the Lord of the Fee ſhall have the Eſcheat. If attainted and then purchaſe, they can only purchaſe for the Benefit of the King. Corporations (ſole or aggregate, Ecccleſiaſtical or Temporal) purchaſing in Mortmain[l] cannot hold; for the King ſhall have the Lands by his Prerogative. And ſome have Ability to hold upon Purchaſe, or not to hold, at the Election of themſelves or others; as Infants or Minors, who may agree or diſagree, when they come to Age[m]; Lunaticks and Feme Coverts, whoſe Heirs or Huſbands may agree or diſagree to it; tho' the Lunatick himſelf making a Purchaſe and recovering his Memory, cannot waive it[n]. [The Law ſeems to be otherwiſe now.] He may agree to it; and if he doth, his Heir cannot afterwards diſagree. But a Feme Covert herſelf, without any Cauſe aledged, may waive the ſame after the Death of her Huſband; tho' the Huſband agreed thereto. So may her Heir, if after the Death of the Huſband ſhe herſelf do not agree to it.

A *Wife* is a good Name of Purchaſe without a Chriſtian Name, * or if the Chriſtian Name is added and miſtaken; as *Em* for *Emelyn*, &c. Yet in *Pleadings* the proper Name muſt be ſet forth.

a 3 Wms, 46.
See B. 4. ch. 5. ſ. 12. poſt.

But Chapters are not of Capacity to take by Purchaſe without the Dean. Pariſhioners or Inhabitants, or Churchwardens Commoners, Papiſts, [See 11 *&* 12 *W.* 3. *ch.* 4. 1 *Geo.* 1. *St.* 2. *ch.* 55. 3 *Geo.* 1. *ch.* 18.] may not purchaſe or hold Lands a. [See 12 *&* 13 *W.* 3. *ch.* 2. and 1 *Geo.* 1. *St.* 2. *ch.* 4. whereby Aliens, tho' made Denizens or naturalized, are uncapable to have any Grant of Lands, *&c.* from the *King*. Alſo 5 *Geo.* 1. *ch.* 27. By which Artificers, exerciſing or teaching their Trades in foreign Parts, and not returning within ſix Months after Warning, are made incapable of taking Lands by Deſcent, Deviſe or Purchaſe.] And ſome may not purchaſe [b] *particular* Things, and ſome Purchaſes may be *avoided*.

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* *Utile per inutile non vitiatur.* 1 Inſt. 3. a.

[b] 1 Inſt. 3. b. See of Offices ch. 2. ante.

The King may *convey* as well as *purchaſe*; and ſo may all others, [c] except Men attainted of Treaſon, Felony, *Præmunire*, Aliens [d] born, Idiots and Lunaticks, Feme Coverts, Infants, [But Infants, Truſtees or Mortgagees, may convey by the Direction of the Court of Chancery or Exchequer, by 7 *An. ch.* 19]. and Men under Dureſs; for tho' they may purchaſe, the *Conveyance* of theſe may be avoided. A Man deaf, dumb and blind, that hath Underſtanding, and ſound Memory, tho' he expreſſeth his intention by Signs, may convey. Some Bodies politick (as [e] Biſhops, Colleges or Halls, Dean and Chapter, Guardian of an Hoſpital, Parſon, Vicar,) muſt convey purſuant to the Statutes to be mentioned hereafter.

[c] 1 Inſt. 42. b.

[d] See p. 25. ante.

[e] 1 Inſt. 43. a. See of Leaſes infra.

[f] *Note*, that where one hath two Ways of conveying Lands, both at *Common Law*, and intends to paſs it by one of them, which cannot be done, it may paſs by the other, if there are ſufficient Words to paſs it that Way. But where one may paſs Lands, either by the Common Law, or by raiſing of an Uſe, and ſettling it by *Statute*, there in many Caſes it is otherwiſe.

[f] 1 Inſt. 49. a.

By 13 El. ch. 5. *All fraudulent Conveyances of Lands, Tenements, Hereditaments, Goods or Chattels, to avoid the Debt or Duty of another, ſhall (only as againſt the Party, whoſe Debt or Duty is ſo endeavoured to be avoided, and his Heirs, Succeſſors, Executors, Adminiſtrators and Aſſigns,) be utterly void. And every of the Parties to ſuch fraudulent Conveyance, and being privy thereunto, and putting in Ure, avowing, or aſſigning the ſame, ſhall forfeit one Year's Value of ſuch Lands, Tenements, or Hereditaments, and the whole Value of ſuch Goods and Chattels. Provided, this Act ſhall not extend to Grants made* Bonâ Fide, *and upon* good Conſideration, *to Perſons not privy to ſuch Colluſion, or having no Notice or Knowledge thereof at the time of ſuch Grant.*

Here [g] two Things are to be conſidered. The *Conſideration* and *Bona Fides*. The *Conſideration* as muſt be valuable, Money, Marriage, *&c.* * *Bona Fides* is oppoſite to Fraud, and to a Truſt expreſſed or implied. So that there muſt be a *good Conſideration*, and ſuch a *Bona Fides*, to bring it within the *Proviſo*.

[g] 3 Rep. 81, 82.

See ch 6. ſ. 2. poſt.

This *Act* againſt Conveyances to defraud Creditors, makes the Conveyance void as to all Strangers, who are to receive Prejudice by it; but between the Parties it is to ſtand good. [See *the* Statutes *concerning fraudulent Conveyances of Bankrupts to deceive Creditors, poſt, ch.* 4.]

But if one, that is indebted, doth *Bona Fide* ſell his Lands, tho' it be with Intent to avoid Payment of his Debts, this is good, if the Purchaſer is not privy to his Intent.

A Man being indebted by Bond, makes a voluntary Conveyance, and then contracts other Bond Debts: The Conveyance is fraudulent as to all.

Com. 255.

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* *Fraus et dolus nemini patrocinari debent.* 3 Rep. 78. 7 Rep. 38.
Quod alias bonum et juſtum eſt, ſi per vim vel fraudem petatur, malum et injuſtum efficitur. 3 Rep. 78.
Fucatus error nuda veritate in multis eſt probabilior. 2 Rep. 72, 73.
Sæpenumero rationibus vincit veritatem error. Ibid.

As this Act was to relieve *Creditors* againſt fraudulent Conveyances, and all others who have Cauſe of Action for any Penalty or Forfeiture; ſo for the Relief of *Purchaſers*, it is enacted,

By 27 El. ch. 4. *That every Conveyance, Incumbrance, or Limitation of Uſe, of, in or out of any Lands, Tenements or Hereditaments, made to defraud any Purchaſer upon good Conſideration, ſhall (only as againſt ſuch Purchaſer, and all claiming under him) be utterly void. And every of the Parties or Privies, who ſhall put in Ure or avow or juſtify the ſame, to the Diſturbance of ſuch Purchaſer, or any claiming under him, ſhall forfeit one Year's Value of ſuch Lands, Tenements or Hereditaments. Provided that Conveyances made upon* good Conſideration and Bonâ Fide *ſhall be good, notwithſtanding this Act.*

[a] 3 Rep. 83.

Note, [a] The Conveyance is not made void againſt all, but only againſt thoſe, who afterwards come to the Land *Bonâ Fide*, and upon *good Conſideration*. Both *Bona Fides* and a *good Conſideration* are requiſite, to bring it within the *Proviſo*. For in a Deed a Conſideration may be good, and the Deed not made *Bonâ Fide*; becauſe the Deed may be fraudulent, and accompanied with a Truſt. The Conſideration of Nature and Blood is a *good* Conſideration; but not ſuch a *valuable* Conſideration as is intended by the Statute. The Statute means Money *paid*, or other good Conſideration given. The Conveyance being void, it is not material, whether the Purchaſer had [b] Notice of the fraudulent Conveyance, or not. For Notice cannot make that good, which an Act of Parliament hath made void as to him. Again,

[b] 5 Rep. 60.

By the ſaid Statute, *If Lands are firſt conveyed with Clauſe or Condition of* [c] Revocation, *and are afterwards ſold or charged for Money, or other good Conſideration paid or given, before the firſt Conveyance is revoked, according to the Power reſerved, ſuch firſt Conveyance ſhall be void againſt the Purchaſer, and all others claiming under him. Howbeit, No lawful Mortgage made* Bonâ Fide *without Fraud ſhall be impeached by this Act.* [See further in the ſaid Act concerning the Entry of *Statutes Merchant* and *Staple* in the Office of the Clerk of the Recognizances, elſe to be void againſt the Purchaſer of Lands chargeable therewith. And ſee of *Statute Merchant* and *Staple*, and *of Recognizanzes, poſt.*]

[c] 3 Rep. 82. 83.

By 29 Car. 2. ch. 3. Judgments, *as againſt Purchaſers* Bonâ Fide *for valuable Conſideration, ſhall be Judgments only from the Signing, and Entry of the Day of the Month and Year upon the Paper Book, Docket, or Record by the proper Officer. And no* Recognizances *ſhall bind Lands in the Hands of Purchaſers* Bonâ Fide *and for valuable Conſideration, but from the Time of the Inrollment; and the Day of the Month and Year when inrolled ſhall be ſet down in the Margin of the Roll. And no Writ of* Execution *ſhall bind the Property of Goods, but from the Time of its Delivery to the Sheriff.*

By 4 & 5 W. & M. ch. 20. *Judgments not doggetted and entred as directed by that Statute, ſhall not affect any Lands or Tenements as to Purchaſers or Mortgagees.*

See 3 *W. & M. ch.* 14. For Relief of Creditors againſt fraudulent *Deviſes*; and 4 & 5 *W. & M. ch.* 16. An Act to prevent Frauds by clandeſtine Mortgages. Alſo 9 *An. ch.* 14. Concerning Mortgages obtained by Gaming.

By 10 Ann. ch. 23. *Fraudulent Conveyances made to qualify one to vote for Knights of the Shire, ſhall be taken as free and abſolute againſt the Perſons who executed the ſame.*

[See the Statutes for appointing Regiſters of Conveyances and Incumbrances of Lands in *Middleſex* and *Yorkſhire.* 2 *An. ch.* 4. 5 *An. ch.* 18. 6 *An. ch.* 35. 7 *An. ch.* 20. and 8 *Geo.* 2. *ch.* 6.]

See the Statute *Againſt* [a] *Uſury,* 12 *An. St.* 2. *ch.* 16.

Note, * That Purchaſers without Notice of Incumbrances are favoured in the *Chancery.*

[a] 5 Rep. 69, 70.
* See p. 138. ante.

2. *How* one may *purchaſe* or *convey.*

All *Purchaſes* or *Conveyances* of Lands regularly muſt be by *Deed.* And,

By 29 Ca. 2. ch. 3. *No Action ſhall be brought, to charge any Perſon upon any Contract, or Sale of Lands, Tenements, or Hereditaments, or any Intereſt in or concerning the ſame, unleſs the Agreement be in Writing, ſigned by the Party to be charged therewith, or by ſome other Perſon by him lawfully authoriſed.*

A [b] *Deed* (*Factum*) in the Underſtanding of the Common Law, is an Inſtrument written on Parchment or Paper, comprehending a Contract betwixt Party and Party. *Ten* Things are neceſſarily incident to it. 1. *Writing* in any Hand or Language, ſo that it be legible. 2. *Parchment* or *Paper*; not upon Leather, Cloth, *&c.* 3. A *Perſon able to contract.* 4. By a ſufficient *Name.* 5. A *Perſon* able to be contracted with. 6. By a ſufficient Name. 7. A *Thing* to be contracted for. 8. Apt *Words* required by Law. 9. *Sealing.* 10. *Delivery.*

[b] 1 Inſt. 35. b. 171. b. 229. a. See 2 Black. Com. ch. 20. of Alienation by Deed. Shep. Touchs, ch. 4 per totum.

Of Deeds, ſome concern the *Realty,* ſome the *Perſonalty,* and ſome are *Mixt.* Again, Deeds are *indented,* or *poll.* 1. An [c] *Indenture* (*inſtar Dentium*) is a Writing, containing a Conveyance between two or more, indented or cut unevenly, or in and out, on the Top or ſide, anſwerable to another Writing, that likewiſe comprehendeth the ſelf-ſame Words. It uſually begins thus, *This Indneture, &c.* But if a Deed begins, *This Indenture,* and is not Indented, it is no Indenture, but it may work as a Deed-Poll. Yet if the Deed is actually indented, and there are no Words importing an Indenture in the Deed, it is an Indenture in Law. This Indenture may be [a] *Bipartite,* where there are two Parts and Parties to the Deed; *Tripartite,* where there are three Parts and Parties; *Quadripartite, Quinquepartite,* &c. All which muſt be indented alike, and then they make but [b] one Deed in Law; every Part of the Indenture being of as great Force and Effect as all the Parts together. It may be made in the *firſt* or *third* Perſon. And tho' the Feoffor, Donor or Leſſor only ſeals the Part of the Indenture running in the third Perſon belonging to the Feoffee, Donee or Leſſee, the Indenture is good. For if the Feoffee, Donee or Leſſee, never ſealeth the Counterpart belonging to the Feoffor, *&c.* he has an Intereſt in the Eſtate, being made Party to the Deed in the Beginning. But if the Indenture is made in the [c] firſt Perſon, Mention muſt be made in the Deed, that the Feoffee, *&c.* hath put his Seal, and he muſt put his Seal accordingly, to make himſelf Party to the Deed. For he is not Party to the Deed (being made in the firſt Perſon) but only by the Clauſe that he hath put his Seal thereunto. That Part, which the Feoffor, Grantor or Leſſor ſeals, is called the *Original,* and the Reſt are ſaid to be *Counterparts*; tho' now of late it is thought more proper, to make all the Parts Originals, and to be ſealed as ſuch by all Parties. Otherwiſe, if the Original and Counterpart diſagree, you muſt judge by the Original. In Deeds indented all Parties are [d] *eſtopped* (or concluded) to ſay againſt any Thing contained in it. It eſtops a Leſſee, to plead that the Leſſor had nothing in the Land. But where an Intereſt paſſes from the Party, there can be no Eſtoppel againſt him. *Laſtly,* No Bond, Covenant or Grant, can be made to or with

[c] 1 Inſt. 35. b. 143 b. 229 a. 2 Inſt. 672. 5 Rep. 20.
[a] Lit. 370. 371, 372 1 Inſt. 229 a.
[b] Lit 370. 373. 1 Inſt. 229 a. 230. b.
[c] Lit. 373. 1 Inſt. 230 b. 1 Ld Ray. 28.
[d] Lit. 58. 1 Inſt. 45 a. 47. b. 352. a & b. 4 Rep. 53, 54. 2 Ld Ray. 1154, 1155.

any that is not Party to the Deed, [e] if the Indenture is reciprocal between Parties of the one Side and Parties of the other; otherwiſe, if it is not reciprocal, or made between Parties, as when the Deed begins, *To all Chriſtian People. Know all Men by theſe Preſents,* without a *Between.* 2. A *Deed* [f] *Poll* (ſo called, becauſe it is cut even, or *polled*) is that Writing which is plain without any indenting. Every Deed that is pleaded ſhall be intended to be a Deed-Poll; unleſs it is alledged to be indented. A Deed-Poll is properly ſingle, and but of one Part, and is intended for the Uſe of the Feoffee, Grantee or Leſſee. It commonly begins thus, *To all People to whom theſe Preſents ſhall come,* or *Know all Men by theſe Preſents.* In this Deed-Poll a Leſſee is [g] not eſtopped or concluded to plead, that the Leſſor had nothing at the Time of the Leaſe made. For the Leſſor only puts *his* Seal to it, and delivers it only as *his* Act.

[h] A *Charter* doth touch the Inheritance, but a *Deed* doth not, unleſs it hath ſome other Addition.

Where a Feoffor conveys away all his Eſtate in the Land abſolutely, and is not bound to warrant the Land, or defend the Title; but the Feoffee is to defend the Land at his Peril, the Feoffee ſhall have all the [i] Deeds and Evidences as Incidents to the Land, altho' they be not granted to him by expreſs Words; for the Feoffor cannot reap any Benefit by them. But if the Feoffor warrants the Land *Generally*, there, without expreſs Grant, the Feoffee ſhall not have any Deeds, which do comprehend Warranty, but the Feoffor ſhall have all the Evidences, which are requiſite, to defend the Title of the Land. The Feoffee muſt truſt to his Warranty; and have only ſuch Evidences, which do concern the Poſſeſſion, and not the Title of the Land, as Court-Rolls, *&c.* as Incidents to the Poſſeſſion. So if a Man makes a Feoffment with Warranty and dieth, the Heir of the Feoffor ſhall have all Deeds and Evidences, which the Feoffor himſelf might detain. All this is to be underſtood, where there is no expreſs Grant of the Deeds and Evidences. [But now, ſince expreſs Warranties in Deeds have been out of Uſe, the Purchaſer uſually takes ſuch Title Deeds as relate only or principally to the Eſtate purchaſed, and where they relate as well to other larger Eſtates as to the Eſtate purchaſed, the Seller keeps them, and gives the Purchaſer only atteſted Copies of them, and enters into a Covenant to produce the Originals at the Requeſt of the Purchaſer. And on the other Hand the Seller takes atteſted Copies of ſuch Deeds, as comprehend not only the Eſtate ſold, but alſo any ſmaller Eſtate, and the Purchaſer who has the Originals enters into a Covenant to produce them at the Requeſt of the Seller.]

3. What are the ſeveral formal *Parts* of a Deed of Conveyance?

Deeds by which Lands, *&c.* paſs, have uſually theſe *ſeveral* and *formal* Parts, (*viz.*) The *Premiſſes*, *Habendum*, *Tenendum*, *Reddendum*, the Clauſe of *Warranty*, *Covenants*, *Conditions*, *Date* and *Sealing*. But to make it a Deed, there muſt be a *Delivery* of it.

1. The [a] *Premiſſes* ſet forth the proper *Names* of the Feoffor and Feoffee, Donor and Donee, Leſſor and Leſſee, with a Deſcription of what *Pariſh* and *County*, with their *Addition* or *Quality*; as *Eſquire*, *Gentleman*, *Yeoman*, &c. and comprehend the Certainty of the *Lands* or *Tenements* to be conveyed, either by expreſs Words, or by Implication, with the *Conſideration* of the Conveyance. The *Conſideration* is the Motive or Cauſe of the Contract. As in Conſideration of natural Love and Affection, for Settlement in the Stock or Blood, for Money paid or ſecured to be paid, for

[e] 2 Inſt. 673. 1 Ld. Ray. 28.

[f] 1 Inſt. 229. a.

[g] Lit. 58. 1 Inſt. 47. b.

[h] 1 Inſt. 9. a. & b, 171. b.

[i] 1 Rep. 1, 2. 10 Rep. 92. 1 Inſt. 6. a. 2 Roll. Abr. 30, 31.

[a] 1 Inſt. 6. a. Noy's Max. 54, 133. 2 Black. Com. 298. Shep. Touchſt. 75, 91 to 100.

for Payment of Debts, for Marriage already had or to be had. [b] There is a *good* Conſideration, and a *valuable* Conſideration. Natural Love and Affection is a *good* Conſideration, but not a *valuable* Conſideration, as Money, or Marriage. There is no Conſideration ſo much reſpected in Law, as the Conſideration of Marriage, in reſpect of Alliance and Poſterity. The Premiſſes alſo ſet forth the *Exceptions*, if there are any; as excepting all Timber-Trees. Which muſt be a [c] Particular out of a General, as Timber-Trees out of a Grant of Lands, a Room out of an Houſe, an Acre out of a Manor; and not a Part of what is granted, as one Acre out of twenty, the Services out of a Manor. But this may be done by Covenant.

In many Deeds alſo there may be Occaſion for a *Recital* of Part of ancient or former Deeds in the Premiſſes; but chiefly upon Aſſignments of Leaſes and Mortgages. Yet a Recital is not [d] concluſive, becauſe it is no direct Affirmation. By feigned Recitals in a true Deed, Men might make what Titles they pleaſe, ſince falſe Recitals are not puniſhable.

2. The Office of the [e] *Habendum* (*To have*) is to name again the Feoffee, and to expreſs the Certainty of the Eſtate, which the Party is to have, for what Time, and to what Uſe. And it ſometimes *qualifies* the Eſtate, ſo that the general *Implication* of the Eſtate, which by Conſtruction of Law paſſes in the Premiſſes, may be controlled by the *Habendum*; but not if the Eſtate is *expreſſed* in the Premiſſes. As if a Man by Deed gives Lands by the Premiſſes to one and his Heirs, *Habendum* to him for Life; this *Habendum* is void, becauſe repugnant to what is expreſſed; not if the *Habendum* had been to the Heirs of his Body. But if the Eſtate had only been *implied* in the Premiſſes, as if *A.* grants a Rent to *B.* generally in the Premiſſes, the ſame by Implication and Conſtruction of Law is an Eſtate for Life; yet an *Habendum* for Years is good, and ſhall qualify the Generality and Implication of Law in the Premiſſes. It is required of the *Habendum*, to compriſe and include the Premiſſes; and it muſt be conſiſtent with that which was there expreſſed. If it is not, the precedent Eſtate given by the Premiſſes ſhall ſtand, and the Eſtate by the *Habendum* ſhall be void. *Note* therefore the Difference betwixt an Eſtate *implied* in the Premiſſes, and an Eſtate therein *expreſſed*. An *Habendum* alſo may ſometimes *explain* the Premiſſes, to prevent Wrong; and ſometimes [a] *enlarge* the Premiſſes; as if a Man giveth Lands in the Premiſſes to one and the Heirs of his Body, *Habendum* to him and his Heirs, he hath an Eſtate-tail and a Fee-ſimple expectant. For when the Deed at firſt doth contain ſpecial Words, and afterwards concludes in general Words; both Words, as well general as ſpecial, ſhall ſtand.

3. [b] The *Tenendum* (*To hold*) at this Day, where the Fee-ſimple paſſeth, muſt be of the Chief Lord of the Fee, by the ſame Cuſtoms and Services, as the Feoffor held. For ſince the Statute of the 18 *Ed.* 1. (entituled, *Quia Emptores Terrarum*) no one can convey Lands in Fee to hold of himſelf, except the King. Before the Statute the *Tenendum* was uſually from the Feoffor and his Heirs, and not of the Chief Lord of the Fee; whereby Lords loſt their Eſcheats, Forfeitures and Services.

[b] 3 Rep. 85. 1 Inſt. 9. a.

[c] 1 Inſt 47. a. 2 Cro 296, 487, 524.

[d] 1 Inſt. 352 b. Vaugh. 74, 75. 2 Lev. 108, 109.

[e] Plowd. 152, 160, 161. 2 Black. Com. 298. Shep. Touchſt. 75. 2 Rep 23, 24, 55. 8 Rep. 56, 154. 1 Inſt. 6. a, 183. a, & b. 190 b. 299. a. Noy's Max. 54, 150. Shep. Touchſt, 112.

[a] Plowd, 161. 8 Rep. 154. 1 Inſt. 299. a.

[b] 1 Inſt. 6. a. 2 Inſt. 66, 67, 500, 501, 502, 505. 2 Black. Com. 298. Shep. Touchſt. 79.

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[c] *Exceptio ſemper ultimo ponenda eſt.* Regiſt. 1. 9 Rep. 53.
Ex verbo generali aliquid excipitur. 1 Inſt. 47. a.

This Statute therefore does not extend to a Gift in Tail; for the Donee ſhall hold of the Donor. [This Clauſe, as diſtinct from the *Habendum*, is now ſeldom inſerted in Deeds; but if there is any Chief Rent, or the like, payable out of the Eſtate, it is generally mentioned after the *Habendum* by the Words *Subject nevertheleſs to a certain Chief Rent payable*, &c.]

See p. 177. ante.

4. The [c] *Reddendum* is that Clauſe in the Deed, which *reſerveth* or *provideth* ſome *new* Thing to the Grantor, as Rent, Suit, or Service, and is uſually made by the Words Yielding, Paying, Doing, Reſerving, Finding. An [d] *Exception* is always of Part of the Thing granted in *General*, and of a Thing in *Being*. But a Reſervation is always of a Thing not in Being, and is newly created out of the Lands or Tenements demiſed; tho' Exception and Reſervation are ſometimes uſed promiſcuouſly. The Leſſor cannot reſerve to any other but [e] himſelf; but ſome do hold, that it is otherwiſe in the Caſe of the King. Neither can he reſerve to himſelf [f] Parcel of the annual Profits themſelves, as to reſerve the Veſture or Herbage of the Land, for that would be repugnant to the Grant.

[c] 1 Inſt. 47. a. 142. b. 143. a. Shep. Touchſt. 80. 2 Black. Com. 299.
[d] 1 Inſt. 47. a.
[e] 1 Inſt. 143. b.
[f] 1 Inſt. 142. a.

If a Man in the Month of *February* makes a Leaſe for Years, reſerving a yearly Rent payable at *Michaelmas* and *Lady-Day* during the Term; the Law (in this Caſe of a Reſervation) will [g] tranſpoſe the Days of Payment, ſo that the Grant may take Effect, and that the Rent may be paid yearly during the Term, (*viz.*) at *Lady-Day* and *Michaelmas*.

See p. 177. ante.
[g] 1 Inſt. 217. b.

Antiently the Reſervations were for the moſt part in Victuals; as *Corn*, *Fleſh*, *Fiſh*. But about the Reign of *H.* 1. the Reſervation of Victuals was changed into ready Money.

The proper Place for a Reſervation is after the Limitation of all the Eſtates.

Next to the *Reddendum*, the *Re-entry*, *Nomine Pœnæ*, and Clauſe of *Diſtreſs* may be inſerted in the Deed.

5. [a] A *Warranty* is a Covenant real annexed to Lands or Tenements, whereby the Bargainor or Seller, and his Heirs are bound to warrant and ſecure the ſame to the Bargainee or Buyer, and his Heirs, and that they ſhall quietly hold and enjoy the ſame, and either upon Voucher, or by Judgment in a Writ of *Warrantia Chartæ*, to yield other Lands and Tenements to the Value of thoſe, that ſhall be evicted by a former Title. Warranties are favoured in Law, being Part of a Man's Aſſurance. The Word [b] *Warrantizo* (or *Warrant* in *Engliſh*) maketh the Warranty, and is the Cauſe of it; and it cannot be expreſſed by any other Word, as *Defendo*, *&c.* but this is to be underſtood of a Warranty annexed to a Freehold or Inheritance, *corporeal* or *incorporeal*. Tho' it is not expreſſed to whom the Warranty ſhall extend, yet the Law gives the Benefit of it to the Feoffee. The Feoffor may by expreſs Words warrant the Land for the Life of the Feoffee or of the Feoffor. But the Recovery in Value ſhall be in Fee. The Words *Grant* or *Demiſe*, do make a Warranty in Law, if ſpoken of *Chattels real*. [c] A *Warranty*, which is a Covenant real, bindeth to yield Lands in Recompence. A *Covenant* annexed to Land yeildeth only Damages. And tho' by the Civil Law every one is bound to Warrant [d] the Thing he ſells, tho' there be no expreſs Warranty, yet by the Common Law he is not bound, unleſs there be an expreſs Warranty at the Time of the Sale, or in Law.

[a] 1 Inſt. 365. a. 2 Black. Com. 300. Shep. Touchſt ch. 8. Of a Warranty per totum.
[b] Lit. 733. 1 Inſt. 366. a. 383. b. 384. a. 4 Rep. 80.
[c] 1 Inſt. 101. b. 102. a. 365. a. 384. b. 385. a. 389. a. 1 Ld. Ray. 593.
[d] See of Actions of Deceit B. 4. ch. 4. poſt.

Of Warranties annexed to Freeholds and Inheritances ſome are Warranties in *Deed*, ſome in *Law*. 1. A Warranty in Deed is an expreſs Warranty by the Word *Warrantizo*. 2. Warranties in *Law* are thoſe, which are created by other Words; as *Dedi*, is a Warranty in Law to the Feoffee and his Heirs during the Life of the Feoffor, but not in the

1 Inſt. 384. a. 386. a. 2 Inſt. 269, 275. 4 Rep. 81.

King's Caſe. They are called Warranties in Law, becauſe in Judgment of Law they amount to a Warranty without the Word *Warrantizo.* [See 4 *Ed.* 1. *St.* 3. *ch.* 6.] Alſo this Word *Exchange* implies a Warranty in Law, even in the Caſe of the King. Warranty in Law and Aſſets in ſome Caſes are a good Bar. It binds the Heir of him that made it, in many Caſes, tho' not named; which an expreſs Warranty cannot. So a Warranty in Law may be by Will[f]. But an expreſs Warranty cannot be created by Will.

Again, Warranties are either *General,* (*viz.*) by one and his Heirs to another and his Heirs; or *Particular,* and reſtrained to a certain Perſon.

Warranties alſo are [g] *lineal, collateral,* or commencing by *Diſſeiſin.* 1. *Lineal* Warranty is a Covenant real; where a Man (either as Owner, or who might have inherited the Land, and from whom his Heir lineal or collateral might by Poſſibility have claimed as Heir) bindeth himſelf and his Heirs by his Deed to Warranty and dieth, and the Warranty doth deſcend to the Heir. He muſt bind his Heirs, otherwiſe the Heirs are not bound. And the Reaſon why this is called lineal Warranty, is not becauſe that it muſt deſcend upon the lineal Heir, but becauſe if there had been no ſuch Deed of Alienation with Warranty, the Right of the Tenements, and the very Lands had deſcended to the Heir of him, that made the Warranty, either lineally or collaterally. [a] Lineal Warranty doth bind the Right of a Fee-ſimple. It doth not bind the Right of an Eſtate-tail; for *that* is reſtrained by 13 *Ed.* 1. *De Donis Conditionalibus.* But a lineal Warranty and *Aſſets* is a Bar of the Right in Tail, and is not reſtrained by the ſaid Act. [b] *Aſſets* ſignify here ſufficient by Deſcent, or Lands of equal Value at leaſt by Deſcent, not by Purchaſe or Gift. It muſt alſo be Aſſets in Fee-ſimple, and deſcend to him as Heir of the ſame Anceſtor, that made the Warranty. Warranty lineal or collateral deſcendeth always to the Heir at [c] Common Law and bindeth him. But the Heir cannot be bound by expreſs Warranty, if the Anceſtor is not bound in his [d] Life-time. Therefore an expreſs Warranty by *Will* cannot bind. 2. [e] *Collateral* Warranty is where the Party, upon whom the Warranty deſcendeth, cannot convey the Title, which he hath in the Land, from him that was the Maker of the Warranty, or ſhew that he is his Heir, inaſmuch as he that maketh the Warranty, is collateral to the Title of the Tenements. Thus for an Example; [f] If Tenant in Tail diſcontinues the Tail, (*i. e.* alienates the Lands, and thereby gives away the Poſſeſſion,) and hath Iſſue and dieth, and the Uncle of the Iſſue, having no Right to the Land entailed, releaſes to the Diſcontinuee (or to him to whom the Poſſeſſion is given away) with Warranty, and dieth without Iſſue; this is a collateral Warranty to the Iſſue in Tail, and bindeth his Right without Aſſets; becauſe the Warranty deſcendeth upon the Iſſue, who cannot make Title to the Entail from his Uncle. This was ſuffered, becauſe the Law preſumed, that the Uncle would not diſinherit the lawful Heir of his own Blood without a Recompence ſome other Way. Collateral Warranty binds the Right of an Eſtate in Fee or Tail with or without Aſſets; for it is not [g] reſtrained by 13 *Ed.* 1. *St.* 1. tho' a lineal Warranty without Aſſets is reſtrained, as aforeſaid. But,

By 4 Ann. ch. 16. *All collateral Warranties to be made of Lands, Tenements or Hereditaments, by any Anceſtor, who has no Eſtate of Inheritance in Poſſeſſion of the ſame, ſhall be void againſt his Heir.*

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[f] 1 Inſt. 386. a.

[g] Lit. 697, 703. 1 Inſt. 370. a. 383. b. 384. b. 386. a. 2 Black. Com. 302.

[a] Lit. 711, 712. 1 Inſt. 374. b. 392. a.

[b] 1 Inſt. 374. b.

[c] Lit 718, 735, 736, &c. 1 Inſt 370 a. 376. a. 386. b.

[d] Lit. 734. 1 Inſt. 386. a. 388. a. & b.

[e] Lit. 704, 705, 717. Noy's Max. 83. 1 Inſt. 376. a.

[f] Lit. 709. 1 Inſt. 373. a. 374. b.

[g] 1 Inſt. 374. b. 392. a.

[h] 10 Rep. 96, 97.

It is a Maxim in Law, [h] that no Warranty ſhall extend to bar any Eſtate of Freehold or Inheritance, which is *in eſſe* in Poſſeſſion, Reverſion or Remainder (and not diſplaced and turned to a Right) before or at the Time of the Warranty made, tho' afterwards, and at the Time of the Deſcent of the Warranty, the Eſtate of Freehold or Inheritance be diveſted and diſplaced.

[i] Noy's Max. 83.

[k] Lit. 698, 702. 1 Inſt. 366. b. 367 a. 369 b. See ch. 4. §. 7. poſt. 2 Black Com. 302.

3. Warranty by [i] *Diſſeiſin* is where one that hath no Right to enter upon the Freehold of another, entereth, and conveyeth it away, with Warranty. [k] It is alſo called a Warranty that commenceth by *Diſſeiſin*, where the Conveyance whereunto the Warranty is annexed, doth work a *Diſſeiſin*. As when Leſſee for Years, or at Will, or Tenant by *Elegit*, by Statute-Merchant, or by Statute-Staple, makes a Feoffment with Warranty. Or if one enters into Lands, to which he has no Title, and preſently makes a Feoffment with Warranty, this Warranty commences by Diſſeiſin. But it barreth not.

[a] 1 Inſt. 371. a. & b.

[a] Warranty may be annexed to any Conveyance of Lands, Tenements, or Hereditaments, as Fines, Feoffments, Gifts, Releaſes and Confirmations, made to the Tenant of the Land, though he that makes the Releaſe or Confirmation hath no Right to the Lands, *&c.* But,

By 4 Ann. ch. 16. *All Warranties by Tenant for Life of Lands, Tenements or Hereditaments, the ſame deſcending to any Perſon in Reverſion or Remainder, ſhall be void.* [See 6 *Ed.* 1. *ch.* 3. and the Expoſition thereof, 1 *Inſt.* 365. a. & b. 366. a. 13 *Ed.* 1. *St.* 1. *ch.* 1. 11 *H.* 7. *ch.* 20.]

See B. 4. ch. 4. poſt.

Warranties are pleadable only to *real* Actions [b], as in *Recoveries*. [And expreſs Warranties are now ſeldom inſerted in Conveyances, their Place being ſupplied by particular Covenants, which alſo reſtrain any *implied* Warranty in the Deed.]

2 Black. Com. 304. Shep. Touchſt. 81.

[c] 1 Inſt. 203. b. 2 Rep. 71, 72.

6. A *Covenant* is an Agreement made by Deed in Writing by the Conſent of two or more, to do or not to do. The Words of Covenanting are, do *Covenant*, *Grant*, *Promiſe* and *Agree*, *&c.* tho' there needs no great Exactneſs in the Words, to make a Covenant. For if Words of *Condition* and Words of *Covenant* are coupled together in the ſame Sentence, as *provided* always, and it is *covenanted*, &c. [c] in ſuch Caſe the Words may be conſtrued to make a Condition and a Covenant too.

[d] 4 Rep. 80. 1 Inſt. 384. a.

[e] 4 Rep. 80.

[d] A Covenant is either *expreſs* in the Deed, or *implied* by Law. By the Words *Demiſe* and *Grant*, the Law doth *imply* and *intend* on the Leſſor's Part, that the Leſſee ſhall quietly enjoy againſt all Incumbrances during the Life of the Leſſor. And this Covenant in Law created by *ſuch* Words, ſhall go to the Aſſignee of the Term. [e] But where there is an expreſs Covenant in Deed for quiet Enjoyment, the *implied* Covenant ſhall be governed by it. An *expreſs* Covenant is either *real*, whereby a Man obligeth himſelf to paſs Lands, to levy a Fine, *&c.* or *perſonal*, where a Man covenants with another to build him a Houſe, to allow Timber, *&c.* A Covenant alſo may be in the *Affirmative* or *Negative*, *executed*, i. e. already done, or *executory*, i. e. to be done hereafter.

[f] Plowd. 284. 5 Rep. 16, 17, 18, 24. 1 Roll. Abr. 915, 916. 1 Cro. 552, 553.

[f] Covenants may extend to *Aſſigns* in Deed, or *Aſſigns* in Law. An Aſſignee in *Deed* is a Perſon appointed; as when the Leſſee of a Term aſſigns the ſame to another. An Aſſignee in Law is he whom the Law makes; as an Executor, is ſuch an Aſſignee to the Teſtator, and an Adminiſtrator

to an Inteſtate. And *Note*, * That when a Covenant does extend to a Thing in Being, Parcel of the Demiſe, the Covenant ſhall go with the Land, and ſhall bind the Aſſignee, tho' he is not named or bound by expreſs Words; as to repair the Houſe. But if the Covenant doth concern a Thing, which was not in Being at the Time of the Demiſe made; the Covenantor, his Executors or Adminiſtrators ſhall be bound, but an Aſſignee ſhall not be bound; as to make a new Wall, upon Part of the Land demiſed. For the Law will not annex the Covenant to a Thing that hath no Being. But if a Leſſee doth covenant for himſelf and Aſſigns in expreſs Words, it is otherwiſe; becauſe the Aſſignee ſhall have the Benefit of it. Yet though the Covenant is expreſs for one and his Aſſigns, if the Thing to be done doth not concern the Thing demiſed, there the Aſſignee ſhall not be charged; as if the Leſſee covenants for himſelf and his Aſſigns, to build a Houſe upon other Land of the Leſſor, which is no Parcel of the Land demiſed; or to pay a collateral Sum to the Leſſor or to a Stranger. So if in a Demiſe of Sheep or other perſonal Things, the Leſſee covenants for him and his Aſſigns, to deliver them up at the End of the Term, and the Leſſee aſſigns them over; the Aſſignee ſhall not be bound; for it is but a perſonal Contract.

2 Cro. 125. 1 Ld. Ray. 320, 322.

The [a] Executors and Adminiſtrators of Aſſigns, and the Heirs of Aſſigns, and Aſſigns of Aſſigns; and Aſſigns of Heirs are within this Word *Aſſigns*.

[a] 5 Rep. 17. 1 Inſt. 384. b. 385. a.

[b] There are ſome Covenants, of which none ſhall have the Advantage but the Party and his Heirs. Covenants of Inheritance, (*viz*) ſuch as are knit to the Eſtate, ſhall deſcend to the Heir; otherwiſe of Covenants in Groſs, which go to the Executors.

[b] 1 Roll. Abr. 520, 521. 2 Danv. Abr. 235. Tit. Covenant. 1 Ld. Ray. 322.

Covenants made by Deed [c] *Poll* are as effectual, as thoſe made by Deed indented, if the Party hath the Deed to ſhew.

[c] 1 Roll. Abr. 517.

A Bond for Performance of Covenants is termed a collateral Aſſurance. It is the beſt Way always, to take a Bond for Performance of Covenants with a Penalty: (For if you ſue upon the Bond at Common Law, you recover the Penalty. But if you ſue upon the Covenant, the Damages are left to the Jury.) But then the Party, when he ſues upon the Bond at Common Law, ought to take Care, that he does not levy much more than his Damage and Coſts, for fear of a Bill in Equity for Relief. Of late a Covenant with a Penalty, is uſually inſerted in the Body of the Deed, to ſave the Charge of ſtamp'd Paper upon a Bond. [d] If the Condition of the Bond is, to perform all the Covenants in an Indenture, Covenants in Law, as well as Covenants in Deed are included. [See 8 & 9 *W*. 3. *ch*. 11.]

[d] 4 Rep. 80. See of Actions of Covenant, B. 4. ch. 4. poſt.

There may be *Articles* of Agreement or Covenants framed according to the Caſe, by mutual and reciprocal Covenants only, to be performed by the Parties; and this is good, if in Writing and ſealed and delivered by the Parties, without the other formal Parts of a Deed.

[See 32 *H*. 8. *ch*. 34. Whereby Grantees of Reverſions are enabled to take Advantages of *Covenants* to be performed by Leſſees.]

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* *Qui ſentit commodum ſentire, debet et onus.* 5 Rep. 24. 2 Inſt. 489.
Qui ſentit onus, ſentire debet et commodum. 1 Rep. 99.

RULES *Concerning* COVENANTS.

Shep. Touchſt ch. 7. Of a Covenant per totum.

IF a Covenant is unlawful in the Subſtance thereof, or impoſſible, it it is void.

If no Time is limited for doing of a Thing, it ſhall be done in reaſonable Time.

[e] Plowd. 287. 1 Inſt. 36. a.

[e] A Covenant is moſt ſtrongly to be taken againſt the Covenantor, and moſt in Advantage of the Covenantee.

[f] 5 Rep. 21.

[f] Where one by his own Act diſables himſelf to perform a Covenant, it is a Breach of it.

[a] 5 Rep. 26.

[a] Every Contract or Agreement ought to be diſſolved by Matter of as high a Nature, as it was made.

[b] 1 Inſt 201. a. See p. 137. ante. Shep. Touchſt. 81.

7. * A *Condition* is the Suſpenſion of the Execution of an Act, until ſomething is performed, which may be and which may not be. A Condition annexed to [b] real Eſtates is a Quality annexed by him that hath Eſtate, Intereſt or Right to the ſame, whereby the Eſtate granted may be defeated, enlarged, or created upon an uncertain Event; as hath been before obſerved.

A Condition is either in *Deed* or in *Law*.

[c] Lit 328, 329. 8 Rep 44. 10 Rep. 42. 1 Inſt 204. a. 236. b. 2 Black. Com. 155.

1. Conditions in *Deed* may be expreſſed by [c] theſe Words; (*viz.*) *Upon Condition*, *provided*, *ſo that*. But theſe Words, *to the Intent*, *to pay*, *to the Effect*, &c. are no Words of Condition in Feoffments and Grants in the Caſe of a common Perſon. But in the Caſe of the *King* ſuch Words do create a Condition; and ſo it is in Caſe of a Will. And for avoiding a Leaſe for *Years*, preciſe Words of Condition are not ſo ſtrictly required, as in the Caſe of Freehold; for a Leaſe for Years is but a Contract, and if for three Years or leſs, may begin by Words, and be diſſolved by Words. [See 29 *Car.* 2. *ch.* 3] Therefore if one makes a Leaſe for Years, eſpecially by Deed, in which there is a Clauſe, *that the Leſſee ſhall do ſuch an Act upon Pain of Forfeiture of the ſaid Term*, or the like, theſe Words amount to a Condition.

[d] 1 Inſt. 201. a. & b.

[e] Lit. 362. 1 Inſt. 201. a. & b. 223. b.

[f] 2 Rep. 72. 1 Inſt. 203. b. 1 Ventr. 200, 202, 203. 3 Cro. 128, 129.

[g] 2 Rep. 70, 72. 1 Inſt. 146. a. & b.

Again, of Conditions in *Deed*, ſome are in the [d] *Affirmative*, and ſome in the *Negative*, and ſome in the Affirmative which imply a Negative, as *behind* and *unpaid* imply a *Nonpayment*. A Condition, that the Tenant in Tail, [e] *nor* his Heirs, ſhall *not* Alien, *&c.* is a double Negative; and yet it ſhall not be conſtrued to be an Affirmative. For in Law grammatical Conſtruction is not always to be followed. Some Conditions make the Eſtate whereunto they are annexed *voidable* by Entry or Claim, and ſome make the Eſtate void *ipſo facto*, without Entry or Claim. [f] *Provided* always, and it is *covenanted*, &c. is a Condition by Force of the *Proviſo*, and a Covenant by Force of the other Words. Yet ſometimes a *Proviſo* ſhall amount to a Covenant, and ſometimes it ſhall be taken for a *Limitation* or *Qualification*, ſometimes for an *Exception*, *Reſervation*, and *Explanation*. [g] A *Proviſo* makes a Condition, if it does not depend upon another Sentence, and if the *Proviſo* is the Word of the Feoffor, Donor, Leſſor, and if it is compulſory, to enforce the

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[a] *Nihil tam conveniens eſt naturali æquitati, unumquodque diſſolvi eo ligamine quo ligatum eſt.* 2 Rep. 53. 5 Rep. 26. 6 Rep. 43. 4 Inſt. 28, 122.

* *Conditio eſt cum quid in caſum incertum, qui poteſt tendere ad eſſe aut non eſſe, confertur.* 1 Inſt. 201. a.

Feoffee, Donee, Leſſee, to do an Act. Otherwiſe it may be a Covenant. A *Proviſo*, that would take away the whole Effect of a Grant, is void; and ſo is a *Proviſo*, that is repugnant to the expreſs Words of the Grant. And if a *Proviſo* is good at firſt and afterwards it happens that there is no other Remedy, but that which was reſtrain'd, it ſhall be had notwithſtanding the Reſtraint. A [h] *Limitation* or *Qualification* is by ſuch Words as *Durante, Dum, Dummodo, Quamdiu, Donec, Quouſque, Uſque ad, Tam Diu*, and are improperly called Conditions. For a Limitation ſhall always determime an Eſtate without Entry or Claim, which a Condition doth not. [a]. The [b] *Cauſe* is the Conſideration of the Grant, which ſometimes amounts to a Condition, and ſometimes not. *Pro* (as in the Grant of an Annuity, *pro conſilio*,) ſhewing the Cauſe of the Grant, amounteth to a Condition. But in a Feoffment or Leaſe for Life, *pro conſilio* is the Conſideration, and does not amount to a Condition; and the Reaſon of the Difference is, becauſe the State of the Land is executed; and the Annuity executory, or to be executed hereafter.

[h] 10 Rep 41, 42.
1 Inſt. 204. a. 234. b 235. a.
[a] 2 Rep. 53.
[b] Plowd 412.
1 Inſt. 204. a.
Hob. 41.

Conditions in *Deed* may be ſubdivided, into Conditions [c] *precedent*, which muſt be performed before the Eſtate can take Effect, and Conditions *ſubſequent* to the Eſtate or to be executed after it.

A Condition regularly ſhould follow the *Habendum* preſently. But the Law hath not appointed any Place in a Deed proper or peculiar to a Condition. Its Place is where the Parties pleaſe.

[c] 7 Rep. 10.
1 Inſt. 201. a. 217. a.
1 Roll. Abr. 414, 415. 416.
2 Rep. 70.

See 32 *H.* 8. *ch.* 34. Where Grantees of Reverſions may take Advantage of *Conditions* broken.

2. A Condition in [d] *Law* is that which the Law implieth without expreſs Words in the Deed; and it may be either by the *Common Law*, or by *Statute*, where an Action or Entry is given.

Conditions may be annexed to Lands of Inheritance, for Life or Years, to Copyhold-Lands, Chattels perſonal, and perſonal Contracts.

[d] Lit. 378, 379.
1 Inſt 232. b. 233 b.
8 Rep. 44.

[See of *Eſtates* upon *Condition*, *ante*, *ch.* 1. *Acceptance of Rent* and of *Offices*, *ch.* 2. *ante*. And how Eſtates in Land, may be *forfeited* and *loſt*, by Alienation of particular Tenant, Mortmain, by Waſte, *ch.* 4. *poſt*.]

2 Black. Com. 152 to 162.

RULES *concerning* CONDITIONS.

CONditions created by the Party are [e] odious, for that they defeat Eſtates where Right is favoured.

[f] Tho' Conditions are not favoured yet they are not always to be taken literally.

The [g] Words of a Condition ſhall be taken out of their proper Senſe, to ſupport an Eſtate.

Conditions [h] repugnant to the Eſtate, or Grant, are void.

[i] If an impoſſible Condition is *precedent*, no Eſtate is made. But,

An impoſſible Condition *ſubſequent* to an Eſtate makes it abſolute.

* Where the Condition (the Performance of which was poſſible at the Time of making) becometh impoſſible to be performed by the Act of God, as Death, the State of a Feoffee ſhall not be avoided; for be-

Shep. Touchſt. ch. 6. Of a Condition per totum.
[e] 1 Inſt. 218 a. 219. b. 274. b.
8 Rep. 90.
[f] 1 Inſt. 205. b.
8 Rep. 91.
[g] 1 Inſt. 213. a.
[h] 1 Inſt. 206. b. 223. a.
[i] 1 Inſt. 206. a. & b.
2 Wms. (627)
1 Inſt. 206. a. & b.

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[c] *Conditio adimpleri debet priuſquam ſequatur effectus.* 1 Inſt. 201. a.

[e] [f] [g] *Conditio beneficialis quæ ſtatum conſtruit, benigne ſecundum verborum intentionem eſt interpretanda. Odioſa autem quæ ſtatum deſtruit, ſtricte ſecundum verborum proprietatem eſt accipienda.* 1 Inſt. 218. a. 8 Rep. 90.

* *Actus Dei nemini facit injuriam.* 1 Inſt. 206. a. & b.

ing ſettled in him it cannot be defeated but by Performance of the Condition. But in the Caſe of a Recognizance or Bond with ſuch a Condition, the Recognizance or Obligation is ſaved. For they transfer no Intereſt, but only give a Right of Action upon Default; whereas there is no Default in the Conuſor or Obligor.

a 1 Inſt. 223. b.

[a] Regularly what is prohibited by *Law*, may be prohibited by *Condition.*

b 1 Inſt. 204. a. 236. a. & b.

Words make a Condition in a [b] Will, that make no Condition in a *Deed*.

c Dr. & Stud. Dial. 2. ch. 20.

No man ſhall take Advantage of a Condition broken, but he that is [c] Party or Privy to the Condition. [See 32 *H.* 8. *ch.* 34.]

d 1 Inſt. 206. b.

If one is the [d] Cauſe that a Condition cannot be performed, he ſhall not take Advantage for the Non-performance thereof.

e Ibid.

A Condition [e] againſt Law is void: Therefore,

f Ibid. 2 Ventr. 100. 2 Wilſon. 341, to 352.

A Feoffment upon Condition to do a Thing that is [f] *Malum in ſe*, makes the Eſtate abſolute, and the Condition void. But a Bond with ſuch a Condition is void.

When the Thing to be done, or not to be done, is only againſt ſome Rule of Law, the Condition is only void, and the Bond good. But the Condition may be good in Part and void in Part [g].

g 2 Ld. Ray. 1459. h Ibid. 1 Inſt. 223. a. & b. 224. a. 5 Rep. 56 Lit. 361, 362.

A Feoffment in Fee upon Condition not to [h] alien the Eſtate is abſolute, and the Condition void. But a Bond not to alien is good; for he may alien if he will forfeit his Bond. A Condition not to alien for a particular *Time*, or to a particular *Perſon*, *&c.* is Good.

The King may grant Lands in Fee upon Condition not to alien, and the Condition is Good.

1 Inſt. 233. b. 224. a. See p, ante. 6 Rep. 40, 41.

A Gift in Tail made upon Condition, that the Donee ſhall not alien againſt the Statute of *Weſt.* 2. *De Donis*, or to work a Diſcontinuance of the Eſtate-Tail, is Good; [but this muſt be underſtood of ſuch Alienation only as is againſt that Statute, or amounts to a Diſcontinuance, but not of a common Recovery; for a condition to reſtrain any Right incident to the Eſtate granted is repugnant and void.]

A Leſſor in reſpect of the Reverſion may by Condition reſtrain his Leſſee from aliening without Licence. Yet when the Leſſor does licence; he ſhall never by Force of the Proviſo defeat the Term, which is abſolutely aliened by his Licence. For hereby he has diſpenſed with all Alienations to be made afterwards.

i Lit. 378. 1 Inſt. 233. b. 234. a.

A Condition *implied* by [i] *Law* to be annexed to any Thing, is as ſtrong as if the Condition were made by expreſs Words in Writing.

k Lit. 378, 379.

All Grants of [k] Offices are ſubject to this Condition in Law, that the Grantees duly execute them.

1 Inſt. 233. b. 8 Rep. 44.

All Conditions in Law requiring Skill and Confidence bind Infants and Feme Coverts, as well as Conditions in Deed. But thoſe that do not require Skill and Confidence, whether by Common Law or Statute, do not abſolutely infer a Forfeiture of their Eſtate, except in Waſte.

l 1 Inſt 233 b. 234. a.

[l] Regularly he that taketh Advantage of a Condition in Law, ſhall take the Land with ſuch Charge as he finds it.

m 1 Inſt. 208. b, 219. a. 2 Rep. 78, 79. 6 Rep. 30, 31.

[m] Sometimes Conditions are to be performed in convenient Time, ſometimes upon Requeſt, ſometimes during the Life of a Party, if he is not haſtened by Requeſt.

n 4 Rep. 120.

A Condition may be [n] apportioned or divided by Act of *Law*, and by the Act of the *Leſſee*.

None ſhall by Plea *defeat* any Eſtate of [b] *Freehold* upon Condition, unleſs he ſheweth the Condition in Writing. Otherwiſe of Chattels real, [But ſee 29 *Car.* 2. *ch.* 3.] and perſonal.

[b] Lit. 365.
1 Inſt. 225. a. & b.

[c] Regularly he that will take Advantage of a Condition, muſt *enter* if he can. If he cannot, he muſt *claim.* For a Freehold, whether it lie in Grant or Livery, cannot ceaſe by Condition without Entry or Claim; tho' the Words are, *Provided that if he does not pay, the Eſtate ſhall ceaſe and be void.*

[c] 1 Inſt. 218.

He that entereth by Force of a [d] Remainder in a Deed, is bound by the Conditions in the Deed, tho' he does not ſeal it. But by ſpecial Limitation they may not extend to him.

[d] Lit. 374.
1 Inſt. 230. b. 231. a.

8. [e] The *Date* of the Deed is the Deſcription of the Time, in which the Deed is made.

[e] 1 Inſt. 6. a.
2 Black. Com. 304.

A Deed is good, tho' it hath [f] no Date of the *Day* or *Place*, or if the Date is miſtaken, or if it be dated at one Time, and ſealed and delivered at another, or tho' it hath an impoſſible Date, as the 30th of *February*. But he that doth plead ſuch a Deed without any Date, or with ſuch an impoſſible Date, muſt ſet forth in his Pleading the Time *when* it was *delivered.* If a Leaſe for Years be made by Indenture, bearing Date the 26th of *May*, To have and to hold for twenty-one Years [g] *from the Date*, or *from the Day of the Date*, it ſhall begin on the 27th of *May*: [* But it ſeems to be the better Opinion, that if it is To hold for twenty-one Years from the Date, it ſhall begin on the 26th.] If the Leaſe bears Date the 26th of *May*, To have and to hold from the *Making* thereof, or from *henceforth*; it ſhall begin on the Day on which it was delivered. But every Deed ſhall be intended, to be delivered on the [h] ſame Day it bears Date, unleſs the contrary is proved. [i] But if a Deed is dated at Four o'Clock in the Afternoon on the 20th of *June*, the whole Day is to be taken in. For the Law in this Computation doth reject all Fractions and Diviſions of a Day for the Uncertainty. As to the *Place*, if it bears Date at a Place *out* of the Realm, it is good, by averring, that the Place, mentioned in the Deed, is in ſome County in *England*. For here the Place is not traverſable. But if this is not averred, and it appears that it was dated beyond Sea, it is otherwiſe, and the Deed cannot be tried.

[f] 2 Rep. 5.
1 Inſt. 46. b.
2 Roll Abr. 27.
2 Ld. Raym. 795.
1 Ld. Raym. 336, 704.
[g] 5 Rep. 1, 94.
1 Inſt. 46. b.
2 Inſt. 674.
1 Ld. Raym. 480.
* 1 Roll, Abr. 849, 850.
2 Cro. 135, 258, 647.
3 Cro. 388.
3 Lev. 438.
2 Salk. 413.
1 Ld. Raym. 84.
2 Ld. Raym. 1242.
[h] 2 Inſt. 674.
[i] 5 Rep. 1.
1 Inſt. 135. a. & b.

9. The *Sealing* is comprehended in theſe Words, (*viz.*) [k] *In Witneſs whereof I have ſet my Seal.* Tho' if thoſe Words are wanting, the Sealing of the Deed is ſufficient.

[k] 1 Inſt. 6. a.
2 Rep. 5.
2 Black. Com. 305.

The Seal is the eſſential Part of the Deed. If a Writing is not ſealed, it cannot be a Deed. If the [l] Print of the Seal be utterly defaced, the Deed is inſufficient; ſo that it cannot be pleaded, tho' it may be given in Evidence. [See of the *Privy Signet*, *Privy Seal*, and *Great Seal*, *B.* 4. *ch.* 1. *poſt.*]

[l] 3 Inſt. 169.
5 Rep. 23.
Noy's Max. 55.
2 Ld. Raym. 1536.

[m] Theſe are the *orderly* and *formal* Parts of a Deed; but all are not eſſential Parts. For if a Deed of Feoffment is without *Premiſes*, *Habendum*, *Tenendum*, *Reddendum*, Clauſe of *Warranty*, *Date*, *and In Witneſs*, &c. yet the Deed is good. For if one by Deed gives Lands to another, and to his Heirs, without ſaying any Thing more, and puts his Seal to the Deed, and delivers it, and makes Livery where neceſſary, it is good.

[m] 1 Inſt, 7. a
1 Ld. Raym. 28.

2 Black. Com. 306.
a 1 Inſt. 35. b. 2 Rep. 5. 5 Rep. 1.
b Noy's Max. 55.
c 9 Rep. 137. 1 Inſt. 36. a. 49. b.
d 4 Inſt. 209. 2 Roll. Abr. 23, 24. Dav. 44.
e 9 Rep. 137. 1 Inſt. 36 a. 2 Roll. Abr. 25, 26.

For tho' it is never ſo well written and ſealed, it is of no Force if it is not [a] *delivered* by the Party himſelf, or his ſpecial Attorney, to the Party himſelf to whom it is made, or to his Uſe. A Delivery (*Traditio*) is a neceſſary Incident to every Deed; and then when it is delivered, it ſhall bind him that delivers it, tho' dated before, and [b] tho' another wrote or ſealed the ſame. The Delivery of the Deed may be *abſolutely* or *conditionally*: [c] When you deliver a Deed *abſolutely*, Words are not neceſſary; for then a Man that is mute, could not deliver a Deed. It is ſufficient, if it is delivered. And as a Deed may be delivered to the Party without Words, ſo may a Deed be delivered by Words, without any Act of Delivery; as if the Writing ſealed lieth upon the Table, and the Feoffor ſaith to the Feoffee, *Take that as my Deed*, it is ſufficient Delivery. [d] In Caſe of the King's Letters Patents, or of Grants under the Seal of the Dutchy of *Lancaſter*, the Seal is Matter of Record, and the Deeds need no Delivery: So the Deed of a Corporation needs no Delivery: The common Seal is perfect without it. When a Deed is delivered [e] *conditionally*, it is called an *Eſcrow* (*Eſcroll* or *Scroll*) as where one doth ſeal a Deed, and deliver it to a Stranger, [as an Eſcrow] until certain Conditions are performed, and then to be delivered to him, to whom the Deed is made, to take Effect as his Deed, who ſo delivered it. For it ſhall have [*] *Relation* to that firſt Delivery. In the Delivery of a Deed as an *Eſcrow* you muſt uſe Words, and ſay, *I deliver this as my* Eſcrow, *to deliver to the Party as my Deed, upon Condition that*, &c. or to the like Effect. For here a bare Act of Delivery to a Stranger without Words ſignifies Nothing. It muſt be delivered to a *Stranger*; for if it is delivered to the Party himſelf, it is an abſolute Delivery; tho' Words mention it only as an *Eſcrow*.

If a Deed is ſealed and delivered, there is no Neceſſity of ſigning it, tho' it is uſually done.

f 1 Inſt. 7. b. 10 Rep. 93. 2 Black. Com. 304.

There muſt be one or more [f] *Witneſſes*, to teſtify the Sealing and Delivery of the Deed. Their Names ſhould properly be either underwritten or indorſed by them.

A Deed may be made to a Feme Covert, Infant, *&c.*

g 2 Rep 3. & 9. 11 Rep. 27. 28. 2 Roll. Abr. 28.
h 1 Wms. 240, 727.

If any Writing be read in any other Form to an unlearned Man, [g] it ſhall not be his Deed, altho' he ſeals and delivers it. But if the Party who ſhould deliver the Deed, doth not require it to be read, he ſhall be bound by the Deed, tho' it is penned againſt his Meaning. So if one declares the Effect thereof, in other Manner, than the Writing doth import, the ſame ſhall not bind the Party that ſeals and delivers the Deed, if there is no Colluſion between them. [And *Suppreſſio veri*, or *Suggeſtio falſi*, [h] is a good Reaſon for a Court of Equity to ſet aſide any Deed.]

i 1 Inſt. 35. b. 225. a. & b. 231. b. 5 Rep. 74. 6 Rep 38. 10 Rep. 92.

Regularly if a Deed is [i] alledged, it muſt be ſhewed to the Court, that the Court may judge, whether there are apt Words, to make a good Contract. And when it is ſhewn to the Court, the Deed by Intendment of Law remains in Court all that Term. But at the End of the Term, if not denied, the Law adjudges it to be in the Cuſtody of the Party to whom it belongs. If the Deed is denied, it ſhall be intended that it remains in Court, till the Plea is determined.

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[a] *Traditio loqui facet chartam.* 5 Rep. 1.

[*] *Relatio eſt fictio juris, et eſt intenta ad unum.* 3 Rep. 28, 29. 2 Inſt. 591.

RULES *concerning* DEEDS.

SUCH Conſtruction ſhall be always made of Deeds, that the [a] Intent of the Parties ſhall take Effect, if the ſame by any Conſtruction may ſtand with the Rules of Law.

[a] 2 Rep. 23. 6 Rep. 36.

[b] If the Words of a Deed have a double Intendment, and the one ſtandeth with Law and Right, and the other is wrongful and againſt Law, the Intendment which ſtandeth with Law ſhall be preferred.

[b] 1 Inſt. 42. a. 183. a. & b.

The Words of a Deed ſhall be taken [c] moſt ſtrongly againſt the Party himſelf, unleſs it be in the Caſe of the King.

[c] 1 Inſt. 36. a. 183. a. 197. a. 378. b. 5 Rep 7. 8 Rep, 145.

The Words muſt be underſtood according to the [d] ſubject Matter.

[d] 1 Inſt. 36. a.

Thus have I ſhewn, how one may *purchaſe* and *convey* by *Deed*, ſetting forth the *Nature* of a Deed, and the ſeveral orderly and formal *Parts* of it. Now, becauſe every Deed or Inſtrument is not fit to be uſed upon all Occaſions, I ſhall give ſome Account of each *particular* Deed or Inſtrument, and of their peculiar *Uſe*. Therefore,

4. Of the ſeveral *Sorts* of *Deeds* or *Inſtruments* of *Conveyance*.

Deeds or *Inſtruments*, by which *Lands* paſs from one to another are, 1. *Feoffment*. 2. *Fine*. 3. *Recovery*. 4. *Indentures* to lead the *Uſes* of Fines and Recoveries. 5. *Covenants to ſtand ſeiſed to Uſes*. 6. *Bargain* and *Sale* 7. *Grant*. 8. *Leaſe*. 9. *Leaſe* and *Releaſe*. 10. *Confirmation*. 11. *Aſſignment*. 12. *Exchange*. 13. *Surrender*. 14. *Revocation* and *New Declaration*. 15. *Statutes*. 16. *Obligations*. 17. *Defeaſances*. 18. *Deviſe*.

1. [e] A *Feoffment* (from *Feodum*, becauſe it is a Gift of the *Fee*) is properly a Conveyance of a corporeal Fee by Livery and Seiſin. Yet ſometimes it is called a Feoffment, when an Eſtate of Freehold only doth paſs in that Manner. Theſe Words *his Heirs* make an Eſtate of Inheritance in all Feoffments and Grants. But this Rule hath ſeveral * Exceptions.

[e] Lit. 1. 1 Inſt. 9. a. & b. 10. a. 2 Black. Com. 310. Shep. Touchſt. ch. 9. 203. See p. 120. ante.

It is the only Conveyance in Law, that cleareth all Diſſeiſins, Abatements, Intruſions, and other wrongful Eſtates, where the Entry of the Feoffor is lawful (which a Fine, Recovery, or Bargain and Sale by Deed indented and inrolled cannot do) becauſe the Feoffor, re-entering to make Livery, re-continues his former Eſtate. [a] He that maketh the Feoffment is called the *Feoffor*, and he to whom it is made is called the *Feoffee*. It is made by theſe Words, Have *enfeoffed*, *given*, *granted*, tho' the Conveyance is not always ſo much to be known by the Words of Conveyance, as from the Eſtate and Nature of the Things conveyed. [b] A Leaſe and Releaſe to a Man and his Heirs amounts to a Feoffment, if one was bound to make a Feoffment.

1 Inſt. 9. a.

[a] Lit. 57. 2 Inſt. 295.

[b] 1 Inſt. 207. a.

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[a] *Benignæ faciendæ ſunt interpretationes chartarum, ut res magis valeat quam pereat.* 1 Inſt. 36. a. 183. b.

Verba intentioni, non è contra, debent inſervire. Ibid. 8 Rep. 94.

Verba debent intelligi ut aliquid operentur. 8 Rep. 94. Bacon 18.

Verba accipienda ſunt cum effectu. 4 Rep. 51.

[b] *Verba æquivoca et in dubio poſita intelliguntur in digniori et potentiori ſenſu.* 6 Rep. 20.

[c] *Verba chartarum fortius accipiuntur contra proferentem.* 1 Inſt. 36. a. 183. a. 5 Rep. 7. 10 Rep. 59. Bacon 11.

[d] *Verba debent intelligi ſecundum ſubjectam materiam.* 1 Inſt. 36. a.

* *Exceptio probat regulam.* 1 Inſt. 9. b.

Exceptio in non exceptis firmat regulam.

There muſt be [c] *Livery* and *Seiſin* in all Feoffments in Fee, made out of a Court of Record, and in all Gifts in Tail, or Leaſes for Term of Life, where a corporeal Inheritance or Freehold doth paſs; [d] which ſhews that a Freehold cannot be granted to commence in *Futuro*, or at a Day to come.

[c] Lit. 59. 2 Black. Com. 314, 315.
[d] 5 Rep. 94. 1 Inſt. 217. a.

[e] *Livery* and *Seiſin* (or Delivery of Seiſin) is a Solemnity, uſed in paſſing or conveying Freehold Lands or Tenements, by Delivery of Seiſin thereof. It muſt be of [f] corporeal Freeholds, as Houſes, Lands: Incorporeal paſs by Deed only [g]. Livery and Seiſin was invented, that People might have Knowledge of the Alteration of Eſtates from Man to Man. It muſt not be made by an Attorney upon the Day on which the Deed is dated, if the Deed is To have and to hold *from the Day of the Date*. For in ſuch Caſe, the Feoffment, Gift or Leaſe for Life, and the Livery are void.

[e] 1 Inſt. 48 a. Shep. Touchſt. ch. 9. p. 209.
[f] 1 Inſt. 9. a. 49. a. 5 Rep. 84. 3 Cro. 94, 95. 388, 389. Yelv. 151,
[g] See p. 149. ante.

There are [h] *two Kinds* of Livery of Seiſin, (*viz.*) A Livery in *Deed*, and a Livery in *Law*. 1. A Livery in *Deed* is, when the Feoffor taketh the Ring of the Door, Turf or Twig of the Land, or a Ring of Gold or any other Thing, tho' it doth not concern the Land, and delivereth the ſame upon the Land to the Feoffee, in the Name of Seiſin of all the Land contained in the Deed. This Livery in Deed may be either by Words, and ſome ſolemn Act, or by Words without any ſolemn Act, if the Feoffor and Feoffee are upon the Land. In all Caſes Words are neceſſary. If then Words may amount to a Livery within the *View* (as ſhall be preſently ſet forth) when one is off the Land, much more ſhall it be, when one is upon the Land. The bare Delivery of the Deed on the Land may make it a Deed; but ſhall not amount to Livery of Seiſin, unleſs it is delivered in the Name of Seiſin of the Land. Livery and Seiſin made to one before in Poſſeſſion is * void. But if Leſſor and Leſſee come upon the Ground, † on Purpoſe to make and take Livery, that Entry veſts no Poſſeſſion until Livery. [i] A Man may make a Letter of Attorney, to deliver Seiſin by Force of the Deed. But the Attorney muſt purſue his Warrant, otherwiſe he doth not deliver Seiſin by Force of the Deed: If he do leſs, it is void. For he, that hath but a bare Authority, muſt purſue his Authority. If a Letter of Attorney is made to three *Conjunctim et Diviſim* to make Livery, and two make it, the Third being abſent, the Livery is void. A Letter of Atterney alſo may be made to [k] receive Livery and Seiſin. This Warrant of Attorney muſt be by Deed, and not by Parol or Word of Mouth; becauſe it concerneth the Freehold. The Letter of Attorney may be contained in the Deed of Feoffment, though the Attorney is not made Party. The [l] Death of the Feoffor, or Feoffee, is a Countermand of the Authority, or of the Letter of Attorney. But not the Death of a Mayor in the Grant of a Mayor and Commonalty; nor of a Dean in the Grant of a Dean and Chapter, for aggregate Bodies never die. But if a Leſſor by his Deed *licences* a Leſſee for Life or Years to alien, the Death of the Leſſor is no Countermand of the Licence. For the Licence exempts the Leſſee from the Penalty of the Condition. 2. A Livery [a] in *Law* is when the Feoffor himſelf (not his Attorney being in *View* of the Houſe or Land, ſaith to the Feoffee himſelf, (not his Attorney) after Delivery of the Deed, *I give you yonder Land to you and*

[h] 1 Inſt 48. a. 49. b. 6 Rep. 26.
[i] 1 Inſt. 52. a. 181. b. 5 Rep. 91.
[k] 1 Inſt. 49. b. 52. b. 2 Roll. Abr. 8, 9.
[l] Lit. 66. 1 Inſt. 52. b.
[a] 1 Inſt. 48. b. 52.

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* *Quod ſemel meum eſt, amplius meum eſſe non poteſt.* 1 Inſt. 49. b.

† *Affectio tua nomen imponit operi tuo.* Ibid.

your Heirs, go enter into the ſame, and take Poſſeſſion of it accordingly. Now if the Feoffee doth go accordingly in the Life-time of the Feoffor and *enters,* or if he makes his *Claim* when he dares not go (for this is an Entry in Law) it is a good Feoffment and Livery to him, tho' the Land lies in another County. But if either the Feoffor or the Feoffee die before the Entry, the Livery is void. This is to be underſtood of ſole Perſons or ſole Corporations; not of Corporations aggregate of many Perſons, as before hinted.

One may have an Inheritance in an upper Chamber, and paſs it by Livery, tho' the lower Buildings and Soil belong to another.

If a Man makes a Leaſe for Years, and [b] afterwards makes a Feoffment, and delivers Seiſin, while the Leſſee is in Poſſeſſion, and not aſſenting to the Feoffment, the Livery is void; for he doth not give Livery of the Poſſeſſion, altho' the Feoffor hath the Freehold and Inheritance. But if the Leſſee be abſent, and hath neither Wife nor Servants (tho' he hath Cattle) upon the Ground, the Livery is good. If the Leſſee, his Wife or Servants, had been in the Houſe, or upon any Part of the Land to him demiſed, it would have been ſufficient to have preſerved and continued his Poſſeſſion in the Whole.

[c] If one makes a Leaſe for Years, Remainder to another for Life, in Tail, or in Fee, the Leſſor muſt make Livery of Seiſin (in *Deed,* not in *Law*) to the Leſſee for Years; otherwiſe nothing paſſeth to him in Remainder. This Livery is for the Benefit of him in Remainder, for the Leſſee hath only a Term for Years. But if Leſſee entereth, before any Livery or Seiſin made to him, the Livery is void. [d] If one makes a Feoffment to four, and Seiſin is delivered to three in the Name of all, the Eſtate is veſted in all of them.

[e] Tho' Lands and Tenements lie in divers Towns in one County, Livery and Seiſin made in one Parcel of the Tenements in one *Town,* in the Name of all the Reſt, is ſufficient. But if Lands lie in divers Counties, there ought to be a Livery and Seiſin in every *County.*

A Fee-ſimple may be got wrongfully [f] by Diſſeiſin, Abatement or Intruſion into Lands and Tenements, or by Uſurpation of Advowſons, *&c.* *without* any Livery of Seiſin.

If a Houſe or Land belong to an [g] *Office;* by Grant of the Office by Deed, the Houſe or Land paſſeth *without* Livery. [h] And in an *Exchange,* a *Fine* which is a Feoffment of Record, a *Deviſe, Surrender, Leaſe* and *Releaſe, Releaſe* and *Confirmation* to Leſſee for Years, or at Will, *Bargain* and *Sale* by Deed indented and inrolled, (becauſe the Statute of 27 *H.* 8. *ch.* 10. gives the Poſſeſſion to the Uſe,) a *Freehold* may paſs without Livery. By Force of that Statute, a Feoffment to the Uſe of the Feoffor, Feoffee, or any other, ſupplies the Place of Livery and Seiſin; ſo that Livery and Seiſin upon Feoffments is not ſo commonly uſed as formerly; neither can Eſtates be created now by Livery and Seiſin only without Writing. [See 29 *Car.* 2. *ch.* 3.]

There are [a] other *Seiſins,* but they do not relate to Feoffments; as Payment of Money, before any Rent due, is a good *Seiſin* of the Rent, to bring an Action for it. And ſo a Gift of a Pair of Gloves, *&c.* in the Name of Seiſin of the Rent, is a good Seiſin. Upon a Gift or Bargain and Sale of Goods and Chattels perſonal, the Delivery of Six-pence, or a Spoon, is a good Seiſin of the Whole.

2. Of a *Fine.*

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[b] 1 Inſt. 48. b. 2 Rep. 31, 32.

[c] Lit. 60. 1 Inſt. 49. a. & b.

[d] 3 Rep. 26.

[e] Lit. 61.

[f] 1 Inſt. 10. a. 3 Black Com. 168, 169.

[g] 1 Inſt. 49. a.

[h] 1 Inſt. 50. a. & b.

[a] 1 Inſt. 159. b. 160. a. 315. a.

Shep. Touchſt. ch. 2 Of a Fine. N. B the late Ch. Juſtice Willes uſed to ſay this was the beſt Book in the Law upon Common Aſſurances.

For the right Underſtanding of the Nature of a *Fine*, Enquire 1. What is a *Fine*. 2. How *divided*. 3. *Who* may *levy* or *take* by Fine. 4. *Of what* Eſtates may Fines be levied. 5. Before *whom*. 6. The *Force* and *Effect* of a Fine. 7. How Fines may be *avoided*.

[b] 1 Inſt. 120. b. 121. a. 262. a. Weſt. Symb. 2 Part, Sect. 1. 2 Black. Com. 348.

1. [b] A *Fine* (*Finis*, improperly called a Deed) is an Inſtrument of Record of an amicable Compoſition or final Agreement, made betwixt Parties in Suit, concerning Lands, Tenements or Hereditaments, by the Conſent or Licence of the King, or his Juſtices in the Court of Common Pleas, or others authorized, to end all Controverſies between thoſe that are *Parties* and *Privies* to the ſame, and all *Strangers* not claiming in due Time. It is called a Fine, becauſe it makes a *final* Agreement of all Controverſies. The *Civilians* call it *Tranſactio Judicialis De Re immobili*. Anciently it was a Compoſition of a real Controverſy. But now it is generally a feigned Action upon a Writ of Covenant, and ſuppoſes a Controverſy, when in Reality there is none, to ſecure the Title that a Man hath in his Eſtate againſt all Men, or to cut off Entails, and with more Certainty to convey the Intereſt or Title of Lands, to whom he pleaſes, either in Fee-ſimple, Fee-tail, for Life or Years; whereupon alſo a Rent may be reſerved. A Concord cannot be of any other Thing, than what is contained in the Writ of Covenant. This Fine is a [c] Feoffment of Record, and doth imply in it Livery and Seſin, as above mentioned.

[c] 1 Inſt. 50. a.

[d] 5 Rep. 38, 39. 2 Inſt. 511, 517. Coke De Finibus Levat. Lectio prima.

There are [d] five Parts in every Fine. 1. An original *Writ*, uſually a Writ of Covenant, taken out againſt the Conuſor. 2. The King's *Licence*; for which he hath a Fine called the *King's Silver*. 3. The *Concord* itſelf, or the Agreement betwixt the Parties, how the Land ſhall paſs, which is the Ground of the Fine. It begins thus, *Et eſt Concordia Talis*, upon which, if the King's Silver is entered, the Fine is good, tho' the Conuſor dies afterwards. 4. The *Note* of the Fine or Abſtract of the Original Writ and Concord, beginning thus, *Inter* A. *Querentem* & B. & C. *uxorem ejus Deforcientes*. 5. The *Foot* of the Fine, (or the laſt Part of it) which includeth all, and beginneth thus, *Hæc eſt Finalis Concordia*, ſetting forth the Day, Year, and Place, and before what Juſtices the concord was made. Of this there are Cyrographs or Indentures made, which is called the Ingroſſing of the Fine. [e] For the Fine is ſaid to be ingroſſed, when the Cyrographer maketh the Indentures, and delivers them; one for the Buyer, another for the Seller.

[e] F.N.B. 167. 2 Inſt. 468.

He who acknowledges the Fine is called *The Cognizor* or *Conuſor*, or *Deforceant* (*i. e.* he that caſteth out by Force,) and he to whom the Fine is acknowledged, or levied, is the Plaintiff, called the *Cognizee*. Theſe Terms of *Cognizor* and *Cognizee* come from *Cognoſco*, which ſignifies to *acknowledge*, as well as to *know*.

[a] Weſt Symb. Part 2. Sect. 21.

2. Fines may be thus [a] *divided*. They are either *ſingle* or *double*. A *ſingle* Fine is that, by which nothing is granted or render'd back again by the Cognizees to the Cognizors, or any of them. A *double* Fine containeth a Grant and Render-back again, either of ſome Rent, Common, &c. out of the Land, or of the Land itſelf.

[b] Terms of the Law, v. Fine. Weſt. Symb. Part 2. Sect. 20. 2 Inſt. 513, 514. 3 Rep. 89.

Alſo of Fines there are *four* Kinds. 1. [b] A Fine *Sur Cognizance de Droit come ceo que il ad de ſon Done*, (*i. e.* upon Acknowlengment of the Right of the Cognizee, as that which he hath of the Gift of the Cognizor.) It is a ſingle Fine and admits the Poſſeſſion (at leaſt in Law) of the Lands by virtue of a Feoffment or former Gift of the Cognizor, and works by Way of Releaſe, a Fee-ſimple paſſing without the Word *Heirs*, and nothing being render'd back to the Cognizor. This is the principal and ſureſt Fine, and is a Fine executed; ſo that the Cognizee may preſently enter. 2. A Fine *ſur Done, Grant* and *Render*; which is a double Fine, (being in a Manner two Fines, (*viz.*) a Fine *ſur Cognizance come ceo,* and a Fine *ſur Conceſſit,*) and where the Cognizee, after a Releaſe and Warranty made to him by the Cognizor, doth grant and render back to the Cognizor the Lands, limiting oftentimes thereby Remainders to Strangers not named in the Writ. If the Party is in Poſſeſſion, this Fine is executed, otherwiſe he muſt enter or have the Writ of *Habere facias ſeiſinam.* 3. A Fine *ſur Cognizance de droit tantum*; which is commonly uſed to paſs a Reverſion. It may be expreſſed in ſuch Fine that the particular Eſtate is in another, whom the Cognizor is willing ſhould have the Reverſion. Sometimes it is uſed by Tenant for Life, to make a Grant and Releaſe to him in Reverſion. In a Fine [c] *ſur Cognizance de Droit tantum,* the Cognizee hath a Freehold in Law in him, before he enters. 4. A Fine *ſur Conceſſit* is where the Cognizor is ſeiſed of the Lands contained in the Fine, and the Cognizee hath no Freehold there, but it paſſeth by the Fine. It is commonly uſed to grant away [d] Eſtates for Life or Years. And if the Cognizees are not in Poſſeſſion they muſt enter, or have a Writ of *Habere facias ſeiſinam.*

Hence alſo appears [e] another *Diviſion* of Fines, (*viz.*) that they may be *executed,* where the preſent Eſtate paſſeth to, or is ſuppoſed in the Conuſee; or *Executory,* to be executed afterwards by Entry, Action, or Writ of *Habere facias Seiſinam,* or *Scire Facias.*

Alſo a Fine is either [f] *without Proclamations* or *with Proclamations.* 1. That *without Proclamations* is a Fine at the Common Law. 2. That *with Proclamations* is a Fine according to the Statutes of 4 *H.* 7. *ch.* 24. 32 *H.* 8. *ch.* 36. 31 *El. ch.* 2. They are abſolutely neceſſary upon Fines *ſur Cognizance de Droit come ceo.* Theſe Fines with Proclamations, are the beſt, and moſt uſed. And if there be Error in the Proclamations, yet the Fine ſhall be taken as a good Fine at Common Law, (*viz.*) to work a Diſcontinuance of the Eſtate of the Cognizor. But every Fine levied ſhall be intended to be *with* Proclamations, becauſe moſt beneficial for the Cognizee; the Proclamations being made to diſtinguiſh it from a Fine at Common Law.

By 31 El. ch. 2. *All Fines with Proclamations ſhall be proclaimed only four Times,* (viz.) *Once in the Term wherein they are ingroſſed, and once in three Terms next following.* See 1 *Mar. Seſſ.* 2. *ch.* 7.]

3. Who may *levy* or *take* by Fine.

The [a] King, and all Perſons, who may lawfully grant by Deed, may be *Cognizors,* or *levy* a Fine. Therefore Infants, Idiots, Madmen, Feme Coverts without their right Huſbands, Monks, Friers, Nuns, are excepted. But as to Infants, Idiots, Madmen, Feme Coverts without their Huſbands, tho' they ought not to be received, yet if they are admitted, their Fines are good and unavoidable; except in the Caſes of Infancy and Coverture. If a Feme Covert is of full Age, and joins with her Huſband to levy a Fine of her Lands, [b] ſhe muſt be privately examined whether ſhe parts with the Right in her Land freely, or by Cumpulſion: But though ſhe is not examined, if the Fine is received and recorded, it is good. [c] Perſons outlaw'd in perſonal Actions, or attainted of Felony and Treaſon, may be Cognizors, and levy a Fine and it is good againſt all Perſons; except the King, or Lord of whom the Lands are holden.

[c] 1 Inſt. 266. b.

[d] Weſt. Symb. Part 2. Sect. 30.

[e] 2 Inſt. 513. Weſt. Symb. Part 2. Sect. 20, 176, 177, 178.

[f] Weſt. &c. Part. 2. Sect. 19. 3 Rep. 86, 88, 90.

[a] 7 Rep. 32. Weſt. &c. Part. 2. Sect. 3, 4, 5, 6, 7, 8, &c.

[b] Lit, 669, 670. 10 Rep. 42, 43.

1 Inſt. 353. a. 2 Inſt. 515. 2 Roll. Abr. 17. [c] Weſt. &c.

Part 2. Sect. 13.
11 Rep. 78.
*See of Leaſes poſt.

Civil *Corporations*, as Mayor and Commonalty, may levy a Fine of Land belonging to their Body. But Biſhops, Deans and Chapters, Prebendaries, Parſons, Vicars, Heads and Fellows of Colleges, are reſtrained by *Statutes*, from levying of Fines of their Inheritances to bind their * Succeſſors. Tenant in Fee-ſimple, in Tail General or Special, Tenant in Remainder or Reverſion, may levy a Fine. Tenant for Life may levy a Fine of Lands which he holdeth for Life, to hold to the Cognizee for Life of the Tenant for Life. If he grants a greater Eſtate it is a Forfeiture. So it is of Fines by Tenant in Tail after Poſſibility of Iſſue extinct, Tenant in Dower, Tenant by Curteſy. A Tenant for [d] *Years* cannot levy a Fine of his Term; nor Tenant by *Copy* of Court-Roll of his Eſtate. A Tenant in *Common*, *Jointenant*, or a *Coparcener*, may levy a Fine of their Parts.

[d] 3 Rep. 77. 78.
5 Rep. 124.
9 Rep 105.
1 Wms. 520.
[e] Weſt. &c. Sect. 15.
Lit. 669, 670.
1 Inſt. 353 a.
[f] See ch. 4. §. 2. poſt.

[e] All Perſons that may be Grantees, or that may take by Contract, may be *Cognizees*, or *take* by Fine; as Infants, Perſons of full Age, Feme Coverts, Idiots, Lunaticks, Corporations ſpiritual or temporal [f], Men attainted of Felony or Treaſon, Men outlaw'd in perſonal Actions, Baſtards, but not thoſe that are civilly dead, as Monks. An Infant or Feme Covert Cognizee need not be examined, becauſe the Fine is ſuppoſed to be for their Benefit.

Note, That the *Cognizor* or *Cognizee* muſt be ſeiſed of a Freehold, by right or by wrong.

[See 21 *Ja.* 1. *ch.* 26. Which makes it Felony to levy a Fine in the Name of another Perſon not privy thereto.]

4. Of what *Things* may a Fine be levied?

[g] 5 Rep. 39.
2 Inſt. 513, 514.
Weſt. &c. Sect. 25, 50.
[h] 2 Wms. 128.
[a] Sh. P. Caſ. 11.
[b] 10 Rep 50.
3 Rep. 90.

[g] Fines may be levied upon every *Writ*, by which Land is demanded, or by which Land is to be charged or bound, or which in any Sort doth concern Land. And Fines may be levied of all *Things* in *Being* which are *inheritable*, whether Eccleſiaſtical and made Temporal, or Temporal; as of an Advowſon, Rectory, Portion of Tithes. Of an Honor, Manor, Leet, Meſſuage, Dove-houſe, Garden, Orchard, Land, Meadow, Paſture, Wood, Underwood, Office, Fiſhing, Warren, Fair, Toll, Waifs, Strays, Rent, Common, a Hundred, Shares in the *New River* Water [h]. [But not of a Peer's Title of Honor [a]] It may be levied of a Rent-Charge, that had no being before. And as Fines may be levied of Things in Poſſeſſion, ſo may they be levied of a Remainder or Reverſion, [b] or of a Right *in Futuro*, or of a Poſſibility.

[c] Weſt, &c. Part 2. Sect. 25.
[d] 5 Rep. 124.
[e] 3 Rep. 77, 78.
[f] 2 Inſt. 513, 518.
4 Inſt. 270.

[c] Lands given in Tail by the King's Letters Patent, or by Act of Parliament, the Reverſion being in the King; or Lands reſtrained from Sale by Act of Parliament, [See 32 *H.* 8. *ch.* 36. *infra*] Lands in the Right of one's Wife, without the Wife, [See 32 *H.* 8. *ch.* 28.] Lands aſſured for Dower or Term of Life, or in Tail to any Woman by means of her Huſband, or his Anceſtors, [See 11 *H.* 7. *ch.* 20. and 32 *H.* 8. *ch.* 36. 34 & 35 *H.* 8. *ch.* 22.] cannot be convey'd away by Fine. Of a Leaſe for [d] Years, the Fine is void as to any Strangers, for a Freehold muſt be in the Cognizor or Cognizee as before-mentioned; however, it may be good betwixt the Parties by Way of Eſtoppel, ſo as to conclude them. A Fine may be levied by Tenant in Fee-ſimple, *&c.* for Years, or a Leaſe for Years may be made by it. But the Leſſee for Years cannot levy a Fine of his Leaſe. A Fine by Copyholder of a [e] Copyhold Eſtate is alſo void, if it tends to the Diſinheriſon of the Lord. A Fine ought not to be levied of Lands in [f] ancient Demeſne. For if any Fine be levied of ſuch Lands, it may be reverſed

by Writ of Deceit, brought by the Lord of antient Demeſne. [[g] And ſuch Writ will lie againſt the Heir of the Conuſor or Conuſee, and Non-claim is no Bar to it.]

[g] 1 Ld. Ray. 178, 179.

A Fine levied of Lands in antient Demeſne, in the Court of antient Demeſne, is a Diſcontinuance, but not a Bar; becauſe *Stat.* 4. *H.* 7. does not extend to Fines in antient Demeſne.

Comyn. 93. 1 Salk 340.

Lands bought of divers Perſons by ſeveral Purchaſes may paſs in [h] one Fine. And ſuch joint Fines are proper to ſave Charges, where the Purchaſes are of ſmall Value.

[h] Weſt, &c. Part 2. Sect. 25.

5. Fines may be [i] *acknowledged* before the Lord Chief Juſtice of the *Common Pleas*, or two of the Juſtices in open Court. This is call'd acknowledging a Fine at *Bar*. [See 18 *Ed.* 1.] But the Lord Chief Juſtice may take Fines in any Place out of Court without a Commiſſion, and certify the ſame. Juſtices of Aſſize may do it by the general Words of their Patents. But they do not uſe to certify the ſame, before a ſpecial Writ of *Dedimus Poteſtatem* is ſued out. † Beſides theſe, there may be *Commiſſioners* impower'd by *Dedimus Poteſtatem*, or Commiſſion out of *Chancery*, to take Acknowledgment of Fines, and to certify them in the Life of the Cognizors into the *Common Pleas*, that they may be recorded. [See *Stat.* of *Carliſle* 15 *Ed.* 2.] This laſt Method is often attended with great Abuſes.

[i] Weſt, &c. Sect. 16, 17. 2 Inſt. 512, 514. 515.

A Fine cannot be levied before any that have *Conuſance* of Pleas or Power to *hold* Pleas. It muſt be done only before the Juſtices of the Common Pleas. For the King cannot grant Power to hold Plea for the Levying of a Fine.

2 Inſt. 515.

By 34 & 35 H. 8. ch. 26. *Fines may be levied in* Wales. *By* 37 H. 8. ch. 19. *In the County Palatine of* Lancaſter. *By* 2 & 3 Ed. 6. ch. 28. *In the County Palatine of* Cheſter. *By* 43 El. ch. 15. *In the City* of Cheſter. *By* 5 El. ch. 27. *In the County Palatine of* Durham.

But Fines in theſe Counties muſt be of Lands lying in theſe Counties.

6. Of the *Force* and *Effect* of Fines. 1. With reſpect to *Perſons*, that are to be barr'd. 2. With reſpect to *Eſtates* that are to be barr'd.

1. By the [a] *Common Law* Fines executed bound all *Strangers* and thoſe in Remainder and Reverſion, if Claim was not made within a Year and a Day. But now this is no Bar: For by 4 *H.* 7. *ch.* 24. Five Years are allow'd. It ſtill remains of Force, to work a *Diſcontinuance* [b] of the Eſtate of the Cognizor, if it be executed.

[a] Weſt, &c. Part 2. Sect. 19. Lit. 441. 1 Inſt 262. a. & b. 2 Inſt. 516, 518.

The *Force* and *Effect* of Fines muſt be learn'd by a careful Peruſal of the *Statutes* of 4 *H.* 7. *ch.* 24 and 32 *H.* 8. *ch.* 36. From theſe Statutes you may obſerve, that Fines do bar the *Parties*, *Privies* and *Strangers*.

[b] See B. 4. ch. 3. §. 2. poſt.

To *Bar*, is to take away the *Entry* or *Action* of *him* that hath Right.

The *Parties* are thoſe that are named in the original Writ; or thoſe that levy the Fine, and to whom the Fine is levied. [c] Now the *Parties* are preſently barr'd, tho' they are under *Impediments*, and have no Time given them to avoid the Fine; except that an [d] *Infant* is allow'd Time during his Minority to reverſe his Fine, if he has paſſed away his Eſtate by it. If he dies in his Infancy, his Heir is not limited to any Time.

[c] 1 Inſt. 247. b. 2 Inſt. 516, 522

[d] 1 Inſt 131. a. 380. b. 2 Inſt. 519. Weſt, &c. Sect. 4, 8. 2 Roll. Abr 15.

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† A Fine may be acknowledged before any Serjeant at Law, and is very frequently done, before any *Dedimus poteſtatem* is ſued out: which Writ the Curſitor of the proper County, will afterwards make out, upon producing to him the Precipe, Concord, and Caption thereof before any Serjeant at Law.

[a] *Vigilantibus, non dormientibus jura ſubveniunt.* 2 Rep. 26. 4 Rep. 10, 82, 2 Inſt. 690. Coke's Compl. Cop. Sect. 55.

[e] 4 Rep 125, 126, 127, 128. 1 Inſt. 247, a. & b.

[f] Plowd 374, 376, 538. 11 Rep. 78.

At full Age he that was the Infant cannot do it, becauſe his Infancy muſt be tried by Inſpection of the Judges. If a married Woman *under* Age (of which the Judges may examine her upon Oath) doth levy a Fine *with* her Huſband of her own Lands, ſhe cannot reverſe it during her Huſband's Life; nor after his Death, if ſhe is of full Age when he dies. She can only reverſe it, if her Huſband dies during her Minority. If the Wife *without* her Huſband doth levy a Fine of her own Lands, wherein ſhe hath a Fee-ſimple, it will be a Bar againſt her, and her Heirs, unleſs the Huſband avoid it during her Life; or after her Death, if he is Tenant by the Courteſy. [e] *Idiots* and *Madmen*, if they are admitted, are barred as Parties. [f] *Corporations* which have in themſelves abſolute Right (not reſtrain'd by *Statutes*) are alſo barr'd preſently as Parties. [See 1 *Ri.* 3. *ch.* 7. 4 *H.* 7. *ch.* 24.]

[g] 1 Inſt. 271. a. 3 Rep. 23. 4 Rep. 124. 8 Rep. 42. 2 Inſt. 516, 522.

[h] 3 Rep. 87. 91.

Privies (Privè, Familiaris) ſignify thoſe that are Partakers, or that have an Intereſt in any Action or Thing with another, or any Relation to another. [g] Theſe are either *Privies* in *Eſtate*, as Donor and Donee, Leſſor and Leſſee, Jointenants, or Privies in *Blood*, as the Heir to the Anceſtor, or between Coparceners; by Privies in Blood, Privies in Blood *inheritable* are to be underſtood; Privies in *Repreſentation*, as Executors to Teſtators, Adminiſtrators to Inteſtates; Privies in *Tenure*, as Lord and Tenant. All which may be reduc'd to two general Heads, (*viz.*) Privies in *Deed*, and Privies in *Law*. Privies only in Eſtate are not to be underſtood here; but Privies in *Eſtate* and *Blood*, and by *Repreſentation*. [h] Privies therefore, being *Heirs* to the Parties, are bound or barr'd preſently for ever by a Fine, if they claim the ſame Title that their Anceſtors had, that levied the Fine, whether under *Impediments* or no. For tho' the Iſſue in Tail is under *Impediments* (as within Age, under Coverture, *Non Compos Mentis*, in Priſon, or beyond Sea,) yet ſuch Iſſue in Tail is barr'd. For ſuch Iſſue is out of the *Saving* of 4 *H.* 7. *ch.* 24. *By* 32 H. 8. ch. 36 (which expounds 4 *H.* 7.) *All Fines levied by any Perſon of full Age of Lands any wiſe* entailed *before the ſaid Fine levied, either to the Perſon levying the ſame, or to any of his Anceſtors in* Poſſeſſion, Remainder, Reverſion, *or* Uſe, *ſhall immediately after the Fine* levied, engroſſed, *and* Proclamations *made, be a ſufficient Bar againſt him, and his Heirs claiming only by Force of ſuch Entail; and againſt all others claiming only to their Uſe, or to the Uſe of any Heirs of their Bodies. Provided that this Act ſhall not extend to any Fine levied contrary to* 11 H. 7. ch. 20. *by any Woman of the Inheritance of her late Huſband, and given or aſſigned to her in Dower for Life, or in Tail, nor to any Fine levied by him who is reſtrained by Act of Parliament, nor to any Fine of Lands entailed by Letters Patent or Act of Parliament, the Reverſion whereof at the Time of ſuch Fine levied is in the Crown.*

You ſee (from this Statute) that if the Cogniſor is of full Age, he is concluded; and that if the Iſſue in Tail claims as Heir, by Force of the Eſtate-Tail, he is alſo after the Proclamations preſently barred. But one that makes his Title as Heir to *another*, and not to him that levied the Fine, is not barr'd by the Fine.

[a] 1 Rep. 87.

[a] If Land is given to the Huſband and Wife, and to the Heirs of their two Bodies begotten, and the Huſband levieth a Fine with Proclamations, and hath Iſſue, and dieth; now this Fine by Force of this Statute ſhall bar the Iſſue in Tail, but ſhall not bind the Wife. So that in reſpect of the one it is a Bar, but in reſpect of the other it is no Bar.

[b] 3 Rep. 90, 91.

[b] The Iſſue in Tail ſhall be barred by the Fine, tho' the Tenant in Tail was not ſeiſed thereof at the Time of the Fine. For Seiſin is not

required by the Statute. But the Tenant in Tail muſt be the Cognizor, to bar the Iſſue in Tail.

Tho' Land is entailed to one's Anceſtor, and tho' the Anceſtor is alive, ſo that no Eſtate is deſcended, which may paſs, yet becauſe the Statute ſaith, *Intailed to the Perſon ſo levying, or to any of his Anceſtors,* in the Disjunctive, the Fine with Proclamations doth bar the Right, which after the Fine ſhould deſcend to him; not only as to himſelf, but as to his Iſſue, tho' he that levied the Fine had but a Poſſibility.

Strangers to Fines are thoſe, that are neither Parties nor Privies. *Strangers* have either a *preſent* or *future* Right, or an apparent *Poſſibility* of Right growing afterwards, or a Right to ſomething *iſſuing* only *out* of Lands.

Strangers having [c] *preſent* Right, and no Impediment to make their Claims, are bound by five Years after Proclamations, if they make not their Claim within that Time. Therefore if *A.* purchaſes Lands of *B.* by Feoffment or Bargain and Sale, and enrolls the ſame; and afterwards perceiving that *B.* had but a defeaſible Title, and that *C.* hath Right to it; *A.* levies a Fine with Proclamations to a Stranger, or taketh a Fine from another with Proclamations, to the Intent to bar the Right of *C.* this Fine ſo levied ſhall bind all Strangers, that do not purſue their Right by Action or Entry within five Years. The Levying the Fine is lawful; for *C.* might enter or bring his Action within the Time appointed by the Statute. But thoſe that have a preſent Right, and are under Impediment to make their Claim, as Infants, Feme Coverts, (other than ſuch as are Parties) Perſons of unſound Mind, Perſons in Priſon, or out of the Realm, theſe and their Heirs have five Years Time to purſue their Right, after theſe Impediments are removed, *i. e.* Infants after their firſt coming to full Age, Feme Coverts after the Death of their Huſbands, Perſons of unſound Mind after the Recovery of their Wits, Perſons in Priſon after their Enlargement, Perſons out of the Realm, after their Return from beyond Sea. [a] For it is to be obſerved, that the *Savings* in 4 *H.* 7. *ch.* 24. extend only to Strangers to the Fine, and not to Parties or Privies. [b] But an *Infant* muſt claim within the five Years, if the five Years, for making a Claim after a Fine, began in the Time of his Anceſtor. [c] If a Feme Covert (as a Feme Sole) levies a Fine by herſelf, of Land whereof ſhe is ſeiſed in Fee; this ſhall bar her and her Heirs, if her Huſband doth not enter and avoid it. [d] If a *ſingle Woman*, having preſent Right, takes a Huſband, who ſuffereth five Years to incur. ſhe is barred for ever; becauſe it was her Folly, to marry ſuch a Huſband. [e] If a Feme Covert dies while ſhe is Covert, being no Party to the Fine, [See 32 *H.* 8. ch. 28. as to Fines levied by the Huſband only of the Inheritance or Freehold of the Wife] or *Non Compos* dies while *Non Compos*, or a Perſon in Priſon dies while he is in Priſon, or one beyond Sea at the Time of the Fine levied never returns, the Heir is limited to no Time Civil *Corporations*, as Mayor and Commonalty, being diſſeiſed, are barred by Fine and Non-claim, and five Years paſſed after Proclamations. [f] But Biſhops, Dean and Chapter, Prebendary, Parſon, Vicar, Maſter and Fellows of a College, which are reſtrained by *Statutes* to alienate their Lands, cannot be barred by Fine and Non-claim; for they are prohibited to bar their Right by Conveyances, which Prohibition would have been to no purpoſe, if Power is left them by their Permiſſion, or Sufferance, or Nonclaim upon a Fine, to bar it.

[c] Weſt, &c. Part 2. Sect. 183, 184. 2 Inſt. 516. 3 Rep. 79.

[a] 3 Rep. 87, 91.

[b] 1 Inſt. 246 a.

[c] 7 Rep. 8. 10 Rep. 43.

Plowd. 366.

[e] 2 Inſt. 519, 520.

[f] 11 Rep. 78.

Thoſe that have no preſent, but a [g] *future* Right, upon a *precedent Cauſe*, and whoſe Right and Title cometh to them after the Proclamations, ſuch Strangers to Fines being void of Impediments, have only five Years after the coming of ſuch Rights, to enter and make their Claim. [See 1 *R*. 3. *ch*. 7. 4 *H*. 7. *ch*. 24.] As in the Caſes of a Remainder or Reverſion hereafter to be mention'd. But if theſe have Impediments, they ſhall have five Years after the Impediments removed, before their Laches ſhall be prejudicial to them. Therefore if a Wife does ſurceaſe her Time, and lets five Years paſs after the Death of the Huſband upon a Fine levied of *her* Inheritance or Freehold, ſhe is barred of her Right, and cannot enter by Force of 32 *H*. 8. *ch*. 28.

Thoſe that have neither preſent nor future Right, but only a [h] *Poſſibility* at the Time of Levying the Fine, or whoſe Right groweth either entirely after the Proclamations, or partly before and partly after, may enter and claim when they pleaſe. As if the Huſband doth levy a Fine of his Lands, whereof his Wife is dowable, and dies, and then five Years paſs; yet the Wife is not barred of her Dower. For before his Death, the Wife had only a Poſſibility of Dower. And not a Title to it.

Thoſe that have neither preſent nor future Right, or Poſſibility of Right to the Lands in the Fine at the Time of levying it, but a Right to ſomething [i] *Iſſuing out* of the ſame, as Rent, Common, a Way, are not bound at all. For the Fine extendeth only to ſecure the Right or Title of the *Eſtate*, but does not bind the *Profits* to be taken out of the Eſtate.

2. Of the *Eſtates* that may be *barred* by Fine.

We have endeavoured already, to ſhew the Law concerning *Perſons*, that have *preſent* and *future* Rights to Eſtates. We go on and ſay in general, that the Intereſt in [a] *Eſtates* which may be barr'd by Fine, are either Intereſts by *Common Law*, or by Cuſtom, as Copyholds; whether they are in Fee-ſimple, Fee-tail, for Life, or Years, Remainders, or Reverſions. The Intereſts alſo and Eſtates by Statute-Merchant, Statute-Staple, or *Elegit*, the Eſtates of Executors that hold Lands until Debts or Legacies are paid, may be barred. But more particularly,

[b] If I have a *Fee-ſimple* and am diſſeiſed, and the Diſſeiſor doth levy a Fine with Proclamations, and I do not claim within five Years after, I and my Heirs (Allowance being made for Impediments) are barred for ever. If I purchaſe a [c] bad Title in Fee-ſimple, a Fine with Proclamations will bar him that hath Right, if he doth not purſue his Right within five Years, as before obſerved.

[d] If Tenant in *Tail* doth levy a Fine with Proclamations, according to 4 *H*. 7. *ch*. 24. and 32 *H*. 8. *ch*. 36. this is a Bar to the Eſtate-tail, and the Iſſue in Tail, as aforeſaid. And if Tenant in Tail is [e] diſſeiſed, or hath Right of Action, and the Diſſeiſor doth levy a Fine with Proclamations, and five Years paſs, the Right of the Eſtate-tail, or Iſſue in Tail, is barred; and he muſt ſuffer for the Negligence of his Anceſtor, that was the firſt that had Right. So the Donor may be barred, if the Tenant in Tail dies without Iſſue. The like of the Laches of him in Remainder or Reverſion; for it barreth him and his Heirs. But if Tenant in Tail makes a Feoffment, and the Feoffee levieth a Fine with Proclamations, the Iſſue in Tail, after the Death of the Father, ſhall have five Years; for he is the firſt, to whom the Right doth accrue after the Fine levied.

[g] Weſt, &c. Part 2 Sect. 186. 2 Rep. 93. 9 Rep. 105. 10 Rep 50.

[h] Weſt, &c. Part 2. Sect. 188. 10 Rep. 49, 50.

[i] Weſt. &c. Part 2. Sect. 190. 5 Rep. 124.

[a] 5 Rep. 124. 9 Rep. 105. Coke's Compl. Cop. §. 35.

[b] Plowd. 353, 356. 3 Rep. 79.

[c] 3 Rep. 79. 9 Rep. 105.

[d] 1 Inſt. 372. a

[e] 1 Inſt. 298. a. 372. b. 373. a. 3 Rep. 87. 9 Rep. 105. Weſt &c. Sect. 183, 186, 187.

[f] If Tenant for *Life* by Covin levieth a Fine with Proclamations, and five Years paſs in his Life, yet the Leſſor ſhall have five Years to make his Claim after the Death of the Tenant, or Leſſee, notwithſtanding the Forfeiture. And if Tenant for Life makes a [g] *Feoffment* in Fee, and the Feoffee levieth a Fine with Proclamations, it ſhall not bind the Leſſor; but he ſhall have five Years after the Death of the Tenant for Life: But upon a *Diſſeiſin* of Tenant for Life, and Fine levied, the Leſſor and Leſſee have but five Years after the Fine. For the Diſſeiſor comes in openly, and without the Conſent of the Leſſee. But *Quære*, For the Leſſor ſeems to be within the ſecond Saving of the Statute of 4 *H.* 7. *Saving to all Perſons ſuch Actions*, &c. *as ſhall come after the Fine levied*, &c. And therefore he ſhall have five Years after the Action accrueth.

[f] 3 Rep. 77, 79.
[g] 3 Rep. 79.
1 Ventr. 241.
9 Rep. 105.

[h] Leſſee for *Years*, at *Will*, Tenant by *Copy* of Court-Roll, who pretend no Title to the Inheritance, but intend the Diſinheriſon of their Leſſors or Lords, cannot by Fine bar them of their Inheritance; therefore if they make a Feoffment by *Aſſent* and *Covin*, that a Fine may be levied, it is void. [i] But it is ſaid, that the Leſſor muſt claim within five Years after the Term is expired. [*Sed Qu.*]

[h] 3 Rep 77, 79
9 Rep. 105.
Coke'sCompl. Cop. §. 55.
1 Wms. 519.
[i] 3 Rep 78.
1 Ventr. 241.
Contra, Caſ. Temp. Talbot 237.

If a Leaſe is made for Years, and the Leſſor, or another, before [a] Entry of the Leſſee, doth levy a Fine with Proclamations, and the Leſſee does not make his Claim within five Years, the Leſſee is barred of his Intereſt for ever; and no Relief is to be had in Equity. For tho' the Leſſee for Years cannot levy a Fine to a Stranger, yet he ſhall be barred by a Fine with Proclamations by the Tenant of the Land, or by one that is in Poſſeſſion of it. If the Leſſee be [b] ouſted, and by it the Leſſor diſſeiſed, and the Diſſeiſor doth levy a Fine, and five Years paſs with Proclamations and Non-claim, the Leſſor and Leſſee both are barred, and ſhall have but five Years after the Fine levied; becauſe they are within the firſt Saving of the Statute, and have a preſent Right.

[a] 5 Rep 124.
9 Rep. 105.
[b] 3 Rep. 77, 79.
9 Rep. 105.
Coke's Compl. Cop. § 55.

So if one enters upon and puts out a *Copyholder*, and the Diſſeiſor doth levy a Fine of the Lands, and the Copyholder ſuffers five Years to paſs after the Diſſeiſin and Fine, without making any Claim, the Intereſt of the Copyholder, and of his Lord, are hereby barred for ever. This is not a Fine levied by Covin, becauſe the Levying of the Fine is lawful, and the Diſſeiſee may re-enter, or bring his Action within five Years, and the Lord muſt needs know of the Diſſeiſin. So if a Copyholder makes a Feoffment in Fee, upon good Conſideration, and the Feoffee levieth a Fine with Proclamations, and five Years paſs, the Lord is barr'd. But if a Copyholder levies a Fine, and five Years paſs, the Lord is not barr'd, as before obſerved; for, the Copyholder having not a Freehold, the Fine is utterly void.

[c] He that hath Right to a *Remainder* or *Reverſion* expectant upon an Eſtate of *Freehold*, hath five Years allowed after the Remainder or Reverſion accrueth. So if Tenant for ninety-nine Years, if he ſo long lives, levies a Fine and dies, they in Remainder, *&c.* ſhall have five Years after his Death, to avoid the Fine.

[c] 1 Inſt. 372, a.
2 Inſt. 518.
2 Lev. 52.

But if one hath a Remainder or Reverſion depending upon an Eſtate for [d] *Years*, and the Termor is *diſſeiſed*, and a Fine levied, and five Years paſs, they are barred. For the Termor might preſently have entered, and he in Remainder or Reverſion might have had an Aſſize for ſuch Diſſeiſin.

[d] Weſt, &c. Sect. 183.

Eſtates

[e] 5 Rep. 124. 2 Inſt. 517.

Eſtates by [e] *Statute-Merchant*, *Statute-Staple* and *Elegit* may be barred, if they are out of Poſſeſſion, and a Fine is levied, and five Years paſs without Claim.

[f] 2 Inſt. 513, 518. 10 Rep. 50. [g] 1 Ld. Ray. 179.

A Fine with Proclamations, and five Years paſs'd, doth bar the Lord, in [f] *antient Demeſne* of his Writ of *Deceit*. And likewiſe a Writ of *Error* is barred thereby. [But this appears not to be Law by ſubſequent Reſolutions [g];] for the Fine was *Coram non Judice*; and the Lord claimeth not the Lands, but his antient Seigniory. But theſe Fines make a Diſcontinuance, if they do not bar by the Statute of Non-claim.

[h] 3 Rep. 79. 5 Rep. 124. 9 Rep. 106.

Note, That no Fine ſhall bar any Eſtate in Poſſeſſion, Remainder or Reverſion, which is not [h] deveſted and put to a Right. For he who hath the Eſtate or Intereſt in him cannot be put to his Action, Entry or Claim; becauſe he hath that already, which the Action, Entry or Claim would give him. And therefore if one doth levy a Fine of my Land, while I am in Poſſeſſion of it, this Fine will not hurt me. And if I make a Leaſe for Years of my Land, rendering Rent, and a Stranger levies a Fine of the Land, and the Leſſee for Years payeth his Rent to me duly, I am not barr'd of my Reverſion; becauſe I was always in Poſeſſion, and not put to Right only. So if there is Tenant in Tail, Remainder in Tail, or Tenant for Life, Remainder for Life, and the firſt Tenant in Tail, or the firſt Tenant for Life, doth bargain and ſell the Land by Deed indented and inrolled, and after doth levy a Fine to the Bargainee; in theſe Caſes the Remainders are not bound, though the five Years paſs without Claim. For the Law adjudges them always in Poſſeſſion.

[a] 3 Rep. 80.

[a] A Fine levied to deceive Creditors or Purchaſers, ſhall not bar them, but ſhall be void as to them, as well as any other fraudulent Conveyance. [See 13 *El. ch.* 5. 27 *El.* 4.]

By 4 H. 7. ch. 24. *The Fine, after the Ingroſſing it, and Proclamations made, ſhall conclude as well Privies as Strangers to the ſame; except Women Covert, Perſons under Age, in Priſon, out of the Realm, or not of ſound Mind, not Parties to ſuch Fine. And ſaving to every Perſon and their Heirs, other than Parties, ſuch Right, Title, Claim and Intereſt, as they have at the Time of the Fine ingroſſed, ſo that they purſue their Title or Intereſt by Way of Action or Entry within five Years after Proclamations made. And alſo ſaving to all other Perſons ſuch Action, Right or Intereſt, as ſhall come to them after the Fine ingroſſed, and Proclamations made, by force of any Cauſe or Matter had before the Fine levied; ſo that they,* (or their Heirs) *purſue their Action or Right, within five Years next after the ſame doth accrue; or within five Years after the before-mentioned Impediments of Infancy, Coverture,* &c. *are removed. Otherwiſe they are concluded, as if they had been Parties or Privies to the ſaid Fine.* Laſtly, *Saving to every Perſon, not Party nor Privy to the ſaid Fine, their Exception to avoid the ſame, by Reaſon that thoſe which were Parties had nothing in the Lands compriſed in the ſaid Fine.* [See 32 *H.* 8. *ch.* 36. *ante.* and ſee alſo 1 *Ri.* 3. *ch.* 7.]

[b] 3 Rep. 87.

All the *Savings* in this Act relate to [b] *Strangers* only as to their *preſent* or *future* Right.

[c] 3 Rep. 87, 91.

Infancy, Coverture, *&c.* of the [c] *Heir* in *Tail*, gives no Claim to him, inaſmuch as he is *Privy*.

[d] 3 Rep. 90. 2 Inſt. 523.

The *Saving* to avoid the Fine, [d] *becauſe the Parties had nothing in the Lands*, relates alſo only to Strangers, or to every Perſon not Party or Privy.

See 5 *H.* 4. *ch.* 14. 23 *El. ch.* 3. and 27 *El. ch.* 9. *For the Inrollment of Fines.*

7. A Fine may be *avoided*, 1. By the *Death* of all, or ſome of the Parties before the King's Silver is enter'd. 2. For *Deceit* or Covin in procuring it. 3. For ſome notorious *Error* in the Proceedings. A ſmall Error will not avoid it. [See 23 *El. ch.* 3. 10 & 11 *W.* 3. *ch.* 14.] 4. By *Claim*, *Entry* ([e] which muſt be an actual Entry) or *Action* of him that hath Right to the Land, if he claims, &c. in due Time. [See 21 *Ja.* 1. *ch.* 16. 4 & 5 *Ann. ch.* 16.] 5. By *Plea*, that *neither of the Parties had any Thing at the Time of Levying the Fine in the Lands, &c.*; and then one muſt ſhew, in whom the Eſtate was veſted. This is allow'd only to Strangers to the Fine, not to Parties or Privies. [See 27 *Ed.* 1. *St.* 1. *ch.* 1. and the Expoſition thereof, 2 *Inſt.* 521, &c. and 4 *H.* 7. *ch.* 24. *ſupra.*]

[e] 1 Str. 1086.

3. Of a *Common Recovery.*

Therefore, 1. *What* is a Common Recovery. 2. *Who may ſuffer* a Common Recovery. 3. Of what *Things*. 4. Before *whom*. 5. What is the *Force* and *Effect* of a Recovery. 6. How *falſified*, or *avoided*.

Shep. Touchſt. ch. 3. of a common Recovery per totum.

1. A [a] *Common Recovery (Recuperatio)* is a feigned and formal Suit and Judgment, upon a real Action brought in the *Common Pleas* Court, by one, againſt another that is ſeiſed of the Freehold, to deſtroy Eſtates in Tail, Remainders and Reverſions, and to bar the former Owners thereof. [b] It is a *feign'd* Suit, and is now by Uſage and Cuſtom become a Common Conveyance and Aſſurance of Land, which the Judges will not ſuffer to be impeached or queſtioned, becauſe ſo many Mens Titles to their Eſtates do depend upon it. Feign'd Recoveries, as well as Fines, were contriv'd and allow'd when Eſtates-tail came to be inconvenient. For an Eſtate in Tail [c] might poſſibly laſt for ever. A *true* Recovery is an actual and real Recovery of any Thing injuriouſly taken away or detained, or the Value thereof, by Judgment in the ordinary Courſe.

[a] 1 Inſt. 154 a. Weſt. Symb. Of Recoveries, Sect. 1. 2 Black. Com. 116, 271, 357. 4 Black. Com. 422.
[b] 5 Rep. 40, 41. 10 Rep. 39, 42.
[c] See p. 117. ante.

There muſt be three *Perſons* at leaſt, to make a common or feign'd Recovery, (*viz.*) A *Recoveror*, a *Recoveree*, and a *Vouchee*. The *Recoveror* is the Plaintiff or Demandant, that brings the Writ of *Entry ſur Diſſeiſin*. The *Recoveree* is the Defendant or Tenant of the Land, againſt whom the Writ is brought. He muſt be perfect Tenant of the Freehold. [d] The *Vouchee* is he, whom the Defendant or Tenant voucheth (*a Vocando*) or calls to Warranty of the Land in Demand, either to defend the Right, or to yield him other Lands in Value, according to the ſuppoſed Agreement.

[d] 1 Inſt. 101. b.

Now to ſuffer a *Common Recovery*, the Tenant of the Freehold [e] agrees with the Demandant (ſome Friend) that he ſhall bring his Action real againſt him, as tho' he the Demandant had good Right to the Land, and the Tenant no Right of Entry to the ſame, but after a Diſſeiſin, which a Stranger had unjuſtly made, whereas indeed the Demandant never

[e] Dr. & Stud. Dial. 1. ch. 26.

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[b] *Communis error facit jus.* Dr. & Stud. Dial. 1. ch. 26. 4 Inſt. 240.
Semper in fictione juris ſubſiſtit æquitas. 10 Rep. 40. 11 Rep. 51. 1 Inſt. 150. a.
Fictio juris inique operatur alicui damnum aut injuriam. 3 Rep. 36.
Neceſſitas vincit legem. Quod neceſſarium eſt licitum eſt. 5 Rep. 40. 10 Rep. 61.
Neceſſitas eſt lex temporis. 8 Rep. 69.

had Poſſeſſion thereof, nor the Stranger. The Tenant appearing to the Writ vouches or calls to Warranty *A. B.* (perhaps the Crier of the Court,) who is called the *Common Vouchee*, and is ſuppoſed to warrant the Title. This Vouchee ſhall appear as tho' he would defend the Title, and enter into the Warranty. But after Imparlance ſhall make Default, whereupon the Plaintiff or Demandant ſhall have Judgment, to recover the Land againſt the Defendant, or Tenant in Tail, and he to recover in Value againſt the common Vouchee. But this Recovery in Value is only imaginary; becauſe the common Vouchee hath no Lands to render in Value; yet it is taken for a Bar of the Tail for ever; and is juſtified to be good in Conſcience as well as Law([f] notwithſtanding the Statute of *Weſt.* 2. *ch.* 1. wherein it is provided, that the Will of the Giver ſhall henceforth be obſerved) and this, whether the Recovery be upon good Title or not. But it is ſaid, that a common Recovery is not contrary to that Act, nor to the Intent of the Donor. [See 7 *H.* 8. *ch.* 4.]

Yelv. 211.

[f] 10 Rep. 37, 38, 39, 40. 1 Inſt. 224. a.

A feigned Recovery is either with a [a] *ſingle* Voucher, as before ſhewn; or with a *double* Voucher, where the Tenant voucheth one, who voucheth over the common Vouchee. And this is the moſt common and ſafeſt Way. Yet there may be more Vouchees, or more Vouchers over, where three or more are vouched. But the laſt is always the common Vouchee, who is worth nothing.

[a] 1 Inſt. 102. a. 372. b.

Note, That one may be a Vouchee and Voucher; as he is *call'd* upon, and then as he *calleth* upon another.

The common Recovery with *ſingle* Voucher is to bar the Tenant in Tail, and his Heirs, only of ſuch Eſtate-tail which is in his [b] *Poſſeſſion* (not where he is put to a Right) with the Remainder dependent upon the ſame, and the Reverſion expectant, which others have; and of all Leaſes and Incumbrances derived out of ſuch Remainder or Reverſion. The common Recovery with *double* Voucher is to bar the firſt Vouchee and his Heirs, of every ſuch Eſtate as at *any Time* was in him, or any of his Anceſtors, whoſe Heir he is of ſuch Eſtate; and all others of ſuch Right in Remainder or Reverſion, as was at any Time dependent or expectant upon the ſame; and of all Leaſes and Incumbrances derived out of them; and it will alſo be a Bar of ſuch Eſtate, whereof the Tenant was then ſeiſed in Reverſion or Remainder, expectant or dependent upon the ſame.

[b] 3 Rep. 5. 10 Rep. 37. 2 Roll. Abr. 394. Skin. 63.

In a Recovery with *ſingle* Voucher, the *Præcipe* or *Writ* of *Entry* muſt be brought againſt the Tenant in Tail in Poſſeſſion, and he to vouch the common Vouchee. But in a Recovery with *double* Voucher, you muſt either by Fine, Feoffment, Bargain and Sale enrolled, or Leaſe and Releaſe, make a Tenant of the Freehold of the Land demanded; and then bring the Writ againſt that Tenant, as the Conuſee, Feoffee, Bargainee, and he to vouch the Tenant in Tail, and he the common Vouchee, who appears, and after makes Default. And then Judgment is given for the Demandant againſt the Tenant, and for the Tenant to recover in Value againſt the firſt Vouchee, and he to recover in Value of the ſecond (or common) Vouchee. In like Manner it is in a *treble* Voucher, &c.

2. *Who may ſuffer* a common Recovery?

[c] Thoſe may be *Recoverors, Recoverees* and *Vouchees*, that may be Cognizors or Cognizees in Fines. [See who may *levy* or *take* by Fine, *ſupra*. And ſee 34 & 35 *H.* 8. *ch.* 20. 14 *El. ch.* 8. *infra.*]

[c] Weſt. &c. Sect. 1.

An [d] *Infant*, appearing by Guardian, cannot ſuffer a common Recovery. But if he obtains a Privy Seal for that Purpoſe, he himſelf is allowed to ſuffer a Recovery. [[e]Yet it ſeems to be in the Diſcretion of the Court whether they will permit it to paſs, and that tho' it is paſſed, it is voidable by Writ of Error.] A *Feme Covert* with her Huſband is bound by a Recovery; but as in a Fine ſhe ought to be examined, (*Qu.*) And a Recovery ſuffered by *Ceſtui que truſt* is good, and bars the Remainders [f].

[d] 10 Rep 43. Hob. 196. 3 Cro. 307. contra

[e] 1 Ld. Ray. 113.

[f] Ca. Temp. Talb. 167.

A Tenant for Years cannot ſuffer a Recovery, for he is not Tenant of a Freehold. [As to Tenant for Life, ſee 14 *El. ch.* 8. *infra.*]

[a] A *Stranger* is not barred by a Recovery, or by Non-claim as in a Fine.

[a] 3 Rep. 5.

3. Of what *Things?*

A common Recovery may be had of ſuch [b] *Things* (for the moſt part) as may paſs by a Fine. An * *Uſe* may be raiſed upon a Recovery, as well as upon a Fine. [See of *Indentures to lead the Uſes of Fines and Reveries, infra.*] But neither Fine or Recovery can deſtroy an Eſtate executory, which depends upon Contingencies; becauſe it is uncertain, whether there will ever be ſuch an Eſtate in Being, for the Fine to work upon; for that is not like to an Eſtate in Remainder, becauſe a Remainder is an Eſtate veſted.

[b] Weſt. &c. Sect. 2, 3.
* 1 Rep. 15.
5 Rep. 40, 41.

4. Before *whom?*

Common Recoveries muſt be *ſuffered* in the *Court* of *Common Pleas* by the Tenants and Vouchees *perſonally* in Court, or by their *Attornies*; or elſe in the *Country* upon a *Dedimus Poteſtatem*, or *Commiſſion* out of *Chancery*.

[c] Recoveries may be had in a Court-Baron by *Cuſtom*. But others ſay without Cuſtom, when by Uſage Copyhold Lands have been entailed.

[c] Kitch. 176, 177, 178. 1 Cro. 391, 907. 1 Lev. 136.

By 34 & 35 H. 8. ch. 26. *Recoveries may be ſuffered at the Aſſizes or Great Seſſions in* Wales *of Lands there.*

[*See* 23 El. ch. 3. *For Reformation of Errors in Fines and Recoveries, and as to the the Inrollment thereof. And* 27 El. ch. 9. *For extending the Proviſions for Reformation of Errors in Fines and Recoveries to thoſe levied and ſuffered in* Wales, *and the Counties Palatine*; *and for the Exemplification of Fines and Recoveries generally.*]

[See 34 & 35 *H.* 8. *ch.* 22. As to Recoveries in Towns corporate.]

5. The *Force* and *Effect* of a Recovery is, to cut off Eſtates-tail, Remainders and Reverſions, and [d] all Leaſes and Incumbrances derived out of Remainders and Reverſions, to enable Tenant in Tail to ſell, give or deviſe the Eſtate in Fee, or in what Manner he pleaſes. [e] For the Recompence adjudged over ſhall go in Succeſſion of the Eſtate, as the Land loſt ſhould have done, and then it would not be reaſonable to allow the Heir Liberty to have the Land, and the Recompence in Value. Therefore he loſeth the Land, and muſt truſt to the Recompence. This ſuppoſed Recompence is the Reaſon, why a common Recovery is a Bar to all, that are in Remainder or Reverſion, as well as to the Iſſues in Tail. Whereas a Fine bars only the Heirs in Tail, but

[d] 1 Rep. 62, 63. 3 Rep. 61. 6 Rep. 42.

[e] Dr. & Stud. Dial. 1. ch. 26.

not thoſe in Remainder or Reverſion; except upon Non-claim in due Time.

[f] 10 Rep. 38, 41. 1 Inſt. 224. a. [g] 1 Wms. 104.

A [f] Tenant in Tail cannot be reſtrained by Condition from ſuffering a Recovery. But a Covenant not to ſuffer a Recovery may be good, and bind him and his Aſſets [g].

A common Recovery is the beſt Aſſurance (except an Act of Parliament) that Purchaſers can have for their Money.

1 Inſt. 372. b. 373. a. 2 Rep. 15, 16

By 34 & 35 H. 8. ch. 20. *No Recovery had againſt Tenant in Tail of the King's Gift (the Remainder or Reverſion being in the King) ſhall bind the Heirs in Tail.*

[a] 1 Inſt. 104. b. [b] 2 Str. 1257.

6. A [a] Recovery may be *falſified* (or proved *falſe*) and *avoided.* 1. By Writ of *Error*; when there is ſome groſs Error in the Proceedings in Matter of Subſtance. As when an Infant, or Feme Covert without her Huſband, ſuffers a Recovery [See 23 *El. ch.* 3. 16 *Car.* 2. *ch.* 9. 16 & 17 *Car.* 2. *ch.* 8. But ſee alſo 10 & 11 *W.* 3. *ch.* 14. That no Writ of Error ſhall be brought, to reverſe a common Recovery, [b] after twenty Years from the Time of the Recovery ſuffered, unleſs the Party is under any Impediment, in which Caſe it may be brought within five Years after the Impediment removed.] 2. By *Pleading*, that it is by Covin againſt Tenant for Life, to diſinherit him in Reverſion, or that he, againſt whom the Writ is brought, is no Tenant of the Freehold by Right or Wrong; or that he, that hath the Eſtate, is neither Party nor Privy to the Recovery; or where the Recovery is had againſt the Huſband alone of the Wife's Land, [ſee 32 *H.* 8. *ch.* 28.] or of the Land to which his Wife hath Title of Dower; or becauſe another hath ſome Eſtate in the Thing, whereof the Recovery is had, as a Leaſe for Years, [but ſee 14 *G.* 2. *ch.* 10. *infra.*] 3. By *Motion* to the Court, and praying a *Vacat* of the Judgment.

[c] 1 Rep. 176. 3 Rep. 50, 51, 60, 61, 62. 5 Rep. 79. 8 Rep. 71, 72. 1 Inſt. 326. b.

[c] *By* 11 H. 7. ch. 20. *A Recovery by Covin ſuffered by any Woman, either being ſole, or with any after taken Huſband, of any Eſtate in* Dower, *for* Life, *or in* Tail, *which ſhe had jointly with her deceaſed Huſband, or only to herſelf, of Lands of the Inheritance or Purchaſe of ſuch firſt Huſband, or given to ſuch firſt Huſband and Wife by ſuch firſt Husband's Anceſtors, ſhall be void; and he that hath Right may enter after her Deceaſe.* [See 32 H. 8. ch. 28.]

[d] 1 Inſt. 46. a. 104. b. 335. a. 2 Inſt. 322.

By 21 H. 8. ch. 15. [d] *A Termor for* Years *may falſify a common Recovery, had againſt him in Reverſion, and ſhall enjoy his Term againſt the Recoveror according to his Leaſe.*

The Recoveror may have the ſame Remedy by Avowry or Action of Debt, for Rents *and* Services *reſerved upon ſuch Leaſe, and due after ſuch Recovery, and alſo like Action for* Waſte, *as the Recoveree had.* [See 7 H. 8. ch. 4.

No Statute *or Execution by* Elegit *ſhall be avoided by ſuch feigned Recovery; but ſuch Tenants ſhall have like Remedy, to falſify ſuch Recoveries, as Tenant for Years.*

[e] 1 Inſt. 43. a. 342. a.

By ſeveral *Statutes* Recoveries ſuffered by [e] ſpiritual Perſons, of Lands held in Right of their Churches, ſhall not bind their Succeſſors. [See of *Leaſes, infra.*]

By 14 El. ch. 8. *All Recoveries had by Agreement of the Parties, or by Covin, againſt Tenant by Curteſy, Tenant in Tail after Poſſibility of Iſſue extinct, for Term of Life or Lives, or of Eſtates determinable upon Life or*

Conſenſus tollit errorem. 5 Rep. 36, 40. 1 Inſt. 294. a. 2 Inſt. 123.

Lives, ſhall be void againſt them in Remainder or Reverſion, and againſt their Heirs and Succeſſors.

This [f] Statute extendeth not to any Recovery, unleſs it be by Agreement or Covin; nor doth it prejudice any one, that ſhall by good Title recover Lands, *&c.* And if there be Tenant for Life, Remainder in Tail, Remainder or Reverſion in Fee, if Tenant for Life be impleaded by Agreement, and vouch Tenant in Tail, and he vouch over the common Vouchee, this ſhall bar the Remainder and Reverſion in Fee, tho' he in Remainder or Reverſion did never aſſent to the Recovery. It was never the Intent of the Act, to extend to ſuch a Recovery, in which a Tenant in Tail was vouched. For he hath Power by common Recovery, if he were in Poſſeſſion, to cut off all Remainders and Reverſions. But if Tenant for Life had ſuffered the Recovery without the Aſſent of him in Remainder, the Recovery had been void. So if Tenant for Life ſurrender to him in Remainder in Tail, Tenant in Tail may by Recovery bar all Remainders and Reverſions expectant upon his Eſtate. And a Surrender of Tenant for Life ſhall be preſumed [a] on a Recovery of forty Years ſtanding. (*Qu.*)

Where the *Proviſo* of this Act ſpeaketh of an Aſſent of Record by him in Remainder or Reverſion, it muſt be underſtood that ſuch Aſſent muſt appear upon the *ſame* Record.

By 14 G. 2. ch. 20. *Common Recoveries of Lands on which there are outſtanding Leaſes, for one or more Lives, under reſerved Rents, ſhall be valid without the Surrender of ſuch freehold Leaſe, and without the Concurrence of, or Conveyance from, ſuch Leſſee, in order to make a good Tenant to the Writ; provided that the Perſon intitled to the firſt Eſtate for Life, or other greater Eſtate (in caſe there be no ſuch Eſtate for Life in Being) in Remainder next after the Expiration of ſuch Leaſe, convey, or join in conveying, an Eſtate for Life at the leaſt, to the Tenant to the Writ. And,*

Purchaſers for valuable Conſideration, or any claiming under them, where a Recovery was neceſſary to complete the Title to ſuch Purchaſe, may, after twenty Years Poſſeſſion from the Time of ſuch Purchaſe, produce in Evidence the Deed to make a Tenant to the Writ; and ſuch Deed (the Execution thereof being duly proved) ſhall be deemed a ſufficient Evidence that ſuch Recovery was duly perfected, in caſe no Record can be found of ſuch Recovery, or the ſame ſhould appear not to be regularly entred on Record; provided the Perſon making ſuch Deed had ſufficient Eſtate to make a Tenant to ſuch Writ, and to ſuffer ſuch Recovery.

And every Common Recovery ſhall after twenty Years from the Time of Suffering be deemed valid, if it appears upon the Face of the Recovery, that there was a Tenant to the Writ, notwithſtanding the Deed for making the Tenant doth not appear [b]*, or the Deed or Fine for making the Tenant was levied or executed after the Time of the Judgment given in ſuch Recovery, and the Award of the Writ of Seiſin; provided the ſame appear to be levied and executed before the End of the Term, Seſſion, or Aſſize, in which ſuch Recovery was ſuffered, and that the Perſons joining in ſuch Recovery had a ſufficient Eſtate to ſuffer the ſame.*

[[c] See 21 *Ja.* 1. *ch.* 26. Whereby the Suffering a Recovery in the Name of another Perſon without his Conſent is made Felony.]

4. [d] *Indentures to lead the Uſes of Feoffments, Fines and Recoveries,* are Writings indented made by the Parties (before or after the Feoffment,

[f] 1 Rep. 15. 3 Rep 60, 61. 10 Rep. 45. 1 Inſt. 362. a.

[a] 2 Str. 1129.

[b] 2 Str. 1267.

[c] See of Felony, B. 3. ch. 1. poſt.

[d] 1 Rep. 100. 2 Black. Com. 339, 363.

175, 176. 2 Rep. 57. 5 Rep. 26. 9 Rep. 14, 15. 1 Inſt. 271. b. 1 Ld. Ray. 287, &c.

Fine or Recovery) to declare the Intent of the Parties, how the Lands are to be ſettled by the Feoffment, Fine or Recovery. On a Bargain and Sale of Lands no Uſe may be declared, but what the Law doth make, (*viz.*) to the Uſe of the Bargainee; nor upon a Covenant of Uſes, but what is contain'd or averr'd within the Deed. Where no Uſes are declared, the Feoffment, Fine or Recovery ſhall enure to the Uſe of the Feoffer [a], Cognizor, *&c.* But if the Conuſee of a Fine levied of Lands doth pay Money to the Conuſor at the Time of the Fine levied, and there is no Uſe declared to lead the Uſe of the Fine, the Law will conſtrue the Fine to be levied of theſe Lands to the Uſe of the Conuſee, or of him to whom the Fine is levied.

[a] 2 Ld. Ray. 802. contra.

[b] 2 Rep. 57. 58.

[b] The Huſband cannot declare the Uſe of the Wife's Land againſt her Will, by reaſon of the Inconveniencies that would follow. [But Coverture cannot be alledged againſt the Deed of a Feme Covert, to lead the Uſes of a Fine, to which ſhe is a Party, ſo long as the Fine continues in Force; neither can Infancy be alledged againſt ſuch a Deed, for the Deed is ſupported by the Fine [c].]

[c] 1 Ld. Ray. 289.

By 4 Ann. ch. 16. §. 15. *Declaration of Uſes or Truſts of Fines and Recoveries, by Deed made* after *the Levying or Suffering ſuch Fines or Recoveries, ſhall be good in Law; notwithſtanding* 29 Car. 2. ch. 3. which requires Writing to paſs Eſtates at the very Time of the Conveyance.

2 Black. Com. 338.

5. Of *Covenants to ſtand ſeiſed to Uſes.* 1. What is an *Uſe*, and a *Covenant* to ſtand ſeiſed to Uſes? 2. How are *Uſes* divided? 3. What *Uſes* require no Execution by the Statute.

1. What is an *Uſe*, and a *Covenant* to ſtand ſeiſed to Uſes?

[d] 1 Rep. 121. Shep. Touchſt. ch. 24. 501. 1 Inſt. 272. b. 1 Ld. Ray. 291.

[e] 1 Inſt. 271. b. 1 Ld. Ray. 290.

[d] An *Uſe* is a Truſt or Confidence, repoſed in one, that *Ceſtuy que Uſe* (he to whoſe Uſe) ſhall take the Profits, and that the Terre-Tenant ſhall make an Eſtate according to his Direction. This is an Uſe at Common Law. But Uſes may be raiſed either by [e] *Tranſmutation* of the Eſtate and Poſſeſſion, as by Feoffment, Fine or Recovery, or *out* of the Eſtate of the Owner of the Land; as by Bargain and Sale by Deed indented and inrolled, or by *Covenant* to ſtand ſeized to an Uſe, upon lawful Conſideration, without Tranſmutation of the Eſtate or Poſſeſſion.

An Uſe cannot be raiſed out of an Uſe.

2 Wilſon. 22, 75.

A *Covenant to ſtand ſeiſed to Uſes*, is when a Man (that hath a Wife, Children, Brother or Kindred,) doth by bare Covenant in Writing under his Hand and Seal agree, in Conſideration of natural Love and Affection, Marriage, or other good Conſideration, that for their or any of their Proviſion or Preferment, he and his Heirs will ſtand ſeiſed of Land to their Uſe, either in Fee-ſimple, Fee-tail, or for Life. [f] A Man at Common Law could not, during the Coverture, limit and Eſtate to his Wife, but now by Deed he may covenant to ſtand ſeiſed to her Uſe, or make other Conveyance to another for the Uſe of his Wife.

[f] 1 Inſt. 112. a. 7 Rep. 40. Bract. li. 2. ch. 12.

[g] 1 Rep. 176. 2 Rep. 15. 1 Lev. 55, 56.

Alſo a Covenant to ſtand ſeiſed to Uſes may be to the Uſe of a [g] Stranger, but then it muſt be for Money; or other valuable Conſideration, not for Love and Affection. Conſideration of natural Affection only, and Conſideration of natural Affection and 20 *l.* will raiſe an Uſe to a Son. But Conſideration of 20 *l.* only, without natural Affection, will not raiſe an Uſe without Inrollment.

A *Covenant to ſtand ſeiſed to Uſes* is become a Conveyance of the Land ſince the Statute of 27 *H.* 8. *ch.* 10. This needs not be by Deed indented and inrolled, as a Bargain and Sale of a Freehold ought to be, becauſe that is particularly required by a ſubſequent Statute, as ſhall be ſhewn hereafter.

If the Party, to whoſe Uſe one *covenanteth to ſtand ſeiſed* of the Land, is not his Wife, or one that he intends to marry, Child, Uncle, Couſin, or one that his Kinſman intends to marry, no Uſe will ariſe, and ſo no Conveyance. [a] The Law allows in ſuch Caſes the *Conſideration* of Blood and Marriage to raiſe Uſes; as well as Money, and other valuable and profitable Conſideration, when the Uſe is to a Stranger. [b] But it does not allow any trifling Conſideration, as of Service, or old Acquaintance; yet where a Man conveyeth his Eſtate to others by [c] Feoffment, Fine, Recovery, or by Feoffment, Fine or Recovery to the Uſe of his *Laſt Will*, and afterwards declares the Uſes in his laſt Will, he may appoint an Uſe without any Conſideration. [d] But in a Covenant to ſtand ſeiſed, or in a Bargain and Sale, there muſt be a Conſideration expreſſed, or ſpecially averred, where the Conſideration is general, (as for good Conſideration) tho' the Matter ſo averred is traverſable.

[a] 2 Stra. 934.

[b] Plowd. 302. 2 Roll. Abr. 783.

[c] 2 Rep. 58. 6 Rep. 18. 1 Inſt 271. b. 2 Roll. Abr. 781.

[d] 1 Rep. 176. 2 Rep 15. 11 Rep. 25. 1 Ld. Raym. 290.

[e] Many Deceits through Fraud or Fear were invented by Men, by Settling the Poſſeſſion in one Man, and the Uſe in another; or by giving the Poſſeſſion of their Lands to another, and to take the Profits themſelves; inſomuch, that the Poſſeſſion and the Uſe were divided, which opened a Gap for Frauds and many Inconveniencies. A Man knew not then againſt whom to bring his Action; the Wife was defrauded of her Dower; Lords of the Fruit and Benefit of their Lordſhips; therefore to prevent theſe and the like Abuſes,

[e] 1 Rep. 121, 123, 124.

By 27 *H.* 8. *ch.* 10. It is provided, That the Uſe and Poſſeſſion ſhall be always united, by declaring, *That where any are or ſhall be ſeiſed to the Uſe, Confidence, or Truſt, of any other by reaſon of any Bargain, Sale, Feoffment, Fine, Recovery, Covenant, Contract, Agreement, Will, or otherwiſe by any Means whatſoever,* Ceſtuy que Uſe, *or he to whoſe Uſe the Lands are ſettled in Fee-ſimple, Fee-tail, for Life, Years, or otherwiſe, or in Reverſion, or Remainder, ſhall be eſteemed to be in lawful Seiſin and Poſſeſſion of ſuch Lands, Reverſion, or Remainder to all Intents and Purpoſes. And where one is ſeiſed of Lands to the Uſe or Intent, that another ſhall have an yearly* Rent *out of the ſame Lands,* Ceſtuy que Uſe, (*or he to whoſe Uſe the Rent is granted*) *ſhall be deemed in Poſeſſion and Seiſin of the ſame Rent, and of like Eſtate, as he had in the Uſe.*

[f] He that had the Uſe before this Statute, had no more than a *Truſt*, or an *Equity* to have the Lands; and no Remedy for it but by *Subpœna* in Chancery. But now the Statute gives the Poſſeſſion to the Uſe. And ſo in a *Covenant to ſtand ſeiſed to Uſes*, the Statute executes the Agreement, as the *Chancery* would have done before, and gives the Land alſo to thoſe that have Intereſt in the Uſe.

[f] 1 Rep. 87, 100, 121. 21E 4 23 a.

This is the Reaſon, That in Conveyances you ſet down in the *Habendum*, *To whoſe Uſe*, in order that they may have the Poſſeſſion without Livery of Seiſin.

But [g] *four Things* are required to the Execution of a Uſe within this Statute. 1. That there be a Perſon ſeiſed. For the Words of the Statute are, *Any Perſon ſtand or be ſeiſed.* [h] But the King, a Corporation, [See 2 & 3 *An. ch.* 11.] Lord by Eſcheat, [*Qu.*] an Alien, one attainted, Tenant by Curteſy or in Dower, cannot be enfeoffed, or ſeiſed to the Uſe of another, nor Tenant in Tail to the Uſe of himſelf and his Heirs, or any other and his Heirs. 2. That there be a *Ceſtuy que Uſe* in Being; for

[g] 1 Rep. 126, 136.

[h] 1 Rep. 122, 127, 133. 1 Inſt. 19. b. 2Cro. 50, 51, 401.

for the Words of the Act are, *Stand and be ſeiſed to the Uſe of any Perſon or Perſons.* [See 10 & 11 *W.* 3. *ch.* 16.] 3. That there muſt be an Uſe *in Eſſe*, either in Poſſeſſion, Remainder, or Reverſion. 4. That the Eſtate of the Feoffees, out of which the Uſes ariſe, be veſted or transferred to *Ceſtuy que Uſe*; for the Words of the Act are, *And the Eſtate* of ſuch Perſon ſeiſed to the Uſe ſhall be adjudged in *Ceſtuy que Uſe.* If any of theſe fail, there is no Execution of the Uſe within this Statute.

2. *Uſes* are thus *divided.*

There are [a] *two* Sorts of Uſes. 1. In *Being*, either in Poſſeſſion, Remainder or Reverſion. 2. In *Contingency*, which by Poſſibility may fall into Poſſeſſion, Remainder, or Reverſion. Theſe remain at the Common Law, till they come *in Eſſe*. In every of theſe Uſes there muſt be *Confidence* in the *Perſon*, and *Privity* in Eſtate.

Alſo a Uſe is *expreſs* or *implied.* 1. *Expreſs*, as when a Feoffment is made of Land to *J. S.* and his Heirs, to the Uſe of *W. S.* and the Heirs of his Body; or when I covenant to ſtand ſeiſed of the Land to the Uſe of my Wife for Life, and after to the Uſe of my firſt Son on her Body begotten, or to be begotten, and the Heirs of his Body. 2. *Implied*, when the Uſe is not declared betwixt the Parties, but is left to the Conſtruction of the Law. [b] As when a Man ſeiſed of Lands makes a Feoffment in Fee, without any Conſideration, and it is not declared to whoſe Uſe; by Conſtruction of Law it ſhall be to the Uſe of the Feoffor. [c] (*Qu.*) [But certainly where a Man makes a Feoffment without valuable Conſideration to divers particular Uſes, ſo much of the Uſe as he makes no Diſpoſition of remains in him [d]; and that is the *old* Uſe.] And ſo where [e] a Man ſeiſed of Lands as Heir on the Part of his Mother, levies a Fine, and ſuffers a Recovery, and declares the Uſe to himſelf for Life, and then to his Wife for Life, then to the firſt and other Sons in Tail, Remainder to his own right Heirs, the laſt Remainder in Fee is the antient Uſe, and ſhall deſcend to the Heirs of the Part of the Mother. [But where Tenant in Tail, with the Reverſion in Fee *ex parte materna*, ſuffered a Common Recovery, it was held that the *old* Uſe was gone, and that the Eſtate deſcended to the right Heir, *i. e.* the Heir *ex parte paterna.* [f]] If there is ſuch a Conſideration, as the Law requires, then the Law will conſtrue it, to be to the Uſe of the Feoffee. So when one doth bargain and ſell his Land for Money to another, and no Uſe is expreſſed in the Deed, the Law will conſtrue the Intent of the Parties, to be to the Uſe of the Bargainee and his Heirs. A Gift in Tail ſhall be to the Uſe of the Donee; Leaſe for Life or Years, to the Uſe of the Leſſee. If Leſſee for Life or Years grants over his Eſtate without expreſſing to whoſe Uſe, it ſhall be to the Uſe of the Grantee; for there is an implied Conſideration, as to pay the Rent to him in Reverſion, to be ſubject to Forfeitures, and to be puniſhed for Waſte.

3. What *Uſes* require no *Execution* by the Statute?

There are Uſes, that need no *Execution*, by the Statute of 27 *H.* 8. *ch.* 10. As when a Man doth convey Lands, to *J. S.* and his Heirs, to the Uſe of *J. S.* and his Heirs. And when Lands are conveyed to others in Truſt after this or the like Manner, (*viz.*) [g] That the Feoffees ſhall take the Profits, and deliver them to the Feoffor and his Heirs. Such a Truſt is not executed by the Statute, but remains as before, and is determinable in a Court of Equity only. [a] Alſo *Leaſes* for *Years* of

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[a] 1 Rep. 121, 122, 176.

[b] 2 Roll. Abr. 781, 782, 789.

[c] 2 Ld. Ray. 802. contra.

[d] 1 Inſt. 23. a.

[e] Comy. 160. 2 Salk. 590. 1 Stra. 491. 2 Wms. 139.

[f] 2 Stra. 1179. 1 Wilſon 2. 66.

[g] Crompt. Jur. 48.

[a] Dyer. 369. Crompt. Jur. 66.

Lands in Uſe (which Leaſes had their Being before, and are granted over in Uſe or Truſt) are not executed by the Statute. And therefore, if a Leſſee for Years of Lands aſſigns over his Eſtate to *A.* and *B.* and their Aſſigns, to the Uſe of the Grantor and his Wiſe, all the Eſtate is in *A.* and *B.* and the Grantor hath nothing but a Uſe or Truſt, for which he hath his Remedy in Equity only. And yet if a Feoffment be made to the Uſe of *A.* and *B.* and their Aſſigns, for Years, this Uſe is executed by the Statute; becauſe the Leaſe had not its Being before; and becauſe the Words of the Statute are, *If any ſhall ſtand* or be *ſeiſed* of any Lands; whereas the Leſſee for Years of Lands that had their Being before, was *poſſeſſed* only of his Term, and not ſeiſed of any Freehold. So there ſtill remains an Uſe of [b] *Goods* and *Chattels* Perſonal, which is properly called an equitable Truſt and Confidence. For one may ſtill have ſuch Things in Truſt and to the Uſe of another. Here ſtill the Uſe and Poſſeſſion are divided, becauſe not united by the Statute. Thus if an *Obligation* or *Statute*-Merchant or Staple be made to *A.* to the Uſe of *B.* this is a Truſt of the ſame Nature. And if *A.* releaſeth the Obligation without the Conſent of *B.* or gets the Money into his own Hands, *B.* ſhall have Relief againſt *A.* in a Court of Equity. And note alſo, when there are other Truſts and Confidences of Lands, that are not executed by the Statute, or of Chattels real or perſonal, and the Truſtee proves falſe, or delays to execute the Truſt, the Party grieved muſt have his Remedy in a Court of *Equity*; for there is no Remedy at Common Law.

[b] Crompt. 45, 62.

[c] *Copyhold Lands* are not within the Statute of 27 *H.* 8. *ch.* 10. becauſe the Tranſferring of the Poſſeſſion by the ſole Operation of the Statute, without Allowance of the Lord and Agreemant of the Tenant, would tend to the Prejudice of the Lord and Tenant.

[c] Coke's Compl. Cop. Sect. 54. Kitch. 176.

By 3 H. 7. ch. 4.] *All Deeds of Gift of Goods and Chattels made in Truſt to the Uſe of the Grantor, to defraud Creditors, ſhall be void.* [See 31 *El. ch.* 5. 27 *El. ch.* 4.]

By 29 Car. 2. ch. 3. *All Declarations and Creations of Truſt of Lands or Hereditaments muſt be in Writing, ſigned by the Party, or by his laſt Will in Writing, or elſe void; except Truſts ariſing by Implication of Law, or transferred or extinguiſhed by Operation of Law.* [See 4 *An. ch.* 16. §. 15. *ante.*]

2 Vent. 361. 1 Wms. 112.

Alſo all Grants and Aſſignments of Truſt ſhall be in Writing, ſigned by the Party granting or aſſigning, or deviſed by ſuch laſt Will, or elſe of no Effect.

6. A [d] *Bargain* and *Sale* is a real Contract upon valuable Conſideration, for paſſing Manors, Lands, Tenements or Hereditaments, by Deed indented, and inrolled within ſix Months after the Date of it, without Livery of Seiſin or Attornment of Tenants. It is created by theſe Words (*viz.*) Have *bargained* and *ſold*. [e] Yet theſe Words are not abſolutely neceſſary; for other Words, as alien, grant, covenant to ſtand ſeiſed, upon valuable Conſideration, may amount to a Bargain and Sale, if it be by Deed indented and inrolled. He that ſells is the *Bargainor*, and he that buys the *Bargainee*. In this Conveyance there muſt be ſome [f] *Valuable Conſideration* given, or at leaſt ſaid to be given, for the Land; for a Uſe cannot be raiſed by any Covenant, *Proviſo*, or Bargain and Sale, upon a general Conſideration. And tho' no Money, or other valuable Conſideration, was really paid, yet the Bargain and Sale may be

[d] 2 Inſt. 672. 2 Black. Com. 338. Shep. Touchſt. ch. 10 per totum.

[e] 7 Rep. 40. 8 Rep. 93, 94. 2 Inſt. 672.

[f] 1 Rep. 176. 11 Rep. 25.

a Dyer 169.
1 Rep. 125, 176.
11 Rep 25.
b Dyer 155.
1 Rep. 125.

good, becauſe no Averment (or Juſtification of the Exception) will lie againſt that which is expreſly affirmed in the Deed. [a] A Conſideration expreſſed in the Indenture is not examinable, whether true or falſe. However where Money, or other valuable Conſideration, is really given, tho' it is not expreſſed in the Deed, the Bargainee may aver it, and being proved, the Bargain ſhall be good. The Uſe muſt be always to the Bargainee upon a valuable Conſideration, for he cannot ſtand ſeiſed [b] to the Uſe of another. And at Common Law the Bargainee had only the Uſe; and by Force of the Statute of 27 *H.* 8. *ch.* 10. *For transferrring Uſes into Poſſeſſion*, If a Man by his Deed had bargained and ſold for valuable Conſideration any Lands or any Eſtate of Inheritance, or Freehold, (as before explained) the ſame had been executed by that Act. But

By 27 H. 8. ch. 16. *No Eſtate of Inheritance or Freehold in any Land, or any Uſe thereof, ſhall paſs or be made by reaſon only of any Bargain and Sale thereof, except ſuch Bargain and Sale be made by* Deed indented, *and* inrolled *within ſix Months after the Date thereof in ſome Court of Record at* Weſtminſter, *or in the County where the Land lieth, before the* Cuſtos Rotulorum, *two Juſtices of the Peace, and the Clerk of the Peace, or two of them, whereof the Clerk of the Peace to be one, who ſhall inroll them in Parchment, and deliver them to the* Cuſtos Rotulorum *within one Year after.*

This Act ſhall not extend to Land in Corporations or Boroughs, where the Corporation Officer hath lawfully uſed to inroll Deeds or other Writings. [See 5 *El. ch.* 26. Concerning Inrollment of Bargains and Sales in the *Counties Palatine* of *Lancaſter*, *Cheſter* and *Durham*; 5 *An. ch.* 18. For the *Weſt-Riding*; 6 *An. ch.* 35. For the *Eaſt-Riding*; and 8 *Geo.* 2. *ch.* 6. For the *North-Riding* of the County of *York*.

This Statute is confined to the Conveyance of an Eſtate of Inheritance or Freehold by Bargain and Sale *only*.

c 2 Inſt. 672.
1 Lev. 56.

If Lands are bargained and ſold for Money only, the Deed ought to be inrolled; [c] but if for Money and natural Affection, the Eſtate will paſs without Inrollment.

d 1 Inſt. 35. b.
2 Inſt. 673.

[d] The Inrollment muſt be in *Parchment* only, for the Strength and Continuance thereof, tho' the Indenture may be either in Parchment or Paper.

e 2 Inſt. 674.

[e] If the Deed is inrolled the laſt Day of the ſix Months after the Day of the Date, it is a good Inrollment. If the Deed hath no Date, the Day of the Delivery is the Day of Date; and the Deed may be inrolled within ſix Months after the Delivery.

f 1 Inſt 135 b.
2 Inſt. 674, 675.
6 Rep. 62.
Skin. 314.

[f] The ſix Months are to be computed at twenty-eight Days by the Month. When a Statute accounteth by the Year, Half Year or Quarter of a Year, then you muſt reckon according to the Kalendar. So a Twelve-month (in the Singular Number) includes the whole Year according to the Kalendar. But twelve Months, ſix Months, (in the Plural Number) ſhall be accounted after twenty-eight Days to every Month, (except in a *Quære Impedit*, where the Law reckons by the Kalendar, and by 13 *G.* 1. *ch.* 29. as to the Months limited for taking the Oaths); for the Month by the Common Law is but eight and twenty Days.

a 1 Inſt. 144 a.
2 Inſt. 673.

[a] A Rent may be reſerved out of a Bargain and Sale by Deed indented and inrolled; for now the Uſe and Poſſeſſion paſs together. And ſo

out of any Conveyance of Lands or Tenements, tho' a Remainder or Reverſion. [See 27 *H.* 8. *ch.* 10. *Ante.*]

Tho' after the Delivery and Acknowledgment, the Bargainor or the Bargainee dies before Inrollment, yet the Land paſſeth by this Act. For a Releaſe of a Stranger to the Bargainee before Inrollment is good. And ſo a Recovery ſuffered againſt the Bargainee before Inrollment (the Deed indented being after within ſix Months inrolled) is good; for the Bargainee was Tenant of the Freehold at the Time of the Recovery. So that if two Bargains and Sales are made of the ſame Lands to two ſeveral Perſons, and the laſt Deed is firſt inrolled, and afterwards the firſt Deed is alſo inrolled within ſix Months, the firſt Buyer ſhall have the Land. For when the Deed is inrolled, the Bargainee is ſeiſed of the Land from the Delivery of the Deed, and the Inrolement ſhall relate to it.

[b] Houſes and Lands in any Corporation, having Authority to inroll, [b] 2 Inſt. 676.
are exempted out of this Act, and Bargains and Sales of them are not injoined to be inrolled, tho' they have Power to inroll.

There can be no Inrollment of a Deed, unleſs it be duly and lawfully acknowledged.

Deeds are inrolled either by Special *Cuſtom*, as in *London*, or by *Common Law*; or in purſuance of *Statutes*.

Every Deed *may* be inrolled at Common Law for Security; but a Bargain and Sale of Freehold Lands *muſt* be inrolled. [c] If a Deed is [c] 2 Inſt. 676.
ſhewed in Court, or is in Cuſtody of the Court, and by Miſchance the Seal is broken off, the Court ſhall inroll the Deed for the Security of the Party.

Tho' a Deed is inrolled, yet one cannot [d] *plead* the Inrollment thereof, [d] 1 Inſt. 225. b.
tho' it is of Record. And tho' it is exemplified under the Great Seal, 3 Inſt. 173.
one muſt ſhew forth the Deed itſelf under Seal, and not the Exemplification. 5 Rep. 52, 53.
But by 10 An. ch. 18. §. 3. *Where a Bargain and Sale inrolled is pleaded with a* Profert in Curia, *a Copy of the Inrollment thereof ſigned by the proper Officer, and proved to be a true Copy, may be produced, and ſhall be of the ſame Effect as the original Indenture would have been if produced.* [For the Exemplification of the Inrollment of *Letters Patent*, See 3 & 4 *Ed.* 6. *ch.* 4. 13 *El. ch.* 6.]

[See alſo 23 *El. ch.* 3. 27 *El. ch.* 9. For the Inrollment of *Fines* and *Recoveries*; 29 *Car.* 2. *ch.* 3. As to the Inrollment of *Recognizances*; 4 & 5 *W.* & *M. ch.* 22. As to Pleading of *Charters*, or other *Conveyances*, inrolled, to *Inquiſitions* returned by *Coroners*; 2 & 3 *An. ch.* 11. Concerning Lands veſted in the *Corporation for the Bounty of Queen ANNE* by Deed inrolled; 2 & 3 *An. ch.* 4. 5 *An. ch.* 18. 6 *An. ch.* 35. 8 *Geo.* 2. *ch.* 6. Concerning *Regiſters* of Land in *Yorkſhire*; 7 *An. ch.* 20. In *Middleſex*; 10 *An. ch.* 11. Concerning fifty new *Churches* to be built in *London*; 1 *Geo.* 1. *ſt.* 2. *ch.* 10. For the Inrollment of Deeds whereby Lands are given for the *Augmentation of poor Livings*; 1 *Geo.* 1. *ch.* 55. 3 *Geo.* 1. *ch.* 18. For the Inrollment of the Conveyances and Wills of *Papiſts*, &c. See alſo of *Evidence*, *Judgments*, *B.* 4. *ch.* 4. *poſt.*]

Note, That a Bargain and Sale of *Leaſes* for *Years*, or *Goods* and *Chattels* Perſonal, is not within 27 *H.* 8. *ch.* 16. or any other Statute. They are good at Law, as between the Parties, tho' not by Deed indented or inrolled, and though without any Conſideration; for *that* in this Caſe is not examinable, when the Sale is acknowledged by Deed.

[But ſee 29 *Car.* 2. *ch.* 3. and of *Leaſes infra.* And *how Property in Goods and Chattels may be acquired*, *ch.* 6. *poſt.* And of *Actions on the Caſe*, *B.* 4. *ch.* 4. *poſt.*]

2Black. Com. 317. Shep.Touchſt. ch. 12. Of a Grant per totum.

7. Of *Grants*. 1. What is a *Grant*, and who may grant. 2. What *Things* may be granted, and therein of *Election*. 3. Of *Attornment*.

[a] 1 Inſt. 9. a. & b. 172. a.

1. [a] *Grant* (*Conceſſio*) is properly of an incorporeal Thing by Deed, whereof no Livery of Seiſin can be made. It cannot be by *Parol*, (or Word of Mouth) and therefore Reverſions, Advowſons in Groſs, Tithes, Services, Rents, Common in Groſs, muſt paſs by Deed; and are ſaid to lie in *Grant*. The Deed of incorporeal Inheritances doth equal the Livery of corporeal. [See 29 *Car.* 2. *ch.* 3.] A *Feoffment* is always applied to a corporeal and immoveable Thing. A *Gift* is of a larger Extent, and is applied to Things moveable and immoveable; yet as to Things immoveable, when taken ſtrictly, it is applied only to Lands and Tenements given in Tail. But *Gift* and *Grant* are often confounded.

[b] Perkins, Tit. Grants, 3, 4, 5, 6, 12, &c. 43, 47, &c. See p. 217. ante.

[b] Any natural Perſon or corporate Body (not prohibited by Law, as Infants, Women Covert, Monks,) may be a *Grantor*. But an Infant or Woman Covert may be a *Grantee*.

[c] 1 Inſt. 301. b.

He that granteth is termed the *Grantor*, and he to whom the Grant is made, is the *Grantee*. And the *Grant* is uſually made by theſe Words, (*viz.*) *Have given*, *granted* and *confirmed*, and then by Delivery of the Deed the Freehold doth paſs. [c] *Have given* and *granted* may amount to a Grant, Feoffment, Gift, Leaſe, Releaſe, Confirmation, Surrender, at the Election of the Party, and may be pleaded as a Grant or as a Feoffment, Gift, Leaſe, as he pleaſes.

[d] See ch. 2. ante.

Regularly theſe Things are requiſite in every good Grant. 1. That there be a Perſon able to grant. 2. That there be a Perſon capable of the Thing granted. 3. That there be a Thing grantable [d]. 4. That it be done by Deed. 5. That there be an Attornment, where needful. 6. That there be an Acceptance by the Grantee of the Thing granted. [See of Grants by Biſhops, *&c.* Of *Leaſes*, *poſt.*]

2. All incorporeal *Things* may be granted by Deed, as before ſaid in the Deſcription of a Grant.

[e] Perkins, Tit. Grants, 57.

All Chattels perſonal may be granted or given [e] without Deed. [For Chattels real, See 29 *Car.* 2. *ch.* 3.]

[f] 2 Rep. 37. 1 Inſt. 90. b.

[f] Of every Thing *uncertain*, which is given or granted, the Grantee has his *Election* to make it certain.

[a] 2 Rep. 37. 1 Inſt. 145. a.

[a] RULES *Concerning* ELECTIONS.

2 Danv. Abr. 759, &c.

WHERE nothing paſſes to the Feoffee or Grantee before Election made by him, the Election ought to be made in the Life of the Parties.

But when an Intereſt paſſes immediately to the Feoffee, Donee or Grantee, there Election may be made by him, or his Heirs or Executors.

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[a] *Alternativa petitio non eſt audienda.* 4 Rep. 40.
Cujus eſt diviſio, alterius eſt electio. 1 Inſt. 166. b.
Electio ſemel facta non patitur regreſſum. 1 Inſt. 146. a.
Quod ſemel placuit in electionibus, amplius diſplicere non poteſt. Ibid.

When one and the ſame Thing paſſeth to the Donee or Grantee, and the Donee or Grantee hath Election, in what Manner or Degree he will take this, there the Intereſt paſſes immediately; and the Party his Heirs or Executors, may make Election when they will.

When Election is given to ſeveral Perſons, the firſt Election made by any of the Perſons, ſhall ſtand.

When an Election is given of two ſeveral Things, he which is the firſt Agent, or is to do the firſt Act, ſhall have the Election.

When a Grant is of Things annual, and which are to have Continuance, there the Election remaineth to the Grantor, where the Law gives him Election, as well after the Day as before. Otherwiſe it is, when Things are to be perform'd but once.

He that has Election may by his Act and Wrong loſe it, and give it to the other Party.

3. I ſaid that an *Attornment* might be requiſite in every good Grant.

Now, an [b] *Attornment* (from *turning* from one to another) is the Agreement of the Tenant to the Grant of a Seigniory, or of a Rent, or of the Donee in Tail or Tenant for Life or Years to the Grant of the Remainder or Reverſion made to another. By this the Tenant acknowledges his new Landlord. For otherwiſe, he that buyeth any Lands or Tenements, which are in the Occupation of a third Perſon, cannot get the Poſſeſſion. [c] It is not neceſſary upon a Fine, or where the Eſtate is transferr'd to the Uſe by 27 *H.* 8. *ch.* 10. nor indeed upon any Grant but ſuch as hath its Operation by the Common Law; nor where a Rent or Reverſion is granted by Matter of Record; nor where it paſſeth by Deviſe. [d] And it is never neceſſary, but where there is a Tenure, Attendance, Reverſion, or Remainder, or Payment of Rent out of the Land. And therefore if an Annuity, Common, or the like, be granted for Life or Years, the Reverſion may be granted without Attornment.

[b] 1 Inſt. 309 a. 2 Black. Com. 288. Shep Touchſt. ch. 13, 253.

[c] 1 Inſt. 309 b. 322. a.

[d] 1 Inſt 312. a. Noy's Max. 64.

The End of Attorment is to perfect Grants, and therefore it cannot be made upon Condition, or for a Time.

5 Rep. 81.

Attornment is either *expreſs* or *implied*. [e] *Expreſs* by *Words* or *Writing*. By *Words* only, as by ſaying, I attorn to you by Force of the ſaid Grant; or I acknowledge myſelf your Tenant. By *Writing* indorſed on the Deed, or ſet down in any other Writing, which is the ſafeſt Way. And in both Caſes, the Tenant may moreover deliver to the Grantee a Penny, or other Thing, by Way of Acknowledgment, that the Witneſſes may better remember it. *Implied* by Law, as if a Reverſion be granted to two by Deed, and the Tenant attorns to one of them according to the Grant. This Attornment is good, to veſt the Reverſion in both the Grantees.

[e] Lit. 551, &c. 1 Inſt. 309. b. 310. a. &c.

It ought to be made in the [a] Life-time of the Grantor and Grantee. If the Tenant dies, he that has the Eſtate may attorn. But the Tenant muſt have Knowledge or [b] Notice of the Grant. When it is made, it ſhall have [c] Relation to the Original Act of the Grantor, for the Law always regards the original Act.

[a] 1 Inſt. 315. a.

[b] 1 Inſt. 309. b.

[c] 1 Inſt. 310 b. 2 Rep. 93. 10 Rep. 49.

[d] If a Reverſion is granted for Life, the Remainder in Tail, the Remainder in Fee, the Attornment to the Grantee for Life ſhall enure to them in Remainder, to veſt the Remainder in them.

[d] 1 Inſt 310. a.

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[a] *Cujuſque rei potiſſima pars eſt pricnipium.* 10 Rep. 49.

[e] 1 Inſt 312.b. 313 a. 315 a.

[e] The Attornment of an *Infant* to a Grant is good. The *Huſband* muſt attorn for his Wife, and it will bind her. A Man that is *Deaf* and *Dumb* may attorn by Signs. But *Non Compos* cannot attorn.

1 Inſt. 215. a. & b.

Attornment is ſo neceſſary, that before it be done, the Grantee cannot bring an Action or diſtrain. [See 32 *H.* 8. *ch.* 34.] But no Attornment was ever requiſite to Grants to or by the King.

The Title of Attornment was a difficult and great Title, with its Appendixes by the Writ of *Quid juris clamat*, *Quem redditum reddit*, *Per quæ ſervitia*. But ſince the Statute of Uſes, and ſince new Expedients have been found out by Fines to Uſes, by Bargain and Sale, by Leaſe and Releaſe, and by Deeds enroll'd, on which no Attornment is neceſſary, that Title is become of little Uſe. And,

By 4 Ann. ch. 16. *All Grants and Conveyances to be made by Fine or otherwiſe, of any Manors or Rents, or of the Reverſion or Remainder of any Meſſuages or Lands, ſhall be good* without *any Attornment of the Tenants, provided, that no Tenant ſhall be prejudiced by Payment of any Rent to any ſuch Grantor or Conuſor, or for Breach of any Condition for Non-payment of Rent, before* Notice *ſhall be given him of ſuch Grant by the Conuſee or Grantee.*

This Act does not extend to *Executions* on Judgments in Ejectment, *&c.* but thoſe remain as before, as to the Attornment of the Tenants to him that gains the Poſſeſſion; for it relates only to *Grants* and *Conveyances.* And,

By 11 Geo. 2. ch. 19. which recites, *That the Poſſeſſion of Eſtates is rendered very precarious by the frequent and fraudulent Practice of Tenants in Attorning to Strangers who claim Title to the Eſtates of their Landlords, who are by that Means turned out of Poſſeſſion, It is enacted, That every ſuch Attornment ſhall be abſolutely null and void; and the Poſſeſſion of the Landlord ſhall not be conſtrued to be anywiſe affected by it; but not to extend to vacate or affect any Attornment made in Conſequence of any Judgment or Decree; or with the Privity and Conſent of the Landlord; or to any Mortgagee after the Mortgage is forfeited.*

RULES *concerning* GRANTS.

a Perkins, Tit Grants, 65. 1 Inſt. 309. b.

[a] A Man cannot grant *that* which he hath not, nor more than he hath.

[b] 1 Inſt 214.a. 215. a. & b. 266. a.

[b] A Right of Entry, or Thing in Action, or Cauſe of Suit or Title for Condition broken, cannot be granted over to a Stranger. [See 32 *H.* 8. *ch.* 34. *ut ſupra.*] But ſee of *Aſſignments, poſt.*

[c] 4 Rep. 66. 5 Rep. 24.

A bare [c] Poſſibility of an Intereſt, which is uncertain, is not grantable.

[d] 1 Inſt. 146.b.

Grants ſhall be conſtrued according to the Subſtance of the Deed, and not according to the [d] ſtrict grammatical Senſe.

[e] 1 Inſt. 313. a. & b.

Conſtruction of Grants ſhall be made according to the [e] Intention of the Parties.

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[a] *Nemo plus juris ad alium transferre poteſt quam ipſe habet.* 1 Inſt. 309. b. 4 Rep. 24. 6 Rep. 57, 68. 8 Rep. 63.

[d] *Falſa grammatica non vitiat conceſſionem.* 9 Rep. 48. a.
Falſa orthographia non vitiat conceſſionem. Ibid.
Ille numerus et ſenſus abbreviationūm accipiendus eſt, ut conceſſio non ſit inanis. Ibid.

The Words of a Grant ſhall be [f] tranſpoſed, ſo as the Grant may take Effect.

[f] 1 Inſt. 217. b.

Where the Grant is [g] impoſſible according to the Letter, the Law will make ſuch Conſtruction, as the Gift by Poſſibility may take Effect.

[g] 1 Inſt. 183. b. 1 Rep. 46.

All Grants in the Caſe of a *Subject* ſhall be taken moſt ſtrongly againſt him that made it, and moſt beneficial to the Grantee.

See p. 233, 234. ante.

The [h] Incident ſhall paſs by the Grant of the Principal; but not the Principal by the Grant of the Incident.

[h] 1 Inſt. 152. a.

Grants muſt be certain as to the Perſon. For if a Grant be made to *A.* or *B.* it is void.

In the Grant of a Thing, [i] all Things neceſſary for the obtaining of it are included.

[See 13 *El. ch.* 5. 27 *El. ch.* 4. *Againſt fraudulent Grants.*]

[i] 1 Inſt. 56. a. 2 Inſt. 501. 4 Inſt. 111. 5 Rep. 12. 11 Rep. 52.

8. Of *Leaſes*; and therefore, 1. *What* is a *Leaſe?* 2. How many *Kinds*. 3. What *Perſons* may make *good* and ſufficient Leaſes. 4. How may they be *avoided*.

1. What is a *Leaſe?*

[k] A *Leaſe* (from *Laiſſer. Dimittere*, to part with) is a Demiſe or Letting of Lands, Tenements or Hereditaments unto another for Term of Life or Years, or at Will, upon a reſerved Rent. In all Leaſes there muſt be a Leſſor and Leſſee. He that demiſes or lets to farm is the *Leſſor* (vulgarly call'd the *Landlord*) and he, unto whom it is demiſed, or let, is the *Leſſee*, commonly called the *Tenant*. The Words to make a Leaſe, are, [l] *demiſe*, *grant* and to *farm* let. Other Words, as *have given*, *granted*, may amount to a Leaſe; but *demiſe*, *grant* and *to farm let*, are the moſt uſual. The Uſe in the Court of *Exchequer* is to make Leaſes in the King's Name by the Word *Committimus*; [a] which is good by the Cuſtom of that Court, though not good at Common Law.

2 Black. Com. 317 to 323. Shep. Touchſt. ch. 14. [k] 1 Inſt. 43. b. Lit. 57.

[l] 1 Inſt. 45. b. 301. b.

[a] 1 Roll. Abr. 524.

2. How many *Kinds* of Leaſes?

There are ſeveral *Kinds* of Leaſes; as a Leaſe is either by *Parol (per Parole*, by Word of Mouth only) or by *Writing*. [See 29 *Car.* 2. *ch.* 3. *poſt.*]

Leaſes alſo are Leaſes for *Life*, for *Years*, or at *Will*.

1. A [b] *Leaſe* for *Life*, is when one hath Lands or Tenements let to him for Term of his own Life, or the Life of another, or for the Term both of his own Life, and the Life of another. There muſt be *Livery* of [c] *Seiſin* upon a Leaſe for Life, if it is not made by Covenants to ſtand ſeiſed to Uſes, or Bargain and Sale by Virtue of the Statutes of 27 *H.* 8. *ch.* 10, & 16. It cannot be made to commence *in* [d] *Futuro*. For by the Common Law an Eſtate of Freehold muſt take Effect preſently, either in Poſſeſſion, Remainder, or Reverſion. It muſt always be made in Writing, for it is not good by Parol. [See 29 *Car.* 2. *ch.* 3. *poſt.*]

[b] Lit. 56. 1 Inſt. 41. b.

[c] Lit. 59. 1 Inſt. 50. a. 1 Ld. Ray. 166.

[d] 5 Rep. 94.

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[g] *Quælibet conceſſio fortiſſime contra donatorem interpretanda eſt.* Inſt. 36. a. 183. a. 5. Rep. 7. 10 Rep. 59.

[h] *Acceſſorium non ducit, ſed ſequitur ſuum principale.* 1 Inſt. 152. a.

Quod non valet in principali, in acceſſorio non valebit. 8 Rep. 78.

By 8 Ann. ch. 17, *An Action of* Debt *for Rent may be brought on a Leaſe for Life, as well as for Years.*

2. A [e] *Leaſe* for *Years* is when a Man demiſeth or letteth any Lands or Tenements to another, to have and to hold for a certain Number of Years agreed on between them. [f] By Force and Virtue of which Leaſe the Leſſee may *enter* into the ſaid Tenements. And tho' the Leſſor dies before the Leſſee enters, yet the Leſſee may enter; for no Livery of Seiſin is to be given upon a Leaſe for Years. The Leſſee may grant over his Term before *Entry*, as hath been ſaid. For before Entry the Leſſee hath *Intereſſe Termini*, or an Intereſt in it, and may take a Releaſe of the Rent. Yet the Leſſor cannot paſs the Reverſion by the Name of the Reverſion, before the Leſſee enters. If the Leſſee dies before Entry, his Executors or Adminiſtrators may enter. But the Leſſee is not in Poſſeſſion, to bring an Action of Treſpaſs, or to take a Releaſe to enlarge the Eſtate, till actual Entry, if the Words of the Leaſe are *Demiſe*, *Grant*. If the Words are *Bargain* and ſell for Conſideration of Money, he is in Poſſeſſion upon Execution of the Deed, to bring Treſpaſs, or to take a Releaſe, by the Statute of Uſes. Leaſes for Years muſt be made of Lands and Tenements, whereunto the Leſſor may come to [g] diſtrain; not of incorporeal Inheritances by common Perſons or Subjects. Yet if a Leaſe is made of them by Deed, it may be good by way of Contract to have an Action of Debt, but one cannot diſtrain by Virtue of it. The King may make a Leaſe of incorporeal Inheritances, becauſe he may diſtrain upon all the other Lands of the Leſſee.

Leaſes for Years alſo may be made of any *Goods* and *Chattels* perſonal; as a Stock of Cattle, a Sum of Money.

A Leaſe for Years may be either by *Parol* or *Writing*. [See 29 *Car.* 2. *ch.* 3. *poſt.*] And it may begin at a Time [h] *paſt*, *preſent* or *to come*. But regularly in every Leaſe for Years the Term muſt have a certain [i] *Beginning*; tho' whether it ſhall take Effect or not, may depend upon an Uncertainty, as upon a Limitation or Condition precedent. And tho' there is no Certainty of Years in the Leaſe, yet if by Reference to a Certainty it may be made certain, it is ſufficient. As if one ſeiſed of Lands in Fee, grants to another, that when he pays him twenty Shillings, from thenceforth he ſhall have the Land for twenty-one Years; this is a good Leaſe for twenty-one Years from thenceforth. And in like Manner the Leaſe alſo muſt have a certain *End*. Therefore if the Parſon of *A.* makes a Leaſe of his Glebe for ſo many Years, as he ſhall be Parſon there, this cannot be made certain. But if he makes a Leaſe for three Years, and ſo from three Years to three Years, *ſo long as he ſhall be Parſon*, this is a good Leaſe for ſix Years, if he continues Parſon ſo long; but the Reſidue is uncertain. And ſo if one makes a Leaſe for twenty-one Years, *if he ſhall ſo long live*, this is a very good Leaſe for Years, and yet is a Certainty in an Uncertainty, and tho' a Leaſe for Years muſt have a certain *Beginning* and a certain *End*, yet the [a] *Continuance* thereof may be uncertain; for the ſame may ceaſe and revive.

[e] Lit. 58.

[f] Lit 59, 454, 455, 459. 1 Inſt. 46. b. 51. b. 270. a. & b. Noy's Max. 30.

See p. 125. ante.

[g] 1 Inſt. 47. a.

See p. 22. ante.

[h] 5 Rep. 94. 1 Str. 651.

[i] 6 Rep. 35, 36. 1 Inſt. 45. b. Noy's Max. 65. 1 Roll. Abr. 850.

[a] 1 Inſt. 46. a.

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[i] *Id certum eſt quod certum reddi poteſt.* 1 Inſt. 45. b. 96. a. 142. a. *Id incertum eſt, quod certum reddi nullo modo poteſt.* 5 Rep. 6.

[b] If a Leaſe be made for Years to *A.* and after the Leſſor doth make a Leaſe for Years to *B.* regularly this Leaſe to *B.* is a good Leaſe, for ſo many Years of the ſecond Leaſe as ſhall come after the firſt Leaſe is determined. A Leaſe for a thouſand Days, Weeks, Months, or a thouſand Years is good. If a Leaſe is made from Day to Day, or from Week to Week for four Years, this is a good Leaſe for four Years. Alſo a Leaſe from Year to Year, [c] *ſo long as both Parties pleaſe,* after Entry in any Year, is a Leaſe for that Year. So if one makes a Leaſe for a Year, and ſo from Year to Year, it is a Leaſe for two Years, and ſo from three Years to three Years, is a good Leaſe for ſix Years as aforeſaid. If a Man leaſeth Land for Years, it is a good Leaſe for two Years, to anſwer the *plural* Number. If there is Leſſee for Years upon Condition, that he ſhall not alien any Part above three Years during the Term; and if he doth, that the Leaſe ſhall be void; now if he lets for three Years, and ſo from three Years to three Years during the Term, it is a Breach of the Condition.

[b] Noy's Max. 67. 6 Rep. 36.

[c] Noy's Max. 65. 6 Rep. 35. 3 Cro. 511.

A Leaſe for Term of Years, tho' never ſo long, is but a Chattel; and tho' it be a very long Leaſe, it cannot be entailed. But the [d] *Deviſe* of a Leaſe for Years to one for Life, and afterwards to another during the Reſidue of the Term is good; becauſe he hath it not by Way of Remainder, but by executory Deviſe. If a Leaſe for Years is made to a Man and his [e] Heirs, it ſhall go to his Executors. If a Leaſe for Years is made to a ſole Corporation, and his Succeſſors, it ſhall go to his Executors. [See 29 *Car.* 2. *ch.* 3. *poſt.*]

See p. 126. ante.

[d] 8 Rep. 95, 96. 10 Rep. 47.

[e] 1 Inſt. 46. b. 388 a. Noy's Max. 49, 99.

3. A Leaſe at [f] *Will* is either at the Will of the Leſſor or Leſſee, or of both Parties. For it is regularly true, that every Leaſe at Will muſt be at the Will of the Leſſor and Leſſee. It may be made by *Parol* as well as by *Writing*, and of Things corporeal and incorporeal.

[f] 1 Inſt. 55. a. See p. 127. ante.

Note, That it is not material, whether any *Rent* is reſerved upon a Leaſe for *Life*, *Years*, or at *Will*; except only in the Caſe of Leaſes for Life or Years, made by Tenant in *Tail*, *Husband* and *Wife*, and *Eccleſiaſtical* Perſons, according to the Statute of 32 *H.* 8. *ch.* 28. hereafter to be mention'd; and except Leaſes *Parol*, or by Word of Mouth. For,

By 29 Car. 2. ch. 3. *All Leaſes, Eſtates, Intereſts of* Freehold *or Terms of* Years, *or any* uncertain *Intereſt in or out of Lands, or Tenements, not put in Writing and ſigned by the Parties making them, or their Agents authorized by Writing, ſhall have no greater Effect than as Eſtates at* Will; *except Leaſes not exceeding three Years from the making thereof, whereupon the Rent reſerved ſhall be two Thirds at leaſt of the full improv'd Value of the Thing demiſed. And no ſuch Leaſes, Eſtates, or uncertain Intereſts, not being Copyhold or cuſtomary Intereſts, ſhall be aſſigned, granted or ſurrendered, unleſs by Deed or* [g] *Note in Writing, ſigned as aforeſaid, or by Act and Operation of Law.*

Prec. Chan. 208, 274, 402, 519.

[g] 2 Wilſon 26.

If the Subſtance of the Leaſe be put in Writing, and ſigned by the Parties (tho' not ſealed by them) it ſhall have the Force and Effect of a Leaſe for Life or Years; otherwiſe, the Effect of a Leaſe at Will. But no Action of *Covenant* can be brought on ſuch Writing. Leaſes that exceed three Years, muſt be made in Writing; and are uſually made by Deed indented.

Pr. Ch. 16.

By 11 Geo. 2. ch. 19. *The Landlord, where the Demiſe is not by Deed, may recover a reaſonable Satisfaction for the Lands held by the Defendant, in an Action on the Caſe, for the Uſe and Occupation of what was ſo held or enjoyed. And if in Evidence on the Trial of ſuch Action, any Parol*

Demiſe, or any Agreement (not being by Deed) ſhall appear, on which a certain Rent was reſerved, the Plaintiff ſhall not therefore be nonſuited, but may make Uſe of it as an Evidence of the Quantum *of the Damages to be recovered.*

There is a common Way of conveying by *mutual* Leaſes, or by Leaſe on each Side; and this is called a Conveyance by *Demiſe* and *Redemiſe*; and is proper upon the Grant of a Rent charge.

3. What Perſons may make *good* and *ſufficient Leaſes* for *Lives*, *Years* or at *Will*.

Every one that is ſeiſed of Lands in *Fee-ſimple*, may leaſe out his Lands for Life or Lives, for what Time he pleaſes, or at Will; except ſome that are reſtrained by Statutes, as ſhall be preſently ſhewn.

[a] 1 Inſt. 47. a. & b. 183. b. See p. 124. ante.

Every one that is ſeiſed of an Eſtate-*tail* of any Lands or Tenements, may make *any* Leaſe out of it for his own Life, but no longer, unleſs it be by Fine or Recovery; or ſuch a Leaſe as is warranted by 32 *H.* 8. *ch.* 28. If Tenant in Tail maketh a Leaſe for Life [a] generally, it ſhall be conſtrued to be for his own Life, that it may not work a Wrong.

[b] 1 Inſt. 183. a. & b. See p. 124. ante.

He that is ſeiſed of an Eſtate for his *own Life*, or the *Life* of *another*, may make a Leaſe for his own or the other's Life, accordingly as he is ſeiſed. Alſo he may make a Leaſe for Years, or at Will, of this Eſtate; and it ſhall be good, as long as the Eſtate for Life does laſt. If one grants Lands or Tenements, Reverſions, Remainders, Rents, Advowſons, Commons, &c. and doth expreſs no Eſtate, the Leſſee or Grantee (due Ceremonies requiſite by Law being performed) hath an Eſtate for his Life. [b] But if Tenant for Life maketh a Leaſe generally, it is an Eſtate for his own Life; for if it ſhould be a Leaſe for Life of the Leſſee, it might be a Wrong to him in the Reverſion.

[c] 1 Ld. Ray. 737.

[a] 1 Ld. Ray. 99. 1 Str. 405. contra.

Every one that is poſſeſſed of Lands or Tenements for *Years* may make a Leaſe of all the Years, except one Day, or any other Part of it; [c] or may make an Underleaſe to commence from his Death. It muſt be granted for a leſſer Time, than he hath that makes the Leaſe; [a] for if all the Eſtate is granted, it is an *Aſſignment* of the Leaſe. And if a Leſſee for Years maketh a Leaſe for Life, the Leſſee for Life may enjoy it for the Leſſor's Life, provided the Term of Years laſts ſo long. But if he gives Livery and Seiſin upon it, this is a Forfeiture of the Eſtate for Years.

Jointenants, *Tenants* in *Common*, and *Coparceners*, may make Leaſes for Life, or Years, or at Will, of their own Parts; and theſe Leaſes will bind their Companions.

1 Ld. Ray. 268.

In ſome Caſes, ſuch Perſons as are not ſeiſed in Fee-ſimple, nor able to derive Eſtates for Life or Years out of their own Eſtates, may lawfully make Leaſes for Life or Years, by ſpecial *Power* or *Proviſo* enabling them to make ſuch Leaſes. But then the Authority muſt be ſtrictly purſued.

[b] 8 Inſt. 44. a.

There are [b] *three* Kinds of *Perſons*, that at this Day may make abſolute Leaſes for *Life*, Lives or *Years* by ſeveral *Statutes*, who could not do ſo heretofore, (*viz.*) Tenant in *Tail*, *Huſband* and *Wife*, one ſeiſed in Right of his Church.

[c] 1 Inſt. 44. a, 45. b

1. *By* [c] 32 *H.* 8. *ch.* 28. *Any Perſon ſeiſed of an Eſtate in* Tail *in his own Right is enabled by his Leaſe for Lives or Years to bind the Iſſues in Tail.*

But not thoſe in Reverſion or Remainder. For if Tenant in Tail makes a Leaſe warranted by the Statute, and dies without Iſſue, the

Leaſe, as to him in Reverſion, or Remainder is void. But if the Remainder be in the Tenant in Tail himſelf, and he makes a Leaſe for Years according to the Statute, or by Fine, this is good, and ſhall bind his own Remainder.

2. By the ſame Statute *any* Huſband *and* Wife, *ſeiſed of any Eſtate of Inheritance in Fee-ſimple, or Fee-tail, in Right of his* Wife or *jointly with his* Wife, *are enabled to make Leaſes for Life, Lives, or Years, ſo as to bind themſelves and their Iſſue or Heirs.*

Provided, That all Leaſes made of Lands, being the Inheritance of the Wife, ſhall be made by Indenture in the Name of the Huſband and Wife, and that ſhe be made a Party to and ſeal the ſame; and that the Rent ſhall be reſerved to Huſband and Wife, and the Heirs of the Wife, according to her Eſtate of Inheritance therein; the Huſband not to alien or diſcharge the Rent, or any Part thereof, longer than during the Coverture, unleſs it be by Fine levied by Huſband and Wife.

No Fine, Feoffment, or other Act, done by the Huſband only, of the Inheritance or Freehold of the Wife, ſhall make any Diſcontinuance, or prejudice the Wife, or any other who is to enjoy it after her Deceaſe; Fines levied by the Huſband and Wife only excepted. 1 Inſt. 326. a. 2 Inſt. 681. 8 Rep. 72.

This Act ſhall not give Liberty to the Wife or her Heirs, to avoid any Leaſe hereafter to be made of the Wife's Inheritance by the Huſband and Wife for twenty-one Years or under, whereupon the accuſtomable yearly Rent for twenty Years before is reſerved according to the Tenor of this Act.

If the Leaſe is not warranted by the Statute, it is a good Leaſe againſt the Huſband, tho' not againſt the Wife. If it be an Eſtate-tail, the Huſband and Wife cannot bind him in [d] Reverſion, or Remainder. [d] 1 Inſt. 326. a.

3. By the ſame Statute, *Perſons ſeiſed in Fee-ſimple in Right of their* Churches, *are enabled by their Leaſes for Life, Lives or Years to bind their Succeſſors.* [See 1 *El. ch.* 19. 13 *El. ch.* 10. *poſt.*] 2 Burn. Eccl. law tit. Leaſes per totum.

As Biſhop, Dean of his ſole Poſſeſſions, Archdeacon, Prebendary, without Confirmation of the Dean and Chapter.

Eccleſiaſtical Corporations *Aggregate* of many, are not included here, as Dean and Chapter, but are left to their Liberty to make Leaſes as before. And *Sole* Corporations (with a proper Confirmation) have ſtill (notwithſtanding this Act) the like liberty. [But ſee 1 *El. ch.* 19. *poſt.*]

[*This Act ſhall not extend to enable any* Parſon *or* Vicar, *to make any Leaſe, otherwiſe than he might have done before.*]

[a] And therefore if Parſon or Vicar makes a Leaſe for three Lives, or twenty-one Years of Lands accuſtomably letten, reſerving the accuſtomed Rent, it muſt be confirmed by Patron and Ordinary. The Common People have a Notion, that a Parſon or Vicar may make a Leaſe for *three* Years, and bind their Succeſſors by it without Confirmation; but it is void by their Deaths. [See 13 *El. ch.* 10. *poſt.*] [a] 1 Inſt. 44. b. 45. b.

But to the making good ſuch Leaſes by Tenant in *Tail, Huſband* and *Wife*, and of thoſe ſeiſed in Fee-ſimple in Right of their *Churches*, as *Biſhops, &c.* [b] *Nine* Things are to be obſerved. 1. The Leaſe muſt be made by Deed indented. Therefore this Statute does not extend to *Copyhold* Lands, which in their own Nature are demiſable only by Copy. 2. It muſt be made to commence from the Day of the making thereof. But if a Leaſe is made for twenty Years to begin at *Michaelmas* next, it is ſaid to be a *good Leaſe*. 3. If there be an old Leaſe in Being, it muſt be [b] 1 Inſt. 44. a. & b.

abſolutely (not conditionally) ſurrendered or expired within a Year after the making of the New. [See 18 *El. ch.* 11.] 4. It muſt be either for Lives (all wearing out together) or Years; either one or the other; and not both, or a double Leaſe. 5. It muſt not exceed three Lives, or twenty-one Years, *from the Day of the making it*; but it may be for fewer Lives, or a ſhorter Term. If it is for twenty-two Years, it is not only void for the Overplus, but for the whole. And if for ninety-nine Years determinable upon three Lives, it is alſo void. 6. It muſt be made of Lands or Tenements corporeal, out of which a Rent may be reſerved, and not out of incorporeal Things, or Things that lie in Grant, as Advowſons, Tithes, Fairs, Franchiſes, whereout a Rent cannot be reſerved. 7. It muſt be of Lands or Tenements which have been moſt commonly letten (by one that was ſeiſed of the Inheritance) to Farm, or occupied by Farmers, by the Space of twenty Years next before the Leaſe made; ſo that if it was let for eleven Years, at one or ſeveral Times, within thoſe twenty Years, it is ſufficient; for then they were *moſt commonly* letten by the Space of twenty Years. 8. There muſt be reſerved yearly, during the whole Term, to the Leſſors, their Heirs or Succeſſors, ſo much yearly Rent or more, as hath been moſt accuſtomably paid *within* twenty Years next before ſuch Leaſe made. Fines, Heriots, or other caſual Services may be omitted. If the Rent was reſerved formerly at four ſeveral Days, and by the new Leaſe is reſerved to be paid at one Day, it is good, if the whole Rent be reſerved *yearly*. 9. The Leaſe muſt not be made without Impeachment of Waſte, *i. e.* it muſt be ſo made as that the Leſſee may be puniſhable for Waſte. Therefore a Leaſe for Life, Remainder for Life, is not good, becauſe it is not diſpuniſhable for Waſte. [See 32 *H.* 8. *ch.* 28. at *large*].

The Statute of 32 *H.* 8. hath enlarged the Power of Biſhops, Deans, Archdeacons, Prebendaries. For by that Act they may make a Leaſe of Lands by Deed indented for twenty-one Years, or three Lives, without the Confirmation of the Dean and Chapter, provided they follow the Limitations in the Statute. This therefore was called the *Enabling Statute*. But becauſe the Statute ſtill ſuffered Biſhops, Deans, Archdeacons, and Prebendaries with Confirmation of Dean and Chapter, Maſters and Fellows of any College, Maſter of an Hoſpital and his Bretheren, Parſon and Vicar with the Confirmation of the Patron and Ordinary, to make Leaſes for Life or Lives, or Years, without any Stint at the Common Law, they are *diſabled* or *reſtrained* by ſubſequent Statutes, to make any Eſtate or Conveyance, except Leaſes for three Lives, or twenty-one Years, with ſuch Proviſions and Limitations as in 32 *H.* 8. are required. For,

1 Burr. 221, to 226. *By* 1 El. ch. 19. *All Conveyances or Eſtates made by any* Archbiſhop, *or* Biſhop, *of any Manors, Lands, Tenements, or Hereditaments, belonging to his Archbiſhoprick, or Biſhoprick, other than for the Term of twenty-one Years, or three Lives,* from ſuch Time *as any ſuch Grant or Aſſurance ſhall begin, whereupon the old accuſtomed yearly Rent or more ſhall be reſerved, ſhall be utterly void.*

So that the Confirmation of the Dean and Chapter cannot now make good the Leaſe of an Archbiſhop or Biſhop for a *longer Time*, as at Common Law. But it may make good a concurrent Leaſe for twenty-one Years, from ſuch Time, &c. For the Act is ſtill obſerved. And if an Archbiſhop or Biſhop obſerves his Act, his Leaſe is good to bind [a] himſelf; but not to bind his Succeſſors unleſs all the Limitations preſcribed

[a] 10 Rep. 60, 61.

preſcribed by 32 *H.* 8. are purſued; for then the Confirmation of the Dean and Chapter is requiſite.

[b] This Act 1 *El.* is a private Act, whereof the Court will not take Notice without Pleading.

[b] 5 Rep 2.
4 Rep. 76.

By 13 El. ch. 10 *All Gifts, Grants, Feoffments, Leaſes, Conveyances, or Eſtates, made by any* Maſter *and* Fellows *of a* College, Dean *and* Chapter *of a* Cathedral *or* Collegiate Church, Maſter *of an* Hoſpital, Parſon, Vicar, *or* any other *having any Spiritual or Eccleſiaſtical Living, (other than for twenty-one Years, or three Lives,* from the Time of making thereof, *and whereupon the accuſtomed yearly Rent, or more, ſhall be reſerved, and payable yearly during the Term*), *ſhall be utterly void,* [See 14 *El. ch* 11. and 18 *El. ch.* 11. *Poſt.*]

These Words, [c] *or any other,* &c. coming after Parſon or Vicar, who are of an inferior Order, will not comprehend Biſhops, who are of an Order that is ſuperior.

[c] See p. 9. ante.

This Act ſhall not make good any Leaſe or Grant made by any College or Collegiate Church, for more Years than are limited by their private Statutes. [See 6 *An.* ch. 21.]

This Act ſhall not extend to any Leaſe to be made upon a Surrender of a former Leaſe, or by reaſon of any Covenant or Condition contained in any former Leaſe, ſo as the Leaſe to be made contains not more Years than the Reſidue of the Years of the former Leaſe, nor any leſs Rent thereby reſerved. [But ſee 18 *El. ch.* 11. *poſt.*]

This is a publick Act, and concerns all the Clergy.

4 Rep. 76.

Note therefore, That all Eccleſiaſtical Perſons whatſoever, (ſole or aggregate Corporations) are *diſabled* or *reſtrained* by theſe two laſt Statutes, to alienate their Lands by any Means whatſoever, or to make Leaſes for above twenty-one Years, or three Lives, with or without Confirmation, (*viz.*) Archbiſhops and Biſhops, by 1 *El. ch.* 19. Maſters and Fellows of Colleges, Dean and Chapter of Cathedral or Collegiate Churches, Chapters where there are no Deans, Maſters of Hoſpitals and their Bretheren, Dean, Archdeacon, Prebendary, Parſon Vicar, and other Eccleſiaſtical Perſons, by 13 *El. ch.* 10. [a] which Act hath been always conſtrued beneficially to prevent Evaſions againſt the true Meaning of it. *Note,* Parſons and Vicars had not their Powers enlarged by 32 *H.* 8. neither were they reſtrained till 13 *El.* but from thenceforth they are reſtrained from making any Leaſes or Grants, other than for twenty-one Years, or three Lives, with the Qualifications above-mentioned. And yet even ſuch Leaſes muſt be confirmed by the Patron and Ordinary, becauſe excepted in the enabling Act of 32 *H.* 8. and becauſe they never could bind the Succeſſors without Confirmation.

[a] 11 Rep. 76.

[b] But Biſhops, Deans, Archdeacons, Prebendaries, may make Grants of ancient *Offices,* with the ancient Fees and no more, as before at the Common Law; [but whether it be a *neceſſary* Office or not is no ways material, [c] if it be an *ancient* one, that is before 1 *El.*] For theſe Grants are not within the Statute of 32 *H.* 8. nor reſtrained by 1 *El.* or 13 *El.* becauſe they are no Diminution of their Revenues. Yet to bind their Succeſſors, *theſe* Grants muſt be confirmed by the Dean and Chapter, as before the Statute, becauſe they are Grants at Common Law. They may not grant any *new* Office, or add any *new* Fees to *old* Offices. Neither may they grant their Offices otherwiſe than they have been granted. And therefore, where the ancient Grants of the Office have been to one, it cannot be now granted to two. And where the ancient Grants have been to two jointly they may not be granted in Remainder one after another

[b] 1 Inſt. 44. a.
1 Burr. 221 to 226.
10 Rep. 60, 61.
3 Cro. 50, 259, 279, 555.
2 Roll. Abr. 154.
2 Lev. 138.
4 Mod. 16.
[c] Trelawney *v.* Biſhop of Wincheſter. K. B. Hil. Term 30. Geo. 2.

another; neither may the Grant of theſe Offices be longer than for Life or Lives of the Grantees. And in Caſe any Grant is void, the Confirmation of the Dean and Chapter will not make it good.

By 14 El. ch. 11. *The* 13 El. ch. 10. *ſhall not extend to Grants or Leaſes of* Houſes *ſituate in Cities, Boroughs, Corporations, or Market-Towns, or the Suburbs thereof; or the Grounds appertaining to ſuch Houſes; ſo that they be not the Dwelling-Houſes of ſuch Grantors or Leſſors, nor have above ten Acres of Ground belonging to them.*

Provided, That no leaſe ſhall be made by Force of this Act in Reverſion, nor without reſerving the accuſtomed yearly Rent at leaſt; nor without Charging the Leſſee with Reparations; nor for a longer Term than forty Years. Neither ſhall ſuch Houſes be alienated unleſs for Recompence of Lands in Fee-ſimple, of as good Value, and of as great yearly Value, at the leaſt.

This Statute gives no Power to Archbiſhops or Biſhops to let Houſes, otherwiſe than according to 1 *El. ch.* 19. But tho' they are not included, it is a general Law, extending to all the reſt of the Clergy.

Theſe Leaſes of Houſes may commence *in Futuro*. But no Leaſes in Reverſion, or concurring Leaſes, can be made of them.

And becauſe divers Leaſes were made long before the Expiration of the former,

[a] Hob. 269.
1 Ventr. 246.

By 18 El. ch. 11. *All Leaſes hereafter to be made by ſuch Perſons, as are mention'd in* 13 El. ch. 10. *of any their Lands or Tenements, whereof a former Leaſe for Years is in Being, not to be expired, ſurrendered, or ended within three Years next after the Making of ſuch new Leaſe, ſhall be void. And all Bonds and Covenants for renewing or making of any Leaſe contrary to this Act, or to* 13 El. ch. 10. *ſhall alſo be void.* [a] But ſuch Leaſes of Houſes as are within 14 *El. ch.* 11. are not made void by this Statute which refers only to 13 *El. ch.* 10.

[b] 4 Rep. 120.

The 13 *El. ch.* 10. doth not (as hath been ſaid) extend to Biſhops; and therefore this Statute of 18 *El. ch.* 11. doth not extend to them. But doth extend to all others that have Spiritual or Eccleſiaſtical Livings. [b] And this is a general Law, whereof the Court ought to take Notice as well as of 13 *El. ch.* 10,

By 43 El. ch. 9. *All* Judgments *had to the Intent, that a Leaſe ſhould be enjoyed contrary to* 13 El. ch. 10. 14 El. ch. 11. 18 El. ch. 11. *ſhall be deemed void, as well as Bonds and Covenants.*

By 1 Ja. 1. ch. 3. *All Aſſurances of Archbiſhops and Biſhops Lands to the King ſhall be void.*

11 Rep. 75. 76.

Maſters and Fellows of Colleges, and all others having Eccleſiaſtical Livings, were before reſtrained by 13 *El. ch.* 10.

[c] 1 Inſt. 44. b. 45. a. & b.

Now obſerve upon all theſe Statutes in Relation to Eccleſiaſtical Perſons. 1. [c] That neither of the *reſtraining* or *diſabling* Statutes of 1 *El.* and 13 *El.* do in any Sort alter or change the *enabling* Statute of 32 *H.* 8. 2. That Leaſes made according to the Exception in 1 *El.* or in 13 *El.* and not warranted by 32 *H.* 8. (if they are made by a Biſhop, Dean, Archdeacon, or any ſole Corporation), muſt be confirmed by Dean and Chapter, or in the Caſe of Parſon or Vicar, by Patron and Ordinary.

Aggregate Corporations did never want any Confirmation.

Therefore to explain this Matter;

If a *Biſhop* makes a Leaſe for one and twenty Years, and all thoſe Years are ſpent, ſaving three or *more* (for the Number of Years to come is not material, the 18. *El.* not extending to Biſhops) yet he may make a new Leaſe to another for twenty-one Years, to begin *from the Making* according to the Exception of the Statute; and this concurrent Leaſe is good, as well upon the Exception in 1 *El.* in the Caſe of Biſhops, as upon 13 *El.* which extends to Spiritual and Eccleſiaſtical Corporations aggregate of many, as Deans and Chapters, which 32 *H.* 8. did not. But the concurrent Leaſe of the Biſhop muſt be confirmed by the Dean and Chapter; it not being warranted by 32 *H.* 8. A Biſhop cannot make a concurrent Leaſe for Life or Lives, but only a concurrent Leaſe for Years upon a Leaſe for Years.

[*Note*, the Exception in 1 *El.* is different from 13 *El.* and 32 *H.* 8. for in 1 *El.* the Words are *for the Term of twenty-one Years from ſuch Time as the Grant or Aſſurance ſhall begin*, (not *be given* or made, *as* it is miſprinted in *Co. Lit.* 44. *b.*) and in 13 *El.* it is from *the Time of* making, and 32 *H.* 8. from the Day of making.]

Though the Statutes of 1 and 13 *El.* do not appoint the Leaſe to be made in Writing, or by Deed indented, yet it muſt therein, and in the other Properties before mentioned, be made according to the Pattern of 32 *H.* 8. (the concurrent Leaſe only excepted).

Tho' the Exception in 1 and 13 *El.* concerning the *accuſtomed Rent* is more general than that of 32 *H.* 8. and no Proviſion made for Impeachment of Waſte, yet muſt the Pattern of 32 *H.* 8. be followed.

And tho' by 1 and 13 *El.* all Grants and Leaſes made (other than 5 Rep. 6. Leaſes for three Lives, and twenty-one Years, without Saying, or *Under*, according to thoſe Acts) ſhall be utterly void; yet Grants or Leaſes *, 3 Rep. 59, 60. for a ſhorter Time are good. And Grants and Leaſes, not warranted by thoſe Acts, are good againſt the Leſſor himſelf, if he is a ſole Corporation; or if an aggregate Corporation, ſo long as the Dean, or other Head of the Corporation remains. For the Statutes were made and intended for the Benefit of the Succeſſor. Therefore they may be good againſt the Leſſors themſelves, ſo long as the Leſſors live; or at leaſt ſo long as they continue in their Places. But of theſe Leaſes we muſt underſtand it thus —— Leaſes by Biſhops, not according to 32 *H.* 8. are *voidable*, tho' confirmed by Dean and Chapter. And ſo of a Dean and Chapter, after the Death of the Dean: But if an Archdeacon, Prebendary, Parſon, or Vicar makes a Leaſe for *Years*, it is *void* by Death, if it be not made according to the Statutes. Otherwiſe it is of a Leaſe for *Life*; for that is only voidable, & *ſic de ſimilibus*: notwithſtanding the Statutes ſay, that the Leaſes ſhall be void.

Where a Biſhop, &c. makes a Leaſe, which may tend to the Diminution of the Revenues of the Biſhoprick, &c. which ſhould maintain the Succeſſor, [a] there the Deprivation, or Tranſlation of the Biſhop, [a] 1 Inſt. 329 a. &c. is all one with his Death. And the like doth hold in Caſe of Re- 10 Rep. 62. ſignation.

Upon the whole Matter it appears, 1. That Archbiſhops and Biſhops may make Leaſes for twenty-one Years, or for one, two, or three Lives, with the Qualifications above-mention'd, without any Confirmation. And they may make concurrent Leaſes for twenty-one Years upon Leaſes for twenty-one Years *from the Making*, with Confirmation of Dean and Chapter, and with ſuch Qualifications as aforeſaid; tho' there

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* *Omne majus includit minus. Cui licet quod majus, non debet quod minus eſt elicere.* 4 Rep. 23. 5 Rep. 115. 9 Rep. 49.

Omne majus trahit ad ſe minus. 6 Rep. 43.

Quod licitum eſt pro minore, et pro majore licitum eſt. 8 Rep. 41.

be above three Years in Being of the old Leaſe at the Time of Making the new. But if they are not confirmed, they muſt follow the Directions of 32 *H.* 8. 2. Deans, Archdeacons, Prebendaries, Heads and Fellows of Colleges, Maſters of Hoſpitals, Cathedral or Collegiate Churches, Parſons, and Vicars, may make Leaſes for twenty-one Years, or any leſſer Number of Years, or one, two, or three Lives in Poſſeſſion,
[a] 2 Str 1201. according to the Qualifications above-mentioned, and concurrent Leaſes [a], with Confirmation, if they are made within three Years of the Determination of the former Term; Biſhops in this Caſe having the *Advantage.* When I ſay *with Confirmation,* Spiritual and Eccleſiaſtical Corporations Aggregate of many are not to be underſtood, as before obſerved.

There are other *Statutes* concerning *Leaſes* fit to be known. Therefore ſee 33 *H.* 8. *ch.* 27. and of *Corporations, B.* 1. *ch.* 8. 13 *El. ch.* 20. Concerning the Leaſes of the Benefices of Incumbents that are abſent from their Benifices above eighty Days in one Year. 18 *El. ch.* 6. Concerning a Third Part of the Rent to be reſerved in Wheat and Malt upon College-Leaſes. 1 *W. & M. Seſſ.* 1. *ch.* 16. Concerning Leaſes made *Bonâ Fide* and for good and valuable Conſideration by Perſons ſimoniacally promoted; and 12 *Ann. St.* 1. *ch.* 4. Concerning Leaſes of Commons incloſed in the *Weſt-Riding* of the County of *York,* for endowing poor Vicarages and Chapelries. And 1 *An. Seſſ.* 1. *ch.* 7. As to Leaſes of Crown Lands. And 5 *Geo.* 3. *c.* 17. As to Leaſes of Tithes, *&c.*

4. How may Leaſes be *avoided.*

[b] 1 Inſt. 45. b. 214.b.215.a. [b] Leaſes for Lives or Years are of three Natures. Some are *good,* ſome *voidable,* ſome *void.*

1. Some are *good* at the *Common Law,* as thoſe made by Tenant in Fee-ſimple, notwithſtanding they are for longer Time than three Lives, or one and twenty Years; ſome *good* by *Act* of *Parliament,* as Leaſes made by *Tenant in Tail;* by a Man ſeiſed in Fee-ſimple or Fee-tail of Land in the Right of his *Wife* together with his Wife; by a *Biſhop* ſole ſeiſed in Fee without his Chapter; who now by Deed indented may make Leaſes for twenty-one Years or three Lives, as by 32 *H.* 8. *ch.* 28. is limited. All which were voidable at Common Law, tho' now made good by Statute.

2. Some are *voidable* at *Common Law,* after the Death of Leſſor, as after the Death of Tenant in Tail, or Biſhop, or after the Death of the Huſband if they are not warranted by 32 *H.* 8. *ch.* 28. Some voidable by *Statute,* as by a Biſhop, tho' confirmed by Dean and Chapter, if not warranted by 32 *H.* 8. And ſo of a Dean and Chapter after the Death of the Dean. Some voidable *at Times* by the Leſſor himſelf, or his Heirs, as in the Caſe of Infancy.

3. Some Leaſes are *void in futuro;* as if a Tenant in Tail makes a Leaſe for Years, and dies without Iſſue, it is void as to them in Remainder or Reverſion, tho' made according to 32 *H.* 8.

See p. 182. ante. If a Prebendary, Parſon, or Vicar makes a Leaſe for Years, it will be void by his Death, if it is not according to the Statutes. Otherwiſe it is of a Leaſe for Life; for that is voidable by Entry; and ſo it is in like Caſes. Some Leaſes are void *in Præſenti;* as if one makes a Leaſe for ſo many Years as he ſhall Live. This is preſently void for the Incer-
[c] 1 Ld. Ray. 166. tainty. So if one makes a Leaſe for Life without Livery of Seiſin. [c] unleſs made by virtue of a Power. [See of Surrenders *Infra.*]

9. Of *Leaſe* and *Releaſe.*

I have ſhewn before what is a *Leaſe*. Therefore now, 1. What is a *Releaſe*, and how *divided*. 2. Who may *make* Releaſes or take them. 3. What *Things* may be releaſed. 4. How Releaſes ſhall be *conſtrued*. 5. What is the Conveyance by *Leaſe* and *Releaſe*. 6. Of *Acquittances*.

2 Black. Com. 339. Shep. Touchſt. ch. 19. Of a Releaſe.

1. [a] *Releaſe* (*Relaxatio*) is a Deed or Inſtrument, whereby a Man doth give or diſcharge the *Right* or Action, which he hath or claimeth againſt another out of or in his Land, *&c.* [b] It is uſually made by the Words, *Remiſe*, *releaſe*, and for ever *quit claim*, or by other Words to the ſame Purpoſe. He that releaſeth is the *Releaſor*, and he, to whom the Releaſe is made, the *Releaſee*.

[a] Terms of the Law, v. Releaſe. Noy's Max. 74.
[b] Lit. 445. 1 Inſt. 264. b. 2 Roll. Abr. 403.

They are of [c] *two* Sorts (*viz.*) A Releaſe as to *Lands*, *Goods*, and *Chattels*; and a Releaſe of *Actions* *, whether real, perſonal, or mixt: For I ſaid, it was a Diſcharge of a *Right* or *Action*.

[c] Lit. 492. 1 Inſt. 264. a. & b.
* See B. 4. c. 4. poſt.

Releaſes alſo are either [d] *expreſs* or *implied*. An *expreſs* Releaſe is the Act of the Party releaſing, and is by Deed. An *Implied* Releaſe is that which the Law makes, and is ſometimes *by Writing*, and ſometimes *without Writing*. When an Obligee or Creditor makes the Obligor or Debtor his Executor, who accepts thereof, this is a Releaſe in Law *by Writing*. But if an Obligor is made [e] Adminiſtrator of the Goods and Chattels of the Obligee, this is no Releaſe in Law. And when he is made Executor, tho' 'tis a Releaſe in Law of the Action; yet the Duty remains, and it ſhall be Aſſets in his Hands. [f] If a Feme Obligee or Creditor takes the Obligor or Debtor to Huſband, this is a Releaſe in Law *without Writing*, [[g] unleſs it be a Marriage Bond which is to take Effect after the Huſband's Deceaſe by way of Proviſion for the Wife.] But if a Feme Executrix takes the Debtor to Huſband, this is no Releaſe in Law; for that would be a Wrong to the Dead. A Releaſe in Law ſhall be expounded more favourably than a Releaſe in Deed.

[d] 1 Inſt. 264 b.
[e] 8 Rep. 136.
[f] 1 Inſt. 264. b. 8 Rep. 136.
[g] See p. 60. &c. ante. 1 Ld. Ray. 515.

[h] Releaſes either enure, 1. By way of *enlarging* an Eſtate; being made by a Reverſioner to a Leſſee in Privity with enlarging Words. 2. By way of *Mitter le Eſtate*, or *transferring* it; as if one Jointenant or Parcener releaſe to another. This muſt be between Privies. 3. By way of *Mitter le Droit*, which transfers the Right of the Releaſor to the Releaſee; as when Diſſeiſee releaſes to Diſſeiſor, and makes his Eſtate rightful, which was wrongful. Here a Releaſe of a bare Right for an Hour, is as good as if it were made to the other and his Heirs. It is not requiſite that there ſhould be any Privity between the Parties to ſuch Releaſe. 4. By way of *Extinguiſhment* only, againſt all Perſons, when the Releaſee cannot have the Thing releaſed. As when the Lord releaſeth his Seigniory to his Tenant of the Land, or when the Grantee of a Rent-charge, or of a Common, releaſes to the Tenant of the Land the Rent-charge or Common. For one Man cannot be Lord and Tenant, he cannot have Land and Rent, nor Land and Common of Paſture out of the ſame Land.

[h] Lit. 305. 306, &c. 465. 1 Inſt. 193. b. 273. b. 275. a. 279. b. 280. a.

[i] A Releaſe is of more Force in Law than a Confirmation. But note, That if a Charge or Duty grows by Record, the Releaſe muſt be upon Record. If by Deed, the Releaſe muſt be by Deed.

[i] 1 Inſt. 298. b.

2. *Who* may *make* Releaſes, or *take* them.

As a Man *may releaſe* any Debt or Duty due to *himſelf*, ſo a Man may releaſe any Thing or any Wrong due or done to his *Wife* before or after Marriage. And if the Wife is [k] Executrix to another, the Huſband may releaſe any Debt or Duty due to the Teſtator, but the Feme Executrix cannot to the Prejudice of her Huſband. Regularly the Releaſe of an *Infant* is void; but an Infant Executor may releaſe a Debt duly paid to him as Executor: Tho' if he releaſes that which he doth not receive, the Releaſe is void. An *Executor* before [a] Probate of the Will, may releaſe a Debt or Duty due to the Teſtator, becauſe he hath an abſolute Intereſt in the Debt in him. And tho' he cannot have an Action before Probate, yet he may releaſe an Action. If one releaſeth, and then taketh Adminiſtration, this Releaſe ſhall not bar him: For he had no Right of Action, at the Time of the Releaſe. One *Tenant* in [b] *Common* cannot releaſe to the other, becauſe the Freehold is ſeveral.

It is to be obſerved, that no [c] Right paſſeth by a Releaſe, but the Right which the Releaſor had at the Time of the Releaſe made. If he had no Right, the Releaſe is void.

If he, *to whom* a Releaſe is made, hath nothing in the Lands, that Releaſe is alſo void.

It behoveth him, to whom the Releaſe is made, that he hath either the Poſſeſſion or a Freehold in the Lands in Deed or in Law, or a Reverſion, or Remainder in Fee-ſimple, Fee-tail, or for Life, at the Time of the Releaſe made; or elſe he cannot *take* the Releaſe.

3. As to the *Things* that may, or may not, be releaſed.

Suppoſing a Right in the Releaſor, and that the Releaſee hath ſomething in them, [d] *Lands*, *Tenements*, and *Hereditaments* may be given and transferred by way of Releaſe, and all *Rights* therein may be given and diſcharged by it. A Releaſe by a Leſſor to his *Leſſee* for *Years* or at *Will*, having entered by Force of ſuch Leaſe, is good in Reſpect of the Privity betwixt them; therefore not to a Tenant at *Sufferance*. A Releaſe to a Leſſee for Years *in Futuro*, or before Entry, (tho' it may extinguiſh the Rent reſerved) yet it cannot enlarge his Eſtate for want of Poſſeſſion. If a next Avoidance is granted to two, one may releaſe to the other, before the Church is void, but not afterwards, for it is then (as it were) but a Thing in Action. Rights and Titles to *Goods* and *Chattles*, *Actions* real, perſonal, and mix'd, may be releaſed. [e] Alſo *Conditions* annexed to Eſtates, *Powers* of *Revocation* of Uſes, *Warranties*, *Covenants* (even before they are broken by a Releaſe of all *Covenants*) *Services*, *Rents*, *Commons*, and other Profits to be taken out of Lands may be diſcharged, extinguiſhed, and determined by a Releaſe to the Tenant of the Land. A Condition cannot be releaſed upon Condition; but the Releaſe will be good, and the Condition void. *Poſſibilities* of enjoying Land, (if they are not remote and uncertain, but near and common Poſſibilities) may be releaſed to him that hath the preſent Eſtate of the Land. *Mere* Poſſibilities cannot be releaſed. *Debts*, [f] *Legacies* by a Releaſe of a *Legacy*, and other Duties, may be releaſed before or after they become due. A Man cannot releaſe a [g] perſonal Thing, as an Obligation, upon a Condition *ſubſequent*, becauſe a perſonal Thing, once ſuſpended is extinguiſhed for ever. Neither can one releaſe a bare *Authority*.

4. Of the *Conſtruction* of Releaſes.

Where divers Perſons join in an Action, to recover any perſonal Thing, of which they are to have the joint Benefit or Intereſt (where the

[k] 5 Rep. 27.

[a] 5 Rep. 28. 9 Rep. 39. 1 Inſt. 292. b.

[b] 1 Inſt. 200. b.

[c] Lit. 446, 447, 450, 499. 1 Inſt. 265. a. a. & b. 266. a. 267. a.

[d] 1 Inſt. 264. a. & b. 265. a. 270. a. & b. Lit. 459, 460, &c.

[e] 1 Rep. 112. 2 Rep. 51. 5 Rep. 71. 10 Rep. 48, 49. 1 Inſt. 237. a. 265. b. 274. b.

[f] 10 Rep. 51.

[g] 1 Roll. Abr. 412, 939, 940.

the Law does not compel them to join) there the Releaſe of [h] *one* of them ſhall bar all the Reſt. [See 23 *H.* 8. *ch.* 3.] And where there are two *Plaintiffs* in Debt, Treſpaſs, *&c.* and one of them alone doth releaſe to the Defendant; this is alſo a Bar to the other Plaintiff. So if an Obligation be made to two, and one does releaſe, this is a Diſcharge with reſpect to the other. Where there are two Executors, and one alone doth releaſe a Debt due to the Teſtator before Judgment, this will bar the other Executor; but not if the Releaſe is after Judgment. A Releaſe of an Action by one [a] Churchwarden is not good, neither can both of them releaſe to the Prejudice of the Church. [b] A Releaſe by the Huſband of his Wife's Suit in the Eccleſiaſtical Court for Defamation, is a good Releaſe as to the Coſts; but not as to the Defamation. For the Court may give Sentence that the Defendant ſhall give a corporal Satisfaction by Penance and Submiſſion; which the Huſband cannot releaſe.

[h] 6 Rep. 25. 2 Roll. Abr. 410, 411, 412. 1 Cro. 648, 649.

[a] 1 Danv. Abr. 788.

[b] 3 Cro. 221.

On the other Hand for the Benefit of a *Defendant.* A Releaſe made to the Tenant in Tail, or Tenant for Life, of the Right of the Land, ſhall enure to him that hath the [c] Remainder or Reverſion. And ſo *è Converſo.* If [d] *two* are *bound* jointly and ſeverally in an Obligation or Bond, or other Specialty to one, and the Obligee or Creditor releaſes to one of them, this ſhall diſcharge the other. And he ſhall not be relieved in *Equity* againſt the other thro' Ignorance of the Law. [See 10 *An. ch.* 15. Concerning *Partners* of a *Bankrupt*, &c.] But a Releaſe from the King to one, ſhall not enure to the other. And if two commit a *Treſpaſs*, a Releaſe to one of them ſhall diſcharge the other.

[c] Lit. 452, 453. 1 Inſt. 267 b.

[d] 1 Inſt. 232. a. 3 Inſt. 239. 5 Rep. 56. 1 Roll. Abr. 374.

A Releaſe of all [e] *Manner* of *Actions* diſcharges all real, perſonal, and mix'd Actions, and bars an Appeal. But a Releaſe of all Actions real and perſonal is no Bar in an Appeal of Death. For ſuch a Releaſe bars only civil Actions. A Releaſe of all Actions real, Releaſes mix'd Actions; and ſo does a Releaſe of all perſonal Actions. In a Releaſe of all Actions, *Cauſes* of Action are releaſed. But within a Submiſſion of all Actions to Arbitrament, Cauſes of Action are not contained. He that hath Right of Entry may enter, tho' he hath releaſed all Actions [f]; and if one takes away my Goods, I may take them out of his Poſſeſſion; tho' I have releaſed all Actions. And if a Man releaſeth all Actions, he releaſeth all Actions which he hath as [g] *Executor*, as well as others which he hath in his own Right. [*Qu.*] A Releaſe of all Actions will not diſcharge [h] *Executions*, or bar one to take out Execution. But a Releaſe of all *Suits* will be a Bar to an Execution, except in the Caſe of the King. A Releaſe of all Actions will not diſcharge any Thing, for which the Releaſor had [i] *no Cauſe* of Action at the Time of the Releaſe made. But Money on Bond to be paid at a future Day may be releaſed by the Obligee; becauſe the Right of Action was in him before. Yet Rent payable at a future Day cannot be diſcharged by a Releaſe of all Actions; nor an Annuity. But one may releaſe the Rent for Annuity before the Day, by ſpecial Words. It will releaſe the Arrears due before the making of the Releaſe.

[e] Lit. 496, 497, 500. 1 Inſt. 285. a. & b. 286. a. 287. b. 4 Rep. 63. 11 Rep. 82.

[f] See B. 4. ch. 4. poſt.

[g] 2 Roll. Abr. 404. 1 Ld. Ray. 235. 2 Ld. Ray. 1306.

[h] Lit. 504, 507. 8 Rep. 152, 153, 154. 1 Inſt. 289. a. 291. a.

[i] Lit. 512, 513. 1 Inſt. 292. b. 8 Rep. 153.

A Releaſe of all [k] *Quarrels* amounts only to a Releaſe of all Actions and Cauſes of Action. So of *Controverſies* and *Debates.* And if I am diſpoſſeſſed of my Goods, and I releaſe all Quarrels, I may take my Goods again as aforeſaid; for ſuch a Releaſe does not bar my * Right.

[k] 1 Inſt. 292. a. 8 Rep. 153.

* 4 Rep. 63. 11 Rep. 82.

A Releaſe of all [a] *Dues* (*Debita*) will releaſe perſonal Actions and Executions; but it will not bar a Writ of *Account*. For there is nothing certainly due, before Account made. But a Releaſe of all Actions will be a good Bar in Account. A Releaſe in full of all *Accounts*, ſhall be extended only to an Account.

One cannot releaſe a *Duty* or *Debt* by his [b] *Will*.

A Releaſe of all [c] *Rights* in any Lands or Tenements does releaſe and diſcharge all Manner of Rights of Action and Entry; but not a Poſſibility of a Right, that he hath at the Time of the Releaſe; or a Right that ſhall deſcend to him afterwards. A Releaſe of all Rights to the Land made to the Terre-Tenant extinguiſhes the Rent iſſuing out of the Land. But a Releaſe of all Right *in* and *to* Lands doth not extinguiſh [d] Tithes. A Releaſe of all one's [e] *Title* to Lands and Tenements is a Releaſe of all one's Right.

By a Releaſe of all [f] *Covenants*, A Covenant not broken may be releaſed, as mentioned before.

A Releaſe of all [g] *Demands* or *Claims* is the beſt Releaſe of all, and the moſt effectual Word to bar Actions, Appeals, Rights of Entry into Lands, Titles, Conditions, before they are broken, [*Qu.*] or after, Covenants broken, Rents even before the Day of Payment, Commons, Debts, Duties, Obligations, Contracts, Recognizances, Statutes, Judgments, Executions, Annuities and Arrearages of Annuities and Rents, Eſtovers, But by a Releaſe of all Demands, a mere [h] *Poſſibility* is not releaſed, nor a Covenant before it is broken, for there is yet nothing to demand. Neither is a Releaſe of all Demands a Diſcharge of a [i] *Legacy* due or payable at a future Day, nor if a Parſon doth releaſe all Demands to a Pariſhioner in his Lands doth it releaſe the [k] *Tithes*; for they are not Things iſſuing out of Lands, but a ſpiritual Duty. He that hath [l] Surety of the Peace cannot releaſe it by any Words, for the Offender is bound to keep the Peace with reſpect to all the King's Subjects. [m] A Releaſe of all Demands is no Bar in Writ of Error to reverſe an Outlawry; for it doth not extend to ſuch Writs, where nothing is demanded either in Fact or in Law. But in ſuch Caſe a Releaſe of a Writ of Error is a good Plea. [n] If the King releaſeth all Demands, a Right of Inheritance ſhall not be releaſed.

A Releaſe of an Action or a Right cannot be for [o] a *Time*. It will enure for ever, if it be made but for an Hour.

[[p] Where there are general Words only in a Releaſe, they ſhall be taken moſt ſtrongly againſt the Releaſor; but where there is a particular Recital or ſpecial Words preceding the general Words, the general Words ſhall be thereby reſtrained or qualified.]

Thus Releaſes ſhall be *conſtrued*, and the Words of a Releaſe applied.

5. What is a Conveyance by *Leaſe* and *Releaſe*?

A Releaſe here is a Conveyance of one's Intereſt or Right, which he hath in a Thing, to another that hath the Poſſeſſion thereof. For firſt you muſt execute a Leaſe or a Bargain and Sale for ſix Months, a Year, *&c.* to the Intent that by Virtue thereof the Leſſee may be in actual Poſſeſſion of the Lands intended to be releaſed to him. And then the Leſſee by Virtue of the Statute of 27 *H.* 8. *ch.* 10. *For transferring Uſes into Poſſeſſion*, is enabled to take a Grant or Releaſe of the Reverſion and Inheritance of the ſaid Lands to the Uſe of himſelf and his Heirs for ever, which is then accordingly done, reciting the ſaid Leaſe and declaring the Uſes. [a] A Reſervation of a Pepper-Corn is ſufficient to raiſe an Uſe, and to make the Leſſee capable of a Releaſe.

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[a] 1 Inſt. 291. a. 8 Rep. 153. 1 Roll. Abr. 123.

[b] 1 Ventr. 29. 1 Wms. 85. 2 Wms. 332.

[c] 2 Roll. Abr. 404. 8 Rep. 151, 152.

[d] 1 Cro. 216.

[e] Lit. 509. 8 Rep. 153, 154. 1 Inſt. 292. a.

[f] 1 Rep. 112. 5 Rep. 71. 8 Rep. 153. 10 Rep. 51. 1 Inſt. 291. b.

[g] Lit. 508. 1 Inſt. 291. b. 5 Rep. 71. 8 Rep. 153, 154. 1 Lev. 99. 3 Lev. 274. 1 Ld. Ray. 518, 522.

[h] 5 Rep. 70, 71. 1 Inſt. 292, 392. Lit. 748.

[i] 10 Rep. 51, 52.

[k] 1 Cro. 216, 814.

[l] 2 Roll. Abr. 401, 402.

[m] 8 Rep. 152, 154.

[n] 5 Rep. 56.

[o] Lit. 467. 1 Inſt. 274 a.

[p] 1 Ld. Ray. 235, 664.

This is become a very common Conveyance, (*viz.*) To paſs Lands by way of Leaſe and Releaſe. It amounteth to a Feoffment, the Uſe drawing after it the Poſſeſſion, and ſupplying the Place of Livery of Seiſin. [The Execution of the Uſe raiſed by the Bargain and Sale for a Year, ſupplies the Want of an actual Entry of the Leſſee. See of *Confirmation, infra.*]

6. [b] An *Acquittance* is a Sort of Releaſe, and is a Diſcharge in Writing, or by Bill under Seal, of a Sum of Money, or other Duty, which ought to be paid or done. As if one is bound to pay Money upon an Obligation, or Rent reſerved upon a Leaſe, and the Party to whom it is due, upon Receipt thereof gives a Writing under his Hand witneſſing that he is paid. This is ſuch a Diſcharge in Law, that he cannot demand and recover the Sum or Duty again, if the Acquittance is ſhewed. An Acquittance without Seal is only an Evidence or Proof of Payment, but not pleadable, becauſe no Deed. [c] *Literæ Acquietantiæ* do ſignify a *Deed* of Acquittance.

The Obligor is not bound to pay Money upon a ſingle Bond, unleſs the Obligee will make him an Acquittance. Nor is he bound to pay it before he hath the Acquittance. And in this Caſe the Obligor may compel the Obligee to make him an Acquittance. And ſo it is of a Statute-Merchant. But otherwiſe it is in Caſe of an Obligation with a Condition; for there one may aver Payment. And now alſo,

By 4 An. ch. 16. *If an Action of Debt is brought upon a ſingle* Bill, *if the Defendant hath paid the Money due upon ſuch Bill, ſuch Payment may be pleaded in Bar of ſuch Action.*

[d] If a Rent is behind twenty Years, and the Landlord makes an Acquittance for the laſt that is due, all the reſt are preſumed to be paid; and the Law will admit no Proof againſt this Preſumption.

If one hath a Debt upon Bond, and upon Book for Wares from the ſame Perſon, the Manner of Tender and of the Payment ſhall be directed, by [e] him who maketh the Tender or Payment, and not by him who accepteth of it; and the Acquittance ought to be given accordingly. [This is, when the Debtor at the Time of Payment declares, on what Account he makes the Payment; otherwiſe the Party receiving the Money may apply it to any juſt Account.]

If one acknowledges himſelf to be ſatisfied by *Deed*, it is a good Plea in Bar, without any Thing received. But an Acquittance without a Seal, is only Evidence of Satisfaction, as hath been ſaid.

10. [g] A Deed of *Confirmation* is a Conveyance of an Eſtate or Right in being, by him that hath a larger or better Eſtate in the Thing granted than the Tenant; whereby a voidable Eſtate is corroborated, made ſure and unavoidable; or whereby a particular Eſtate is increaſed. A Confirmation thereof may make a voidable Eſtate good, but cannot work upon an Eſtate, that is void either in Law, or determined by expreſs Condition or Limitation. It is made by theſe Words, (*viz.*) [a] *ratify, approve, confirm, &c.* He that confirms muſt be in Poſſeſſion of the *Eſtate* or *Right*; and he alſo muſt be in Poſſeſſion, to whom the Confirmation is made.

A Confirmation is almoſt of the Nature of a Releaſe.

[a] 2 Ventr. 35.

[b] Terms of the Law, v. Acquittance. Dyer 6, 25, 51.

[c] 1 Inſt. 52.a.

[d] 1 Inſt. 373.a. 3 Rep 65. Noy's Max. 15.

[e] 5 Rep. 117. 1 Cro. 68.

[g] 1 Inſt 295.b. 2 Black. Com. 325. Shep. Touchſt ch. 18. Of a Confirmation.

[a] Lit. 515.

He that makes the Confirmation is the *Confirmer*, and he to whom it is made, the *Confirmee*.

Confirmations are [b] *expreſs* or *implied*. *Expreſs*, as by the Words *ratify, approve*, and *confirm*. *Implied*, by *Law*, as by the Words have *given* and *granted*, have *demiſed*, which in ſome Caſes ſhall enure to the ſame Intent as I *have confirmed*.

[c] Every Confirmation is *perfecting, increaſing*, or *diminiſhing*. *Perfecting*, as when one makes an Eſtate abſolute that was conditional. *Increaſing*, as when an Eſtate at Will is increaſed for Years, or an Eſtate for Years increaſed for Life. *Diminiſhing*, as where a Landlord confirmeth the Eſtate of his Tenant, to hold by leſs Rent.

In a Deed of Confirmation it is proper to [d] recite in the Premiſſes the Eſtate of the Tenant, which is to be confirmed, and alſo the Eſtate of him that is to confirm, and to expreſs the Conſideration thereof, if there is any.

In ſome Caſes the Confirmation of a [e] *third* Perſon is needful, to perfect the Grants of others, as the Grants and Leaſes of a *Biſhop* (not warranted by 32 *H*. 8. *ch*. 28. and other Statutes) muſt be confirmed by the Dean and Chapter or Chapters; of a [f] *Dean* of his ſole Poſſeſſions by the Chapter; and by the [g] Biſhop; of a donative Dean, by the King and Chapter; of an *Archdeacon* or *Prebendary*, by the Biſhop, Dean and Chapter. If the King is Patron of a Prebend, then it muſt be with the Confirmation of the King, Dean, and Chapter; Grants and Leaſes of a *Parſon* or *Vicar*, to bind his Succeſſors, muſt be with the Confirmation of [h] Patron and Ordinary. But if the Ordinary or Biſhop is Patron, the Dean and Chapter alſo muſt confirm. The Patron muſt conſent to the Grant of ſole Corporations, that have not the abſolute Fee in them. But the Patron muſt have the Fee-ſimple of the Advowſon; otherwiſe the Confirmation is good only during the Patron's Eſtate. If the Parſonage is a *Donative*, the Confirmation is to be by the Patron only.

[i] If a Prebendary or Parſon makes a Leaſe for twenty Years, and the *Leaſe, Demiſe*, or *Eſtate* is confirmed for ten Years, this is a good Confirmation for the whole; and the Addition *for Parcel of the Term* is repugnant when the whole was confirmed before, by confirming the Leaſe, Demiſe, or Eſtate generally. But if the *Land* had been confirmed to the Leſſee for ten Years, or for any other Part of the Term, it had been good for the ten Years, or Part of the Term only; for then there would be no Repugnancy. So may a Confirmation be of *Part* of the Land, or of a leſs Number of Acres, than were granted. So if Tenant for Life makes a Leaſe for a hundred Years, the Leſſor of Tenant for Life may confirm, either for Part of the Term, or for Part of the Land, if he hath not before confirmed the *Leaſe*; but an Eſtate of *Freehold* cannot be confirm'd for Part of the Eſtate; for that the Eſtate is entire, and not ſeveral as Years are.

[a] *Note*; If a Biſhop hath two Chapters, both muſt confirm his Grants or Leaſes, or elſe his Succeſſor may avoid them. And this Confirmation muſt be made in the Life of the Biſhop and of the Grantees.

Alſo if Tenant for Life grants a Rent-Charge to one and his Heirs, a [b] *third* Perſon, (*viz.*) he in the Reverſion muſt confirm it; otherwiſe it is good only for the Life of Tenant for Life.

[c] There are *eight* ſeveral Diverſities betwixt a *Confirmation* and a *Releaſe*; and there are *eight* different Caſes, wherein a Confirmation and a Releaſe have like Operation in Law. But many of the Curioſities of

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[b] 1 Inſt. 295 b. 301. b.

[c] 9 Rep. 142. 1 Inſt. 295. b.

[d] Weſt's Symb. 1. pt. § 457.

[e] 1 Inſt. 300 b.

[f] Dyer 40, 273. 1 Roll. Abr. 478.

[g] Dyer 61. Degg's Parſon's Counſ. Part 1. ch. 10.

[h] 1 Inſt 300. b. 329. a.

[i] 5 Rep. 81. 1 Inſt. 297. a.

[a] Dyer 282. 1 Inſt. 301. a. See p. 29. ante.

[b] Lit 529. 1 Inſt. 301. a.

[c] Lit. 516, 517, &c. 1 Inſt. 296, 297, &c.

ſome Kinds of Confirmations and Releaſes are ſupplied by Fines to Uſes, by Bargain and Sale by Deed inroll'd, and by Leaſe and Releaſe.

11. [d] An *Aſſignment* is the appointing or ſetting over a Right to another by theſe Words, (*viz.*) *have given*, *granted*, *aſſign'd* and *ſet over*. *Have given* or *granted* may amount to a Grant, a Feoffment, a Gift, a Leaſe, a Releaſe, a Confirmation, a Surrender, as hath been ſaid; and it is in the Election of the Party, to uſe them to which of theſe Purpoſes he will. But a Releaſe, Confirmation, or Surrender, cannot amount to a Grant; nor a Surrender to a Confirmation, or Releaſe, becauſe theſe are peculiar Manners of Conveyancing. He that aſſigns is the *Aſſignor*, and he to whom the Thing is aſſign'd is the *Aſſignee*; who always hath the Thing aſſign'd in his own Right, not as a Deputy.

[d] 1 Inſt. 301. b. Terms of the Law, v. Aſſignee. 2 Black. Com. 326.

There may be Aſſignments in *Deed* and Aſſignments in *Law*.

There may be Aſſignment of Lands given in Fee, for Life or Years; of a Mortgage for Years forfeited, the Mortgagor being made a Party, and confirming the Aſſignment; of an Annuity, Rent-Charge, Judgment, Statute, *&c.*

If a Leſſee does aſſign over his Term, [e] The Leſſor may charge the Leſſee, or Aſſignee, as he pleaſes; for a Leſſor ſhall not be forced to take the Aſſignee for his Tenant; but if he accepts the Rent of the Aſſignee (knowing of the Aſſignment) he hath determined his Election, and cannot afterwards ſue the Leſſee for the Rent due after the Aſſignment. [[f] But this muſt be underſtood of an Action of Debt only; for an Action of Covenant will lie againſt the Leſſee or his Executors, for Rent due after his Aſſignment, and even after Acceptance of Rent from the Aſſignee, by the better Opinions. But an *Aſſignee* of a Term may aſſign it over, and thereby diſcharge himſelf from the Payment of the Rent after ſuch Aſſignment[g].]

[e] 3 Rep. 24. 1 Cro. 715. contra.

[f] 3 Rep. 24. 1 Saund 240, 241. 3 Cro. 188, 580. 2 Cro. 521. 3 Lev. 233. 1 Sid. 402. 2 Vent. 209, 234.

[g] 2 Str. 1221.

A Leaſe for Years rendering Rent with a Condition, that if the Leſſee aſſigneth his Term, the Leſſor may re-enter; the Leſſee aſſigneth, and the Leſſor receiveth the Rent of the Aſſignee (not [h] knowing of the Aſſignment) it ſhall not exclude the Leſſor of his Entry. For the Leſſee ſhall not take Benefit of his own Fraud.

[h] 3 Rep. 64.

In an Aſſignment it is neceſſary, to have Covenants on the Aſſignor's Part, to ſave harmleſs of former Rents, Grants, and Incumbrances; and for the Delivery of Evidences and Deeds; that the Aſſignor is Owner in Poſſeſſion, and hath Power to grant and aſſign; that the Aſſignee may quietly enjoy; to make further Aſſurance. And it is neceſſary to have Covenants on the Aſſignee's Part, to pay the Rent, and to perform Covenants.

An [a] *Authority* or *Truſt* cannot be aſſigned over, unleſs it be granted to one and his Aſſigns. And then it muſt be in Writing. [See 29 *Car.* 2. *ch.* 3.] A [b] *Poſſibility*, Right of *Entry*, or *Thing in Action*, or *Cauſe of Suit*, or *Title* for Condition broken cannot be granted or aſſigned over in Law, as hath been ſaid before. [[c] But the Aſſignment for a good Conſideration will be valid in Equity, and even [d] without Conſideration, as againſt Volunteers] [But ſee 32 *H.* 8. *ch.* 34.] A Thing in *Action*, as a Statute, Bond, a juſt Debt, is vulgarly ſaid to be aſſignable over: But then one muſt ſue for the ſame in the Name of the Aſſignor. So that in reality, it amounts to little more than a Letter of Attorney, to ſue in his Name. One may give or aſſign over his Bond, *i. e.* the [e] Parchment, Paper, and Wax, and the Aſſignee may keep or cancel it. [See

[a] Perkins, Tit. Grants, Sect. 99. 4 Inſt. 85. Finch. 16, 17. 31.

[b] 1 Inſt. 214. a. 10 Rep 48.

[c] 1 Wms. 497, 574. 2 Wms. (608)

[d] 3 Wms 199.

[e] 1 Inſt 232. a. & b.

7 *Ja.* 1. *ch.* 15. What Debts only, may be aſſign'd to the King.] Matters of *Eaſe* and *Pleaſure* granted to a Perſon cannot be aſſigned; as to go to Church over my Ground, to dine at my Table; but generally ſpeaking, Matters of *Profit* may be granted over.

By 1 Ja. 1. ch. 15. *The Eſtates of* Bankrupts *may be aſſigned over by the Commiſſioners; and the Aſſignees may bring Actions in their own Names* [See 5 *Geo.* 1. *ch.* 21. 5 *Geo.* 2. *ch.* 30.]

By 10 & 11 W. 3. ch. 23. *The Judges* Certificate *for taking and proſecuting Felons to Conviction, may be aſſign'd over once.*

By 3 & 4 An. ch. 9. *All* Notes, *whereby any Perſon ſhall promiſe to pay another, or Order, or Bearer, the Money mentioned in ſuch Note, ſhall be due and payable to ſuch Perſon to whom the ſame is made payable. And every ſuch* Note *payable to any Perſon, or Order, ſhall be aſſignable or indorſible over as Inland Bills of Exchange are. And the Perſon to whom ſuch Money is payable, may maintain an Action for the ſame as they might upon ſuch Bill of Exchange. And the Perſon to whom ſuch Note that is payable to any Perſon, or Order, is aſſigned, or indorſed, may maintain an Action againſt the Perſon who ſigned, or any who indorſed the ſame, as in caſe of Inland Bills, and recover Damages and Coſts of Suit.*

[See more in the ſaid Statute of drawing, accepting, and proteſting Inland Bills.]

[f] 1 Roll. Abr. 6. [f] *Note*, That Inland Bills of Exchange are aſſignable by the Cuſtom of Merchants.

1 Ventr. 152, 153. 2 Ventr. 307, 310. 2 Cro. 6. 307. 1 Ld. Ray. 281. There is a Difference betwixt an Inland Bill of Exchange and a Foreign Bill of Exchange, which is made to return Money beyond the Seas. For an Inland Bill (without Cuſtom to ſupport it) is but in the Nature of a Letter; whereas if a Foreign or Outland Bill is refuſed to be accepted, an Action (by the *Law*-Merchant) would always lie againſt the Drawer; and if the Merchant to whom it is directed ſubſcribes the Bill, it is an implied *Aſſumpſit* to pay it. [But ſee 9 & 10 *W.* 3. *ch.* 17. and 3 & 4 *An. ch.* 9. at large; and of an *Aſſumpſit*, *B.* 4. *ch.* 4. *poſt.*]

By 4 An. ch. 16. *Bail-Bonds may be aſſigned over by the Sheriff to the Plaintiff in the Action.*

By 5 Geo. 2. ch. 30. *The Lord Chancellor may* aſſign *over the Bond given to him by any Perſon who has fraudulently or maliciouſly petitioned for a Commiſſion of Bankrupt, to the Party grieved; who may ſue ſuch Bond in his own Name.*

And by 11 Geo. 2. ch. 19. *Replevin Bonds may be aſſigned over by the Sheriff to the Avowant or Perſon making Conuſance.*

2 Black. Com. 323. Shep Touchſt. ch. 16. Of an Exchange. [a] 1 Inſt. 50. b. 12. An *Exchange* (*Excambium*) is a mutual Grant of equal Intereſt, the one in Exchange for the other. It is made by theſe Words, (*viz.*) have given, granted, confirm'd to *A.* and his Heirs and Aſſigns for ever in *Exchange* for, &c. To this Conveyance the Word [a] *Exchange* is ſo appropriated by Law, that it cannot be expreſſed by other Words. Freeholds do paſs without Livery of Seiſin, if the Word Exchange is uſed; but it muſt be by Deed.

[b] Lit. 63, 64, 65. 1 Inſt. 50. a. & b. 51. a. & b. [b] It is neceſſary to the Perfection of the Eſtate, 1. That the *Eſtate* given be equal in Quantity, as Fee-ſimple for Fee-ſimple. But it matters not whether the Things be of equal Value, or of the ſame Nature; ſo that they concern Lands or Tenements. Neither is the Quality or Manner of the Eſtate material; for Jointenants may exchange with Tenants in Common. An Exchange with the King is good, though he is ſeiſed in his politick Capacity, and a Subject in his natural Capacity. 2. The Word *Exchange* muſt be uſed. 3. There muſt be an Execution

by Entry in the Life of the Parties. For if one dies before Entry, the Exchange is void. 4. If it be of Things that lie in Grant, it muſt be by Deed. 5. If the Lands lie in ſeveral Counties, it ought to be by Deed indented. So if the Things lie in Grant, tho' it be in one County. [See 29 *Car.* 2. *ch.* 3.]

This was a Conveyance frequent in [c] former Times; but now ſeldom uſed; except that Parſons ſometimes exchange their Churches, and reſign them into the Biſhop's Hands. But this is not a perfect Exchange, 'till both Parties are inducted. Therefore if either dies before they are both inducted, the Exchange is void, according to the third Requiſite neceſſary to an Exchange juſt now mentioned.

As an Inheritance for an Inheritance, Freehold for a Freehold, Chattels real for Chattels real, may be exchanged; ſo Chattels perſonal or Goods may be exchanged for Chattels perſonal or Goods. But [d] Annuities, which charge the Perſon only, and do not concern Lands or Tenements, cannot be exchanged for Lands or Tenements.

13. A [e] *Surrender* (*Surſum Redditio*) is a Deed or Inſtrument in Writing, teſtifying with apt Words, that the particular Tenant for Life or Years of Lands or Tenements, doth yield up the Eſtate, to him that hath the immediate Eſtate in Remainder or Reverſion, that he may have the preſent Poſſeſſion; and wherein the Eſtate for Life or Years may merge or drown by mutual Agreement. For the Leſſee cannot ſurrender to the Leſſor againſt [f] his Will. But if he, to whom the Surrender is made, does once agree to the ſame, he cannot afterwards diſagree.

He that doth ſurrender is the *Surrenderor*, and he to whoſe Uſe it is made is the *Surrenderee*. It is made by theſe Words, (*viz.*) hath *ſurrendered, granted, given, yielded up,* and *confirmed*, &c.

Surrenders are of [a] *three Kinds*. A Surrender properly taken at *Common Law*, which was juſt now deſcribed. A Surrender of *Copyhold* or cuſtomary Eſtates [b], of which we have ſpoken before. A Surrender *improperly* taken, as of a Deed, a Patent, a Rent newly created, and of a Fee-ſimple to the King.

1. A Surrender at *Common Law* is of *two* Sorts.

1. A Surrender in *Deed*, or by expreſs Words in Writing; where the Words of the Leſſee to the Leſſor prove a ſufficient Aſſent, to give him his Eſtate back again. This is a Surrender in Deed, if the Leſſor agrees to it. There is alſo a Surrender *by* Deed, and that is of Things that lie in Grant.

To make a good Surrender in *Deed* of Lands, theſe Things are requiſite. 1. The Surrenderor muſt be a Perſon able to grant, and to make a Surrender; and the Surrenderee a Perſon able to receive, and take it. 2. The Surrenderor muſt have an Eſtate in [c] Poſſeſſion, and not a bare Right or a future Right. 3. The Surrender muſt be made to him that hath the next [d] immediate Eſtate in Remainder or Reverſion, and there muſt be no Eſtate coming between. 4. The Surrenderee muſt have a higher [e] or greater Eſtate in the Thing ſurrendered than the Surrenderor hath, ſo that the Eſtate of the Surrenderor may be drowned therein; for if Leſſee for Life ſurrender to him in Remainder for Years, [or Tenant for Life ſurrender to Tenant for Life, *Qu.*] Theſe are void Surrenders; becauſe the Eſtate ſurrendered cannot be drowned. 5. There muſt be a [f] Privity of

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[c] 1 Inſt. 50. b. 2 Rep. 74.

[d] 1 Inſt. 50. b.

[e] 1 Inſt. 337 b. 2 Black. Com. 326. Shep. Touchſt. ch. 17. Of a Surrender.

[f] Perk. 607, 608.

[a] 1 Inſt. 338. a.

[b] See p. 132. ante.

[c] 1 Inſt. 338 a.

[d] Perk. 584, 588. 1 Inſt. 337. b. Noy's Max. 73.

[e] Perk. 589, 590. 2 Roll. Abr. 494. cont. 1 Ld. Ray. 402.

[f] 1 Inſt. 338. b.

Eſtate betwixt the Surrenderor and the Surrenderee. 6. The Surrenderee muſt have an Eſtate in his [g] own Right, and not in the Right of his Wife, &c. 7. The Surrenderee muſt be [h] ſole ſeiſed of his Eſtate in Remainder or Reverſion, and not in Jointenancy. Therefore one Jointenant for Life cannot ſurrender to his Companion in Fee. For every Jointenant is ſeiſed of the whole in Poſſeſſion in and thro' the whole Land. 8. The Surrenderee muſt [i] agree to the Surrender, as before obſerved.

[g] Perk. 584, 612, 613.
[h] Perk. 584, 586, 587.
2 Roll. Abr. 494.
[i] 1 Inſt. 337. b.

Surrenders muſt not be made of Eſtates in *Fee-ſimple* or *Fee-tail*, nor of *Rights* or *Titles* only to Eſtates for Life or Years; nor yet of [k] *Part* of an Eſtate for Life or Years, as of ſeven Years out of ten. One may ſurrender an Eſtate for *Life* [l] without Livery of Seiſin; becauſe it is but a Reſtoring the Eſtate again to him in the immediate Remainder or Reverſion. As one may ſurrender an Eſtate abſolutely for *Years*, ſo one may ſurrender an Eſtate for Years determinable upon Lives. And Surrenders may be of Meſſuages, Lands, Commons, Rents, or any Things that are grantable; either abſolutely or upon [m] Condition precedent or ſubſequent. [n] But where Things may not paſs by Way of Surrender, it may enure to other Purpoſes, and take effect by Way of Grant; if there are ſufficient Words in the Deed.

[k] Perk. 615.
Noy's Max. 73.
[l] 1 Inſt. 338. a.
[m] Perk. 624.
2 Str. 1201.
[n] Perk. 588.

If Tenant for Life grants a [o] Rent-Charge, and afterwards doth ſurrender his Land; the Rent-Charge ſhall continue notwithſtanding the Surrender.

[o] 1 Inſt. 338. b.

By 29 Car. 2. ch. 3. *No Eſtates of Freehold, or Terms for Years, or any uncertain Intereſt (not being Copyhold or Cuſtomary Eſtates) ſhall be* aſſigned, granted, *or* ſurrendered, *unleſs by Deed or Note in Writing, ſigned by the Parties making them, or their Agents authorized by Writing, or unleſs by Operation of Law.*

[By 29 Geo. 2. ch. 31. *Minors, Lunaticks, and Femes Covert, who ſhall become intitled to any Leaſe for Lives or Years, may apply to the Courts of Chancery or Exchequer, or the Courts of Equity of the Counties Palatine, or the Courts of Great Seſſions in* Wales, *in a ſummary Way; and may by Order of ſuch Court, by Deed only, without levying any Fine, ſurrender ſuch Leaſe, and take a new Leaſe of the ſame Premiſſes for the like Number of Lives or Term of Years as the old Leaſe was granted for, or otherwiſe, as the Court ſhall direct; which new Leaſe ſhall be ſubject to the ſame Uſes, Truſts, and Incumbrances, as the former Leaſe would have been in caſe the ſame had not been ſurrendered; and ſuch Surrender and Renewal ſhall be as valid as if made by a Perſon of full Age, ſane Mind, or not married.*]

[a] 2. A Surrender in *Law* is that which is wrought by Operation of Law; as if one makes a Leaſe for Years to begin at *Michaelmas* next, and the Leſſee before *Michaelmas* takes a new Leaſe for Years to begin preſently, or at *Michaelmas*; this is a Surrender in Law of the former Leaſe. So if one having a Leaſe, and during the Term takes a new Leaſe, this is a Surrender in Law of the former Leaſe. But a future Intereſt cannot be ſurrendered by Deed in expreſs Words, becauſe there is no Reverſion wherein it may be drowned. So that in ſome Caſes a Surrender in Law is of greater Force than a Surrender in Deed. And this Surrender in Law by taking a new Leaſeholds, tho' the ſecond Leaſe is for a [b] ſhorter Term than the firſt; and tho' the ſecond Leaſe is voidable by a [c] Condition, or tho' the ſecond Leaſe is made to the Leſſee and a Stranger, or to the Leſſee and his Wife, &c. [*Quære*, [d] If an Officer for Life

[a] 5 Rep. 11.
6 Rep. 69.
10 Rep. 67.
1 Inſt. 338. a.
[b] 5 Rep. 11.
2 Cro. 84.
[c] 1 Inſt. 218. b.
3 Cro. 259.
[d] 3 Cro. 198.
1 Ventr. 297.

Life accepts of another Grant of the ſame Office to himſelf and another, whether it is a Surrender of the firſt Grant:] But the ſecond Leaſe muſt be made of the ſame Thing whereof the firſt Leaſe is made; muſt be good in Law and not void; and muſt recite the former Leaſe; [e] or elſe perhaps it will not be conſtrued a Surrender of the former Leaſe.

A [f] Maſter of an Hoſpital (being a ſole Corporation) by the Conſent of his Brethren makes a Leaſe for Years of Part of their Poſſeſſions, and the Leſſee for Years is afterwards made Maſter, the Term is drowned. For one cannot have a Term for Years in his own Right, and a Freehold in another's Right together: As if a Leſſee for Years takes a Feme Leſſor to Wife. But one may have a Freehold in his own Right, and a Term in another's Right. Therefore if a Leſſor takes the Leſſee to Wife, the Term is not drowned; but he is poſſeſſed of the Term in her Right during the Coverture. So if a Leſſee makes the Leſſor his Executor, the Term is not drowned.

In a Corporation aggregate of many, if a Leſſee for Years of Part of their Poſſeſſions is made Maſter, the Term is not extinguiſhed, no more than if the Leſſee had been made one of the Members of the Corporation.

14. A *Revocation* and *new Declaration* is a Deed made purſuant to ſome *Proviſo* contained in a former Deed or Conveyance; giving Power to revoke or call back ſomething granted; and by a new Declaration to create a new Eſtate of the Lands; after which Revocation and Declaration the Lands ſhall ſettle accordingly. [g] Theſe *Proviſoes* containing Power of Revocation are crept into voluntary Conveyances, and are become very frequent, and paſs by raiſing of Uſes according to 27 *H.* 8. *ch.* 10. For being coupled with an Uſe they are allowed to be good, and not repugnant to the former Eſtates. As if one ſeiſed in Fee covenants to ſtand ſeiſed to the Uſe of himſelf for Life, and after to the Uſe of his Son in Tail, with divers Remainders over. Provided, that he may revoke any of the ſaid Uſes; and afterwards he revokes them, he is ſeiſed in Fee again without Entry or Claim. But in caſe of a Feoffment or other Conveyance, whereby the Feoffee or Grantee is in by the Common Law, ſuch *Proviſo* would be merely repugnant and void. [It would be void as to deſtroying the Feoffment; but it might be good, as to revoking the Uſes, to which the Feoffment was made.]

Theſe Revocations are favourably interpreted, becauſe many Mens Inheritances depend upon them. [But ſee 27 *El. ch.* 4. *p.* 225. *ante.*]

[a] Some Things may be revoked of Courſe, tho' they are made irrevocable by expreſs Words; as a Letter of Attorney, a Submiſſion to an Award, a Teſtament or laſt Will; for theſe of their own Nature are revocable.

[A Feoffment, [b] even without Livery, Leaſe and Releaſe, Fine or Recovery, Bargain and Sale tho' not inrolled, or other Conveyance ſubſequent to the Will, tho' the Uſe thereof is declared to the Teſtator in Fee, is a Revocation of the Will *quoad* the Deviſe of the Eſtates comprized in ſuch Feoffment, *&c.* But if a Tenant in Common makes his Will, and deviſes his Moiety, and afterwards by Deed and Fine Partition is made, this is no Revocation [c].] A ſubſequent Marriage, and having Children, hath been held *an implied* Revocation [d] of a Will. And by cancelling one of the Duplicates, the whole is revoked [e]: But Cancelling a former Will by Miſtake, or on a Preſumption that a latter

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[e] 2 Roll. Abr. 496.

[f] 1 Inſt. 338. b.

2 Black. Com. 335, 339.

[g] 1 Inſt. 237. a.

[a] 8 Rep. 82.

[b] 3 Wms. 163. Gibb. 233. Sh. P. Caſ. 154. Sparrow. *v.* Hardcaſtle, in Chan. 3 May, 1754.

[c] 3 Wms. 169.

[d] 1 Wms. 304. Salk. 592. Eq. Ab. 413.

[e] 1 Wms. 346.

[f] 1 Wms. 345. Will is good, which proves void, ſhall not be a Revocation, in [f] Equity, but is properly relievable under the Head of Accident. Neither will a void Will or Codicil be a Revocation, altho' it contains a Clauſe of revoking all former Wills [g].

[g] 1 Wms. 344. [h] Pre. Ch. 32, 33, 183. [i] Caſ. Eq. Abr. 177. 2 Ld. Ray. 968. 2 Wms. 334.

[h] A Diſpoſition of a particular Intereſt in the Eſtate is only a Revocation *pro tanto*, [and ſo is a Mortgage [i].]

[k] Shep. Touchſtone, ch. 20. Of a Statute.

15. A *Statute* is a Bond or Obligation of Record [k]. This Word is alſo uſed for an *Act* of Parliament. But here it is called a Statute, becauſe it is made according to the Form provided by *Statute* or Act of Parliament.

The Debtor, or he that enters into the Statute or Bond, is call'd the *Recognizor* or *Conuſor*, and the Debtee, or he to whom it is made, is called the *Recognizee* or *Conuſee*.

Statutes are of *three* Kinds. A Statute-*Merchant*, a Statute-*Staple*, a *Recognizance*.

2 Black. Com. 160.

1. A Statute-*Merchant* was contrived for the Security of Merchants only; yet at this Day it is uſed by others, and is become one of the Common Aſſurances of the Kingdom. [See 31 *H.* 6. *ch.* 9. 32 *H.* 8. *ch.* 5. and of *Eſtates by Statute-Merchant, ch.* 1. *ante.*]

1 Black. Com. 160.

2. A Statute-*Staple* was invented, and is uſed, only for Merchants and Merchandizes of the ſame *Staple*; and is of the ſame Nature with a Statute-Merchant, and moſt properly called a Statute-Staple. [See 23 *H.* 8. *ch.* 6. 32 *H.* 8. *ch.* 5.] But theſe are almoſt out of Uſe. [See of *Eſtates by Statute-Staple, ch.* 1. *ante.*]

By 33 H. 8. ch. 39. *All Obligations and* Specialties (ſo call'd becauſe they muſt be *ſpecially* and particularly pleaded) *due to the King are in the Nature of Statutes-Staple.*

By 34 & 35 H. 8. ch. 26. § 94. *Perſons having Lands in* Wales *are bound by Statutes in* England.

By 27 El. ch. 4. *Every Statute-Merchant or Staple, muſt be brought to the Clerk of the Recognizances, within four Months after the Acknowledgment thereof, and entered in his Office, or elſe ſhall be void againſt Purchaſors of Lands chargeable therewith, and againſt their Heirs, Executors, Adminiſtrators and Aſſigns.*

3. But there is a Statute-Staple improperly ſo call'd which is a *Recognizance* or Bond of Record, teſtifying that the Recognizor doth owe to the Recognizee a Sum of Money.

[a] 2 Inſt. 678. 2 Black. Com. 160, 342. 4 Black. Com. 424. Shep. Touchſt. ch. 20. p. 353.

Recognizances in general are of [a] ſeveral Sorts.

1. One founded upon the Statute of 23 *H.* 8. ch. 6. By which, *The Chief Juſtices of the* King's Bench *and* Common Pleas *in Term Time, or either of them, or (in their Abſence out of the Term) the Mayor of the Staple at* Weſtminſter, *and the Recorder of* London, *jointly together, have Power to take Recognizances for the Payment of a Debt in this Form,* Noverint Univerſi, *&c. And it ſhall be ſealed with the Seal of the Conuſor, and with the Seal of the King appointed for that Purpoſe, and with the Seal of one of the Chief Juſtices or the Seals of the ſaid Mayor and Recorder, and ſubſcribed with their Names who ſhall take the Recognizance. The Clerk of the Recognizances ſhall inroll ſuch Obligation. The Recognizees, their Executors and Adminiſtrators, ſhall have in every Point againſt ſuch Recognizor, his Heirs, Executors, and Adminiſtrators, like Proceſs, Execution, and Advantage, as hath been had or made upon the Statute-Staple.* [See 8. *Geo.* 1. *ch.* 25. for ſupplying ſome Defects in 23 *H.* 8.] And by 32 *H.* 8. ch. 5. *If the*

1 Inſt. 289. b. 2 Inſt. 678. 4 Rep. 66.

Tenant by Execution be evicted, he ſhall have the Remedy provided for Tenants by Execution upon the Statute-Staple. See 34 & 35 *H.* 8. *ch.* 26. § 94, 95. Concerning Recognizances taken in *England* by Perſons having Lands in *Wales.*

The Execution upon a *Statute* or *Recognizance* purſuant to 23 *H.* 8. *ch.* 6. is called an *Extent.* And the Body of the Conuſor (if he is Lay) and all his Lands, Tenements, and Hereditaments that were in his Hands at the Time of the Acknowledging the Statute or after, and into whoſe Hands ſoever they come, whether corporeal or incorporeal, are liable to the Extent. Lands that are Copyhold are ſubject to the Extent only during the Life of the Conuſor. Goods and Chattels, as Leaſes for Years, Cattle, *&c.* that are in his own Hands, and not ſold *Bona Fide*, and for valuable Conſideration, are liable alſo to the Extent. Shep. Touchſt. 356.

[b] If two or more join in a Recognizance, the Lands of all ought equally to be charged. [b] 3 Rep. 13. 14.

This Kind of Recognizance may be uſed by Merchants or any others, for Payment of Debts, or to ſtrengthen other Aſſurances.

[c] If a Recognizance is to pay a hundred Pounds at five ſeveral Days, (*viz.* twenty Pounds on each Day) preſently after the firſt Failure of Payment one ſhall have Execution upon the Recognizance for the twenty Pounds, and ſhall not tarry till the laſt Day is paſt, as in ſome other Caſes; for this is in the Nature of ſeveral Judgments. [c] 1 Inſt. 292. b. 2 Inſt. 395, 471. 10 Rep. 128. See p. 183. ante.

2. There are *other* Recognizances that may be taken before the Lord Chancellor or Keeper, Maſter of the Rolls, a Maſter in Chancery, a Judge, a Baron of the Exchequer, a Juſtice of Peace, *&c.* Theſe may be to ſeveral Ends and Purpoſes. But the Proceedings on theſe Sorts of Recognizances are different from the Proceedings upon the Statutes and Recognizances firſt mention'd. The Conuſee upon theſe Recognizances ſhall have the ſame Things in Execution, as one may have after a Judgment in the *King's Bench* or *Common Pleas.*

[See 11 *Ed.* 1. *Acton Burnel*, 13 *Ed.* 1. *De Mercatoribus.* 27 *Ed.* 3. *ch.* 9. 13 *El. ch.* 5. 27 *El. ch.* 4. 16 & 17 *Car.* 2. *ch.* 5. 29 *Car.* 2. *ch.* 3. 7 *Geo.* 1. *ch.* 25. and of *Action of Debt, Judgment, Execution*, &c. *B.* 4. *ch.* 4. *poſt.* And ſee 21 *Ja.* 1. *ch.* 26. and of *Felony, B.* 3. *ch.* 1. *poſt.*]

By 5 An. ch. 18. 6 An. ch. 35. *and* 8 Geo. 2. ch. 6. *Judgments, Statutes, Recognizances, ſhall not affect Lands in the* [Eaſt, Weſt, *and* North Ridings *of the*] *County of* York, *unleſs they are regiſtred.*

By 7 An. ch. 20. *Statutes, Recognizances, and Judgments ſhall not bind Lands in* Middleſex, *unleſs regiſtred.*

[*By* 4 G. 2. ch. 26. *All Statutes and Recognizances are to be in the* Engliſh *Language.*]

16. [a] An *Obligation*, according to our Common Law, is a Bond containing a Penalty with a Condition, for Payment of Money, or to do or to ſuffer ſome Act or Thing; if it is *without* Condition, it is called a *Bill*; which is ſometimes with a Penalty, and then it is called a *penal* Bill or ſimple Bond. If it is without Seal, it is a ſingle Bill and no Deed. It may be made to an Infant, but if it is made by him the Obligation is voidable. And it may be made to a Feme Covert, but not by her; for then it is void. [See 9 & 10 *W.* 3. *ch.* 17. For better Payment of Inland *Bills* of *Exchange.* 3 & 4 *An. ch.* 9. Concerning Promiſſory Notes and Bills of Exchange.] [a] 1 Inſt. 172. a. 3 Cro. 515. 2 Roll. Abr. 146. 2 Black. Com. 340. Shep. Touchſt. ch. 21. Of an Obligation.

He that enters into the Obligation or Bond is the *Obligor*, and he to whom it is made is the *Obligee.*

Here we may conſider, 1. The *Form* of an Obligation, 2. The *Condition* of an Obligation, and 3. What *Obligations* and *Conditions* are *void.*

[b] 1 Inſt. 229. b. 230. a.

[c] 2 Roll Abr. 149.

1. As to the *Form*, [b] it may be made in the firſt or third Perſon. In the third Perſon, notwithſtanding 38 *Ed.* 3. *ch.* 4. which doth extend only to Obligations made beyond Sea. But the uſual Way is beſt; as *Know all Men by theſe Preſents, That I*, &c. Yet any Words in Writing on Parchment or Paper, ſealed and delivered, whereby one doth acknowledge himſelf indebted to another, will make a good Obligation. And though a Writing made in the Form of a [c] *Statute* (which the Party ſeals and delivers, but is not ſeal'd by the King), is not a good Statute, yet it may be a good Obligation.

[a] Dyer. 19. 5 Rep 103. 2 Roll. Abr. 148.
[b] 2 Roll. Abr. 146.
[c] 1 Inſt. 208. a.
[d] 1 Inſt. 209. a. 2 Inſt. 398. 2 Roll. Abr. 149. Noy's Max. 105.
[e] 2 Ld. Ray. 1327.
[f] Lit. 734. 1 Inſt. 386. a.
[g] 4 Rep. 22.
[h] 4 Rep. 65. 1 Inſt 8. b.
[i] See p. 110. ante.

A Bond may be made from one to one, from one to two, or more; from two or more, to one, from two or more to two or more. If two or more are bound in an Obligation thus, *We bind ourſelves*, without ſaying more, the Obligation is joint and not ſeveral. [a] But if it be thus, *We bind ourſelves and each of us*, this Obligation is both joint and ſeveral. If the Obligation is thus, [b] *Memorandum that I ſhall pay*, &c. it is good. If one binds himſelf to pay ten Pounds, and does not ſay [c] *when*, the Obligation is good, and the Money is due preſently. If the Obligation is, that I own myſelf indebted to one *to be never paid*, the Obligation is good, and the *Solvendum* void, and the Money is preſently due. So if *A.* binds himſelf to *B.* in twenty Pounds, to be paid to *A.* whereas it ſhould be, to be paid to *B.* the Obligation is good, and the *Solvendum* void. If an Obligation is made without binding the [d] *Executors* by Name, yet they are bound. If an Obligation is made thus. *I bind myſelf, my Executors and Adminiſtrators*, (leaving out *Heirs*) the Executors and Adminiſtrators are bound by it, but not the Heir. Debts due to the King are payable by the *Heir*, [e] tho' he is not named in any Specialty. [See 33 *H.* 8. *ch.* 39.] [f] If one binds his Heirs to pay a Sum of Money, it is void; becauſe the Anceſtor was not bound. [g] Copyhold of Inheritance ſhall not be Aſſets to bind the Heir upon an Obligation. [h] A ſole Corporation, as Biſhop, Parſon, cannot bind their *Succeſſors*, or take an Obligation to their Succeſſors. For no Chattel ſhall go in Succeſſion [i]. But in Caſe of a Corporation aggregate, which never dies, it may go to the Succeſſors.

[k] 1 Inſt. 8. a.

[k] If a Bond is made *to* one and his Heirs, the Heir can never have an Action of Debt upon this Bond made to his Anceſtor and his Heirs. But the Executor or Adminiſtrator muſt ſue, tho' they are not named.

[l] 10 Rep. 133. 2 Roll. Abr. 146, 147, 148. 2 Cro. 261. 3 Cro. 416, 418. Lutw. 422.

[l] An Obligation may be good, tho' it contains falſe *Latin*, falſe *Engliſh*, or tho' *Latin* is put for *Engliſh*, or *Engliſh* for *Latin*, if the Intent of the Parties may ſufficiently appear; therefore if *Johannes* is put for *Johannem*, *Wiginti* for *Viginti*, *Septungintis* for *Septuagintis*, *Sewteen* for *Seventeen*, it is good enough. For the Law doth make a reaſonable and favourable Conſtruction of Deeds and Conveyances to ſupport them if poſſible, according to the Intent of the Parties, but will reject what is uncertain. The principal Things contained in an Obligation are the Parties and the Sum of Money; and when both are ſufficiently expreſſed

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[l] *Mala grammatica non vitiat chartam.* 1 Inſt. 146. b. 6 Rep. 39. 9 Rep. 48.

and underſtood without ſtraining, it will ſerve if the Obligation is well executed. The Sum of Money intended may be often found out by comparing the Obligation and Condition; becauſe the Obligation is uſually in a double Sum, or thereabout, to the Sum mentioned in the Condition. But if the Obligation is to do a collateral Thing, there will be greater Difficulty.

If an Obligation hath not a [m] *Date*, or a falſe or impoſſible Date, *&c.* it is a good Obligation from the Delivery, if ſealed and delivered. If it is made [n] beyond Sea and dated at *Bourdeaux*, it may be ſued here in *England* in what Place the Plaintiff pleaſes, with a proper Averment, as *at* Bourdeaux *in* Iſlington *in the County of* Middleſex.

[m] 2 Rep. 5.

[n] 1 Inſt. 261. b. 2 Roll. Abr. 27.

By 33 H. 8. ch. 39. *All Obligations and Specialties muſt be made to the King thus,* Domino Regi, *and to no other for his Uſe,* Solvendum Domino Regi Hæredibus vel Executoribus ſuis. *And theſe will have the Effect of a Statute-Staple, and if unpaid at the Time of the King's Death, he may diſpoſe of them accordingly, either to his Heirs or Executors.*

[*By* 4 Geo. 2. ch. 26. *All Bonds muſt be in the* Engliſh *Language.*]

2. The *Condition* of an Obligation is either writ under it, or indorſed; and ſo it becomes a Bond conditional; and if the Condition is performed, the Penalty is ſaved. [a] A ſingle Obligation is taken moſt in Favour of the *Obligee*; but an Obligation with a Condition is taken moſt in Favour of the *Obligor*. For the Condition is made for his Benefit.

[a] 1 Saund. 66.

When the Condition of the Obligation is, to do any *lawful* or *poſſible* Thing, ſuch Condition is good, [[b] and the Condition may be legal and good in Part, and illegal and void in other Part.] [c] But if the Condition for Payment of Money be made impoſſible, as to make Payment on the 30*th* of *February*, it ſhall be paid preſently. In all Caſes where the Condition of a Bond or Recognizance is poſſible at the Time of making the Condition; and before the ſame can be performed, the Condition becomes impoſſible by the Act of God, or of the Law, or of the Obligee, then the Obligation is ſaved. But if the Condition is impoſſible at the Time of making the Condition, the Obligation is ſingle. Where the Condition of an Obligation doth conſiſt of two Parts in the [d] Disjunctive, and both are poſſible at the Time of the Obligation made, and afterwards one of them becometh impoſſible by the Act of God, the Obligor is not bound to perform the other Part; for the Condition is made for the Benefit of the Obligor, and he has his Election, to perform the one or the other, to ſave the Penalty of the Bond. [But that this Rule if Law, is at leaſt laid down too generally, [e] appears by ſubſequent Reſolutions.] Otherwiſe, if one Part of the Disjunctive was not poſſible to be performed at the Time of the Obligation made, and the Time when the Condition was to be performed.

[b] 2 Ld. Ray. 1459.

[c] 1 Inſt. 206. a. 5 Rep. 22. Shep Touchſt. 371, &c.

[d] 5 Rep 22. 1 Cro. 398.

[e] Moor 645. 1 Cro. 864. 1 Ld. Ray. 279. 1 Salk. 170. Drummond and Wife, *v.* Duke Bolton, K. B. Mich. 29. Geo 2.

If one binds himſelf to do a tranſitory Act, not tied to a certain Place, as to pay Money, and no [f] *Time* is limited, the Money is to be paid preſently (*i. e.*) in convenient Time. If the Act to be done is *local*, or to be done at a certain Place, and does not in any Manner concern the Obligee or his Benefit, but is to be done by the ſole Act, or Labour of the Obligor himſelf, as to go to *Rome*, and no Time is limited, the Obligor hath Time during his Life to perform it, and cannot be haſtened by Requeſt. And where the Condition of the Obligation is local, and no Time limited, if the Concurrence of the Obligor and Obligee is requiſite, the Obligor hath Time during his Life to perform it, unleſs the Obligee haſten

[f] 6 Rep. 30, 31. 1 Inſt. 208. a. & b. 209 a. 219. a. & b. 1 Roll Abr. 437.

haſten it by Requeſt: But if the Obligor may perform it in the Abſence of the Obligee, and it is for his Benefit, there the Obligor ought to do it in convenient Time, and hath not Time during his Life.

[g] If the Condition of an Obligation is to pay Money, or to do the like tranſitory Act, to the Obligee on a certain *Day*, and no *Place* is named where it ſhall be paid, the Obligor muſt at his Peril ſeek out the Obligee, if he is within the Kingdom at the Time when the Thing is to be done. But if the Condition of the Bond is to deliver twenty Quarters of Wheat, the Obligor is not bound to carry it about and ſeek the Obligee, but the Obligor, before the Day muſt go to the Obligee, to know where he will appoint to receive it, and he muſt deliver it accordingly. [a] And if the *Place* is certain, and the Payment may be at any Time during Life, yet the Obligor cannot tender the Money when he will, but he muſt firſt give the Obligee Notice to attend. [b] If a Place is named, and the Money is paid at any other Place, and even received before the Day, the Condition is performed. For it was a Duty preſently, and is to be eſteemed Payment at the Day. It is moſt adviſeable to appoint the Money to be paid at a certain Time and Place; and then the Obligor is not bound to ſeek the Obligee in any other Place, nor to be there longer than is comprized in the Condition, nor is the Obligee bound to receive it in any other Place. If a Man is bound to pay Money at [c] ſeveral Days, the Penalty is not forfeited till all the Days are paſt. But if the Bond is with a Condition, it may be ſo worded, as to enable the Obligee to ſue the Penalty upon the firſt Default. Where the Obligor is to do any [d] *collateral* Thing, or which is not Parcel of the Obligation, as, to deliver a Horſe, to ſtand to an Award, if the Obligor does his Part, and the Obligee refuſeth, the Condition is perform'd, and the Obligation diſcharged for ever. When the Condition is for Payment of Money, (to the Party, not to a Stranger) then if the Obligee [e] accepts a Horſe, or other Thing, in Satisfaction, it is good. But if the Condition was for the *Delivery* of a Horſe, or any other collateral Thing, there tho' the Obligee accepts of Money in lieu of the Horſe, it is no Performance of the Condition. And ſo it is in all other collateral Conditions. Where the Condition is for Payment of twenty Pounds, the Obligor cannot pay a [f] leſſer Sum in Satisfaction of the whole, becauſe a leſſer Sum cannot be a Satisfaction for a greater. But if the Obligee, after he hath received Part, doth give an Acquittance under his Seal in full Satisfaction of the whole, it is ſufficient. [g] If the Obligor is bound by Condition to pay ten Pounds at a certain Day, and at the Day the Parties do account together, and the Obligee did owe five Pounds to the Obligor, and that Sum is allowed, and the Reſidue paid. This is a good Satisfaction; tho' the five Pounds was not paid, but by Way of Retainer.

If the Condition is to pay twenty Pounds of lawful Money of *Great Britain*, and the Obligor pays the Money in [h] any foreign Coin made current here by Act of Parliament or Proclamation, this is a good Performance of the Condition. But a Payment in [i] Farthings is no good Payment.

In all Caſes when the Condition is not performed, the Obligation is *forfeited*; and till then it cannot be forfeited. And yet, if the Obligee himſelf is the [k] Cauſe of the Breach of the Condition, or if he is to do the firſt Act, and will not do it; or the Thing to be done by the Condition is now become impoſſible by the Act of God, or of the Law; the Obligation is not forfeited, but diſcharged for ever.

[g] Lit. 340. 1 Inſt. 210. b.

[a] 1 Inſt. 211. a.

[b] 1 Inſt. 212. a. & b. 1 Roll. Abr. 456.

[c] 8 Rep. 153. 1 Inſt. 47. b. 292. b. See p. 183. ante.

[d] 1 Inſt. 207. a.

[e] 9 Rep. 78. 1 Inſt. 212. b.

[f] 5 Rep. 17. 1 Inſt. 212. b.

[g] 1 Inſt. 212. b. 213. a.

[h] Terms of the Law, verb. Coin. 1 Inſt. 207. a. & b. Dav. 18.

[i] 2 Inſt. 577.

[k] 1 Inſt. 206. a. & b. 1 Rol. Abr. 449, 450, 451, 452.

In the *Condition* of a *Counter-Bond* to ſave a Surety harmleſs ſuch general Words, (*viz.*) *To ſave Harmleſs* may be ſufficient. But it is the beſt Way (after the Repetition of the Obligation and Condition) to fix a certain Time for the Payment of the principal Money upon Default of which the Penalty of the Counter-Bond to be forfeited. Otherwiſe you will be in continual Danger of being ſued by the Neglect of Payment of him for whom you were Surety.

By 4 An. ch. 16. *In Debt upon Bond, if the Defendant before Action brought hath paid the Principal and Intereſt due by the Condition, or Defeazance, tho' not ſtrictly according to the Condition, he may plead Payment in Bar. And pending an Action on Bond with a Penalty, the Defendant may bring into Court Principal, Intereſt, and Coſts in Law and Equity; and the Court ſhall give Judgment to diſcharge the Defendant.*

3. Obligations and Conditions are *void* if they are [a] *unlawful.* Alſo the Obligation is void by the *Performance* of the Condition, or by a *Releaſe* of it. If the *Condition* is *uncertain* or *unintelligible*, it is void, tho' the Bond is good. If an Obligation is made to me, and delivered to *J. S.* for my Uſe, and when it is tendered to me I do [b] *diſagree* to it, it is void. If an Obligation is made to my Wife, and I diſagree to it, it is void. If an Obligation *depends* upon, or is neceſſary to, ſome other Deed, and the Deed becomes void, the Obligation is alſo void.

By 23 H. 6. ch. 10. *Obligations of any Perſon in Ward for Appearance at the Day mention'd in the Writ are void, if they are not made to the Sheriff, and in ſuch Manner as by that Statute is appointed.*

See 33 H. 8. ch. 39. *And of* Statutes, *ſupra.*

By 5 and 6 Ed. 6. ch. 16. *Bonds that concern the buying and ſelling of Offices are void.*

By 13 El. ch. 5. *Bonds made to avoid the Debt or Duty of others, ſhall (as to the Party whoſe Debt or Duty is endeavoured to be avoided) be void.*

By 14 El. ch. 11. *All Bonds with Conditions for enjoying Spiritual Livings contrary to* 13 El. ch. 20. *are made void.*

By 7 and 8 W. 3. ch. 7. *All Contracts. Bonds, and Securities given to procure any Return of any Member of Parliament, or any Thing relating thereto, ſhall be adjudged void.*

By 4 An. ch. 14. *All Inſtruments and Agreements for Farming or Purchaſing Charity Money upon* Briefs *are declared void. And the Purchaſer is to forfeit* 500 l. *for the Uſe of the Sufferers, to be recovered by Action of Debt, Bill, Plaint or Information.*

By 12 An. Seſſ. 2. ch. 16. *Bonds upon Uſury for Payment of more than five* per Cent. *are void.*

The 16 Car. 2. ch. 7. *and* 9 An. ch. 14. *make Bonds and all other Securities for Money won by Gaming void.*

17. A [c] *Defeazance* (from *Defaire*, to defeat or undo) is a Condition relating to a Deed, which being performed, the Act is defeated or made void. The Difference betwixt a *Condition* and a *Defeazance* is that the Condition is inſerted in the Deed, and a Defeazance is uſually a Deed by itſelf, relating to another Deed: Therefore to make a good Defeazance [to defeat another Deed] it muſt be, 1. By Deed. 2. It muſt recite the Deed it relates to, or at leaſt the moſt material Part of it. 3. It muſt be made between the ſame Perſons that were Parties to the firſt Deed. 4. It muſt be made *at* the Time or *after* the firſt Deed, not before it. 5. It muſt be made of a Thing defeaſible.

[a] 10 Rep. 101. 11 Rep. 53. 1 Inſt. 206. b. See p. 226. ante.

[b] 5 Rep. 119.

[c] 1 Inſt. 236. b. 237. a 1 Rep. 113. 2 Black. Com. 327, 342. Shep. Touchſt. ch. 22. Of a Defeazance.

Eſtates of Inheritance, Leaſes for Years, Rents Annuities, Conditions, Covenants, by mutual Conſent, may be ſubject to a Defeazance or Diſcharge. But the Practice is to make Defeazances upon Statutes, Obligations, and Judgments. Inheritances *executory* may be defeated by Defeazances made *at* the Time or at any Time *afterwards*. And ſo of Statutes, Obligations, and Judgments. But Inheritances *executed* by Livery, cannot be defeated by Defeazances made afterwards, but at the Time of the Feoffment they may *.

[a] 1 Inſt. 111. a. 2 Black. Com. ch. 23. 373. per tot. to 383. Shep. Touchſt. ch. 23. of a Teſtament.

18. [a] A *Deviſe* (from *Deviſer*, to ſpeak) is a Bequeathing of Lands or Tenements by laſt Will in Writing. He that gives away his Lands in this Manner, is the *Deviſor*, and he to whom the Lands are given, the *Deviſee*. A *Teſtament* rather concerns Goods and Chattels, of which I ſhall ſpeak in the *6th Chapter*; though theſe Words, *Deviſe*, *Teſtament*, and *laſt Will* are often confounded.

[b] 1 Inſt. 386. a.

[b] A Deviſe in Writing is no Deed, but an Inſtrument, by which Lands are conveyed. I am ſpeaking of Deeds or Inſtruments.

[c] 4 Rep. 61. 1 Lev. 6.

A Woman Covert, an Infant, Idiot, or *Non Compos Mentis* cannot make a Deviſe of Lands. A Woman Covert cannot do it without the Conſent of her Huſband. [See 34 & 35 *H.* 8. *ch.* 5.] [c] If a ſingle Woman doth deviſe Lands, and afterwards takes a Huſband, it is a Countermand of the Will.

[d] 1 Inſt. 111. b. 2 Inſt. 7.

Lands and Tenements were deviſable by [d] Cuſtom only: For at Common Law, in Favour of Heirs, no Lands or Tenements in Fee-ſimple were deviſable by laſt Will; nor could they be transferr'd from one to another but by ſolemn Livery of Seiſin, Matter of Record, or ſufficient Writing. But now,

[e] 3 Rep. 30, 31, 32, 33, 34. 1 Wms. 575. 1 Rep. 25.

[f] See of Mortmain, poſt. ch. 4.

By 32 H. 8. ch. 1. *and* 34 & 35 H. 8. ch. 5. [e] *All Perſons having a ſole Eſtate or Intereſt in Fee-ſimple, or in Coparcenary, or in Common, in Fee-ſimple, of and in any Manors, Lands, Tenements, Rents, or other Hereditaments, in Poſſeſſion, Reverſion, or Remainder, or of Rents or Services incident to any Reverſion, or Remainder, ſhall have full and free Liberty to give, diſpoſe, will, or deviſe to any Perſon or Perſons (except Bodies politick or corporate* [f]*) by his laſt Will and Teſtament in Writing, or otherwiſe by any Act or Acts lawfully executed in his Life-Time, all his ſaid Manors,* &c. *at his own free Will and Pleaſure; except that Wills and Teſtaments of Manors,* &c. *made by Feme Coverts, Infants, Idiots, Perſons of* non-ſane *Memory, ſhall not be good in Law.*

Theſe Acts, as to the other Parts of them which relate to the Tenure of the Lands, &c. are altered by 12 *Car.* 2. *ch.* 24.

[g] Lit. 586. 1 Inſt. 111 a. 112.a. 322.b.

[h] Gibb. 233.

[a] See Revocations ante.

[g] So that now by theſe Statutes a Man that hath Lands, Tenements, Rents, or Reverſions, in *Fee-ſimple*, may deviſe them either in Fee-ſimple, Fee-tail, for Life or Years, abſolutely or conditionally, at his Pleaſure; and this without Livery of Seiſin or Attornment of Tenants, or naming an Executor, becauſe the Deviſe is made by Virtue of an Act of Parliament. [But *Note*, That a Will is an imperfect Conveyance, inchoate only, and ambulatory (as it is termed) till the Death of the Teſtator, and [h] therefore the Eſtate deviſed muſt continue in the Teſtator in the ſame State and Condition till his Death; for any Alteration therein (except under ſome particular Circumſtances [a]) by any Act of the Teſtator will be a Revocation of the Deviſe.]

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* *Quæ incontinenti fiunt ineſſe videntur.* 1 Inſt. 236. b. 2 Rep. 71.

Lands

[b] Lands purchaſed after the making of the Will cannot paſs without a new Publication by the Deviſor. [But this muſt be underſtood of Freeholds only, and not *Chattels* real [c]. And if the Teſtator has entered into Articles for the Purchaſe, ſo as to have an equitable Title to the Eſtate * before the making his Will, the Eſtate will paſs thereby.]

[b] Plowd. 343, 344.
1 Cro. 493.
1 Wms. 575.
[c] Ibid.
3 Wms. 169, 170.
* 2 Vern. 679.
2 Wms. (631.)

Lands in [d] *Tail* are not deviſable by Will, nor *Copyhold* Lands †, unleſs by Surrender to the Uſe of one's laſt Will. [But an Equity of Redemption [e] of a Copyhold Eſtate, and therefore alſo a Truſt or equitable Intereſt in a Copyhold may be deviſed without any Surrender. And by the later Opinions it will paſs by Will not atteſted by three Witneſſes [f], as the legal Eſtate will.] One that hath a Leaſe for *Years* of Lands might always deviſe the ſame as other Goods and Chattels.

[d] 1 Inſt. 111. a.
† See p. 131. ante.
[e] 3 Wms. 360.
[f] 2 Wms 261.

A Deviſe of Land by Tenant in Tail, [g] to a Charity, is good; though there be no Fine levied, nor Recovery ſuffered previous thereto. [*Qu.*] [But a Deviſe to a Charity by a nuncupative Will was not good before the Statute of Frauds, nor by a Will not atteſted [h] according to that Statute ſince.] [But ſee of *Alienations* in *Mortmain*, *ch.* 4. *poſt.*]

[g] 2 Vern. 453.
1 Wms. 247.
[h] 2 Vern. 597.
Prec. Ch. 270.

The Statutes of Wills do not take away a Cuſtom to deviſe Lands.

1 Inſt. 115 a.

By 29 Car. 2. ch. 3. *Any Eſtate held* pur auter vie, *is deviſable by* Will, *atteſted by three Witneſſes.*

But all Deviſes of Lands or Tenements, deviſable either by the Statute *of Wills, or this* Statute, *or by force of* Cuſtom, *muſt be in Writing, ſigned by the Deviſor, or by ſome other Perſon in his Preſence and by his expreſs Direction, and atteſted and ſubſcribed in his Preſence by three or four credible* [See 25 G. 2. ch. 6.] *Witneſſes, or elſe to be utterly void. And*

1 Wms. 741.

No Deviſe in Writing ſhall be revocable other than by ſome other Will or Codicil in Writing, or other Writing declaring the ſame, and ſigned in the Preſence of three or four Witneſſes, or elſe by burning, tearing, cancelling, or obliterating by the Teſtator, or in his Preſence, and by his Directions and Conſent.

Pr. Ch. 459, 514.

Where there is a Power to appoint an Uſe of Land by Deed or Will; a Will atteſted only by two Witneſſes is not a good Appointment: For, it is to be underſtood, ſuch a Will as is proper to diſpoſe of Lands. So tho' it be by *any Writing in the Nature of a Will.*

1 Wms. 741.
Comy. 451.
2 Wms. 258.

[i] A Will publiſhed in the Preſence of three ſeveral Witneſſes, at three ſeveral Times, and atteſted by them ſeverally at the reſpective Times in his Preſence, is within the Statute. [And it is not neceſſary that the Teſtator ſhould actually ſign it in the Preſence of the Witneſſes, but if he acknowledges it to be his Hand, it is ſufficient, for the Statute only requires three Things: 1ſt, That the Will be in Writing. 2dly, That it be ſigned by the Teſtator. 3dly, That it be ſubſcribed by three Witneſſes at leaſt, in the Preſence of the Teſtator [k].]

[i] Pr. Ch. 184.
3 Lev. 1.
3 Wms. 254.
[k] Spencer *v.* Moor, in Chan. July 17. 1752.
Ellis *v.* Smith, in Chan. Eaſt. Term, 1754. expreſs in Point.

A Will of Lands in *England*, tho' made beyond Sea, muſt be atteſted by three Witneſſes.

l 2 Wms. 295.

A Will being written with the Teſtator's own Hand, and beginning I *A. B. &c.* was adjudged to be a good [a] Signing. For the Statute does not direct whether the Signing ſhall be at the Top or Bottom of the Will. [b] Sealing is not neceſſary. But if there is a Sealing, it is a Signing too. [*Qu.*]

[a] 3 Lev. 1.
[b] 2 Danv. Abr. Tit. Deviſe, 542.

* If the ſecond Will cannot be found, and the Contents of it are unknown, it is no Revocation of the former Will.

* Salk. 592.
Sho. P. Caſ. 146.

When a Deviſe is perfected by the Death of the Teſtator, it as much alters the Property of Lands, as Acts executed by Deed in his Life-time. Hereby Deſcents are prevented. And therefore he that takes Lands by Deviſe is in the Nature of a Purchaſer. [c] So that when one ſeiſed in Fee deviſeth in Tail, for Life, or Years, the Deviſee may enter; for the Freehold or Intereſt in Law is in the Deviſee before he doth enter. The Executors have nothing to do in this Caſe; and therefore their Aſſent is not to be expected. [If the Deviſee dies in the Life-time of the Teſtator, though the Deviſe is to him and his Heirs, the Deviſe lapſes for the Benefit of the Teſtator's Heir at Law; and ſo it is where the Deviſe is in Tail [d]; and ſo it is likewiſe where the Deviſe is of Copyhold Lands [e].]

* There are many Things good by a *Deviſe*, which are not good by *Deed*.

A Man may by Will give Lands to his [f] *Wife*, becauſe the Deviſe does not take effect till after the Deceaſe of the Huſband. If one doth deviſe, that after the Deceaſe of his Wife his Son and Heir ſhall have the Houſe wherein he dwells, [g] ſhe ſhall have it for her Life, tho' not deviſed unto her by expreſs Words. And a Feme Covert ſeiſed of Lands in Fee to her ſeparate Uſe, with Power of Appointment by Deed or Will, may deviſe them to her Huſband [h] as well as to any other Perſon.

* If Lands are deviſed in Fee, to an Heir, chargeable with an Annuity; he takes by Deſcent; the Deviſe not making any Alteration of the Eſtate, but conveying the ſame Eſtate, as the Law would by Deſcent, tho' charged with an Incumbrance. [And though where a Deviſe is to one who would otherwiſe take the ſame Eſtate by Deſcent, (which Rule extends to Copyholds alſo [i]) the Deviſe is void, and he ſhall take by his better Title; yet if the Deviſe is to one of two Coheirs, the Deviſee ſhall take the whole by Deviſe, and no Part by Deſcent [k].]

* A Codicil ſigned and publiſhed in the Preſence of three Witneſſes, may amount to a Republication of a Will; and both make but one Will.

The *firſt* Grant and the *laſt* Will is of greateſt Force. For a Will may be countermanded by a later Will, even till the Time of the Death of the Deviſor.

A Deviſe or Teſtament is to be [l] favourably expounded according to the Meaning of the Deviſor or Teſtator. [And in a Deviſe there are no technical Words neceſſary to the Creation or Limitation of the Eſtate of the Deviſee; Words that ſhew the Deviſor's Intention are ſufficient, and that Intention ſhall take Effect if conſiſtent with the Rules of Law; and every Word if poſſible ſhall have its Effect.]

And therefore if one doth deviſe by his Will all his Lands and Tenements, by Virtue of the Word *Tenements* even thoſe Lands ſhall paſs which the Deviſor hath in Reverſion.

If Lands are deviſed to a Man [a] *for ever*, or to him and his Aſſigns *for ever* (without the Word *Heirs*) the Deviſee ſhall have a Fee-ſimple. If he deviſe his Land to another [b] *to do with it as he pleaſeth*, this is a Fee-ſimple.

If one by his laſt Will and Teſtament deviſeth the Lands or Tenements to a Man and his *Heirs* [c] *Male*, this is an Eſtate in Tail in a Will, the Law ſupplying the Words, of his *Body*.

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[c] Lit. 167. 1 Inſt. 111. a.

[d] 1 Str. 25. 1 Wms. 397. S. C.

[e] 1 Str. 445.

* 1 Wms. 20.

[f] Lit. 168. 1 Inſt. 112. b.

[g] Terms of the Law, v. Deviſe. Noy's Max. 100.

[h] See p. 60. ante.

* 1 Ld. Ray. 728. 1 Lutw. 793.

[i] 1 Rol. Abr. 626. 1 Str. 491.

[k] 2 Ld. Ray. 829.

* Comy. 381.

[l] Lit. 586. Terms of the Law, v. Deviſe. 1 Inſt. 112. b. 322. Noy's Max. 99. 2 Wms. 673. 282.

[a] Lit. 586. Terms of the Law, v. Deviſe. 1 Inſt. 9. b. 322. b.

[b] Terms of the Law, v. Deviſe.

[c] 1 Inſt. 27. a. Terms of the Law, v. Deviſe.

[A Deviſe to the Heirs Male of the Body of *J. S.* is good to paſs the Eſtate to him who is Heir Male tho' not Heir General, and he ſhall take as a Purchaſer[d].]

Many Words do make a[e] *Condition* in a Will, which make no Condition in a Deed, as before hath been obſerved.

In a Will where there are[f] divers Deviſes of the ſame Thing, the laſt Deviſe taketh Place. [*Qu.*]

In theſe Inſtances (amongſt others) the Conſtruction of a Deviſe and a Deed do differ.

[g] When you intend to deviſe your Lands by Will, 1. Make it by good Advice, while you are in perfect Health. 2. If your Will concerns Inheritance, make it indented, and leave one Part with a Friend, leſt after your Death it be ſuppreſſed. 3. At the Time of the Publication of your Will, call three credible Witneſſes at leaſt, to ſubſcribe their Names to it in your Preſence. [See 29 *Car.* 2. *ch.* 3. *ante.*] 4. If it may be, let the whole Will be written in one Hand, and in one Parchment or Paper. 5. Let the Hand and Seal of the Deviſor be ſet to it. 6. If it be in ſeveral Parts, let the Deviſor's Hand and Seal, and the Names of the Witneſſes, be ſubſcribed to each Part. 7. If there be any Interlining or Raſure in the Will, let a *Memorandum* be made of it. 8. If you make any Revocation of your Will, make it by Writing with good Advice. [See again 29 *Car.* 2. *ch.* 3.]

By 3 & 4 W. & M. ch. 14. *All Wills concerning Lands, Tenements, or Hereditaments, or any Rents, Profits, Term, or Charge out of the ſame whereof the Deviſors ſhall be ſeiſed in Fee-ſimple, in Poſſeſſion, Reverſion, or Remainder, ſhall be deemed to be fraudulent and void as againſt Creditors upon Bonds or other Specialties, their Heirs, Succeſſors, Executors, Adminiſtrators, and Aſſigns. And ſuch Creditors ſhall have their Actions of Debt againſt the Heirs at Law of the Obligees and ſuch Deviſees jointly.*

Deviſees ſhall be chargeable on Action of Debt to the Value of the Land by them ſold, though the ſame be alien'd before Action brought.

2 Danv. Abr. Tit. Deviſes.

See 2 & 3 *An. ch.* 4. 5 *An. ch.* 18. 6 *An. ch.* 35. and 8 *Geo.* 2. *ch.* 6. For Regiſtring *Wills* that concern Lands in the County of *York.* 7 *An. ch.* 20. For Regiſtring *Wills* that concern Lands in the County of *Middleſex.* 3 *Geo.* 1. *ch.* 18. For Inrolling Wills of *Papiſts,* relating to real Eſtates, in one of the Courts of Record at *Weſtminſter,* or at the Quarter-Seſſions where the Eſtates lie, within ſix Months after the Teſtator's Death. And 28 *Geo.* 2. *ch.* 10. And other Acts for enlarging the Time, whereby no ſubſequent Purchaſe by a Proteſtant ſhall be impeached by reaſon of the Non-inrollment of ſuch Will through which the Title is derived.

Theſe are the ſeveral *Sorts* of *Conveyances.* Yet it is to be obſerved, that there are divers other Kinds of Deeds. For every Agreement in Writing ſealed and delivered is a Deed; as Commiſſions, Authorities, Licences, and ſeveral other Inſtruments concerning Merchants and other Affairs. I come now to ſhew,

5. How *Deeds* are made *void.*

[a] Tho' a Deed is well made, ſealed, and delivered, and well teſtified by Witneſſes, yet it may be made *void,* when got by *corrupt Agreement* or *Fraud*; or when got by *Force,* or by putting into a juſt[b] Fear of one's Perſon, or by *Dureſs* of Impriſonment; or it may be made void by Reaſon of *Infancy,* or *Coverture,* or *Unſoundneſs* of *Mind*; For *Incertainty*;

[d] 1 Str. 35. 2 Vern. 729.

[e] 1 Inſt. 236. b.

[f] Plow. 341. 1 Inſt. 112. b.

[g] 3 Rep. 36.

[a] 2 Rep 3, 9. 5 Rep. 119. 11 Rep 27, 28 2 Roll. Abr. 28.

[b] 1 Inſt 253 b. 2 Inſt 483. 1 Roll. Abr. 687.

c 5 Rep. 119. 10 Rep. 92. 11 Rep. 27, 28. 1 Inſt. 225. a. 1 Cro. 626, 627. 3 Cro. 399. 2 Roll. Abr. 28, 29. d 5 Rep. 23, 119. 11 Rep. 28. 2 Roll. Abr. 30.

By *Diſagreement* of him for whoſe Uſe it is made; By [c] *Raſure* or *Interlining* without Conſent. A Raſure or Interlining ſhall be preſumed to be made at the Time of making the Deed, if the contrary is not proved. [d] By *breaking* off the *Seal*, By *Concord*, *Releaſe*, &c. By *Judgment* of Court.

Having now ſhewed, how Property in Lands may be gained by *Occupancy*, *Deſcent*, and *Purchaſe*, I proceed to ſet forth how Property in Lands may be gained by *Preſcription* and *Eſcheat*.

By Preſcription. e 2 Black. Com. ch. 17. of title by Preſcription. 1 Inſt. 113 a. f Lit. 170. 1 Inſt. 115. a. & b. 2 Inſt. 95, 96, 238, 653. g Lit. 170, 183. 1 Inſt. 113. b. 115. a. 121. a. 1 Ventr. 386, 487, &c.

IV. [e] *Preſcription* is a Title by Uſe and Time allowed by Law. It ſuppoſes a Deſcent cr Purchaſe originally. [f] To make ſuch a Title to an Inheritance, the Time by *Common Law* is Time whereof there is no Memory of Man to the contrary; which is no limited Time. By *Statutes* Preſcription may be *within* Memory.

[g] A Preſcription *properly* ſo called, (as it relates to an Inheritance) is to be Time out of Mind, and is for the moſt part *Perſonal*; being made in the Name of a certain Perſon and his Anceſtors, or thoſe whoſe Eſtate he has, or of a Body politick or corporate, and their Predeceſſors; as when *J. S.* ſeiſed of the Manor of *D.* in Fee, ſhews that he and his Anceſtors, and all thoſe whoſe Eſtate he hath in the ſaid Manor, have Time out of Mind of Man had and uſed to have Common of Paſture, in ſuch a Place (being the Land of another) as appertaining to the ſaid Manor. Tenant in Fee-ſimple ought to preſcribe in his own Name: Tenant for Life, Years, at Will, in the Name of him who hath Fee. Natural Perſons cannot gain or be charged by a general Preſcription from their Anceſtors; tho' Bodies politick may gain or be bound by Preſcription *only*. He that would have a Thing that lies in *Grant* by Preſcription, muſt preſcribe in himſelf and his Anceſtors, whoſe Heir he is by Deſcent; not in himſelf and thoſe whoſe Eſtate he has; (unleſs the *Que Eſtate* is but a Conveyance to the Thing claim'd by Preſcription, as in the former Caſe) for he cannot have their Eſtate that lies in Grant without Deed, which ought to be ſhew'd to the Court. But of Things that are appendant to a Manor, Lands, or Tenements, it is otherwiſe; becauſe the Manor, *&c.* might paſs without Deed. [h] Nothing can be preſcribed for, which cannot be raiſed by Grant at this Day. One cannot make Title to *Land* by Preſcription, but only to Rent or Profit out of Land. It relates to a [a] Fee-ſimple, and is always applied to incorporeal Inheritances. I am ſpeaking of Preſcription ſtrictly taken. A *Cuſtom is local*, and is alledged in no Perſon; but is within ſome Manor or other Place: As that there is a Cuſtom Time out of Mind within the Manor of *A.* that all the Copyholders of the ſaid Manor have had and uſed to have Common of Paſture in ſuch a Waſte of the Lord, Parcel of the ſaid Manor.

h Finch 132. 1 Ventr. 387. 2 Roll. Abr. 264. a 4 Rep. 31, 32. 1 Inſt. 113. b. 6 Rep. 60.

4 Rep. 31, 32.

Thus it muſt be, when a Copyholder alledges a Cuſtom againſt his *Lord*. For a Copyholder cannot lay a Preſcription in himſelf and his Anceſtors by Reaſon of the Baſeneſs of his Tenure. Therefore this is allow'd for Neceſſity. But when he claimeth Common or other Profit in the Soil of a *Stranger*, he muſt preſcribe in the Name of the Lord of the Manor, *(viz.)* That the Lord of the Manor and all his Anceſtors, and all thoſe whoſe Eſtate he hath, have had Common in ſuch a Place for themſelves and Tenants at Will, *&c.* Cuſtom (I ſay) is local, and alledged in no Perſon; and this ſerveth for them who cannot preſcribe in their own Name, nor in the Name of any certain Perſon, as Inhabitants of a Town. Alſo a Cuſtom may be alledged, when it is referred to inſenſible Things, as that all ſuch Lands are deviſable.

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[e] *Præſcriptio eſt titulus ex uſu et tempore ſubſtantiam capiens ex authoritate legis.* 1 Inſt. 113. a. & b.

But to ſpeak in general of *Cuſtoms* and *Preſcriptions* without Diſtinction.

To *Cuſtoms* and *Preſcriptions*, [b] *Poſſeſſion* and *Time* are inſeparably incident. *Poſſeſſion* muſt be long, continual, and peaceable. *Time* (as hath been ſaid) by Common Law muſt be beyond the Memory of Man. But if there is a ſufficient Proof by Record or Writing to the contrary, then it is within the Memory of Man.

[c] A Preſcription muſt not be laid in an *Uncertainty*, or in the *Diſjunctive*, nor againſt the *Publick* Good; as to do a Thing which is a Nuſance; nor againſt *Reaſon* or *Religion*, nor as to a mere *Negative.*

[d] Tenants in Common may be by Preſcription; but not Jointenants, becauſe there is a Survivorſhip betwixt them; nor Tenants at Will. In that Caſe of Tenancy in Common one may make Title to *Lands* by Preſcription. [e] An Attorney at Law may preſcribe, that he and all the Attornies of the Court have uſed to have Time out of Mind ſuch a Privilege. Such a Preſcription may be in General; and it is called here a Preſcription, becauſe it is applied to *Perſons* not to a *Place.* It may be laid in a great many, where it tends but to claim an *Eaſement* or *Diſcharge*, not Matter of Intereſt and Profit. A Man may preſcribe, that all the Inhabitants of the Pariſh have uſed to be buried in the Church-yard, though they are not a Corporation.

No one can preſcribe againſt the [f] King, where he hath an Eſtate permanent, and a certain Intereſt, nor againſt an Act of Parliament. None can preſcribe directly to Goods and Chattels of Traitors. Felons, Felons of themſelves, Fugitives, of thoſe that are put in Exigent, Deodands, Conuſance of Pleas, to make a Corporation, to make a Coroner, *&c.* But one may make Title by Uſage or Preſcription only to Treaſure-Trove, Waifs, Eſtrays, Wreck of Sea, to hold Pleas, Courts-Leet, Hundreds, to have a Park, Warren, Royal Fiſhes, Fairs, Markets, Frank Foldage, the Keeping of a Gaol, Toll, to have a Corporation by Preſcription, *&c.*

The Title being once gained by Cuſtom or Preſcription, it cannot be loſt by [a] *Interruption* of the *Poſſeſſion* for ten or twenty Years; but it may be loſt by Interruption in the *Right*; as if one hath had a Rent or Common by Preſcription, Unity of Poſſeſſion (or a Poſſeſſion of the Land with the Rent or Common) of as high and durable Eſtate, is an Interruption in the Right. A *Modus Decimandi* being alledged by Preſcription for Tithes of Lambs; the Payment of Tithe-Lamb in *Specie* for twenty Years laſt paſt did not deſtroy the Preſcription. If one that hath Title to a Common by Preſcription taketh a Leaſe of the Land, after the Expiration of the Leaſe, he may ſtill claim by Preſcription: For the Suſpenſion was only of the Poſſeſſion.

By Unity of Poſſeſſion, Preſcriptions for Matters of Intereſt and Profit, as Rents or Commons, are extinguiſhed; but Preſcriptions for Eaſements, as for Lights or Air, are not extinguiſhed by Unity of Poſſeſſion: But after the Unity of Poſſeſſion is determined, and the Things ſevered, the Eaſements will revive. And,

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[b] 1 Inſt. 113. b. 114 a. 115. a. 2 Str. 909. See p. 6. ante.

[c] 1 Roll. Abr. 265. 270. 2 Str. 1224.

[d] Lit. 310. 1 Inſt. 114. b. 195. b.

[e] 2 Rol. Abr. 264, 265, 270. 1 Ventr. 386. 6 Rep. 60.

[f] 7 Rep 28. 1 Inſt. 41. b. 113. a. 114. a. & b. See p. 206, &c. ante.

[a] 1 Inſt. 114. b. 2 Inſt. 653, 654. 2 Roll. Abr. 271.

Bro. Ent. 60. Hob. 131. 2 Ld. Ray. 1400.

[b] 4 Rep. 87. [b] Tho' a Houſe or Mill falleth by Default of the Owner or otherwiſe, he may rebuild it upon the ſame Foundation; and all thoſe Things, that were appendant or appurtenant to it, ſhall continue. A Corporation that hath Privileges by Grant or Preſcription, tho' they are incorporated by another Name, yet the new Body ſhall have all the Privileges that the old one had. (See p. 110. ante.) [c] If a Court held by Preſcription is granted and confirmed by the King's Letters Patent, this does not deſtroy the Preſcription; but the Court may be held by Preſcription as before. And if one claims any Thing by Preſcription and alſo by Charter, if the Charter is not contrary to the Preſcription, it ſhall be good by way of Confirmation, as ſome affirm.

[c] 2 Roll. Abr. 271.

What hath been ſaid concerning *Cuſtoms* with Relation to *Acts* of Parliament, the ſame may be ſaid of *Preſcriptions*. (See p. 8. ante.)

I ſhall ſpeak of the Time of *Limitation* of *Writs* and *Actions* when I come to treat of *Actions* [d]. I have ſpoken already of Title by Preſcription in Lands by *Fine* [e] and *Non-claim*, and of the Title to Things *moveable* by buying in Market Overt [f], by Waif, Stray, Wrecks.

[d] See B. 4. ch. 4 poſt.
[e] See p. 240. ante.
[f] See p. 207. ante.

[g] By the *Canon* Law the utmoſt limit of Preſcription is but forty Years. But this Preſcription is not allowed by the Common Law.

[g] 2 Inſt. 649, 653, 654.

Now, upon what hath been ſaid concerning Preſcription, you may obſerve, that a Preſcription properly ſo taken is a Title or Claim of a real Intereſt or Profit in the Land of another; which muſt be ſtrictly pleaded according to certain Rules; and that it is not like a Cuſtom, or improper Preſcription, that is by way of Diſcharge, or for Eaſements, or for Matters of perſonal Exemption or Privilege.

By Eſcheat. 2 Black. Com. 241, to 257.

V. Property in Lands, &c. may be acquired by *Eſcheat*. Here the Inheritance is caſt upon the Lord, otherwiſe than by *Deſcent* or *Purchaſe*. Of which ſee in the next Chapter.

Thus Lands, Tenements and Hereditaments may be *acquired* by *Occupancy*, *Deſcent*, *Purchaſe*, *Preſcription*, and *Eſcheat*. I proceed to ſhew, how they may be *forfeited* or *loſt*; which may be called a Way of acquiring too, in reſpect of the Perſons that gain by the Loſs. But the Method will be more diſtinct, if I do call it rather a *Loſing* than an *Acquiring*.

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[b] *Multiplex interruptio non tollit præſcriptionem ſemel obtentam.* 2 Inſt. 654.

CHAP.

CHAP. IV.

How *Eſtates in Lands, &c.* may be *forfeited or loſt*, (*viz.*) 1. By *Alienation* of a *particular* Tenant. 2. By *Alienation* in *Mortmain*. 3. By *Non-performance* of a *Condition*. 4. By *Waſte*. 5. By *Bankruptcy*. 6. By *Eſcheat*. 7. By *Diſſeiſin*, *Abatement*, and *Intruſion*.

See 2 Black. Com. 15. Of Title by Forfeiture.

TOuching the *Forfeiture* of Lands, Tenements and Hereditaments in *Criminal* Caſes, I ſhall ſpeak in the *4th Book* under the Title *Forfeiture*. Here I intend only to ſhew how *Eſtates* in *Lands, &c.* may be *loſt* in *Civil* Caſes, as by the *Alienation* of a particular Tenant, By Alienation in *Mortmain*, By *Non-performance* of a *Condition*, By *Waſte*, By *Bankruptcy*, By *Eſcheat*, By *Diſſeiſin*, *Abatement*, and *Intruſion*.

How Eſtates in Lands, &c. may be forfeited or loſt.

I. [a] An *Alienation* is a Transferring ones Right and Property to another. But ſome Alienations are forbidden; as an Alienation by a particular Tenant; as by a Tenant for Life, which infers a Forfeiture of the Eſtate. This Forfeiture may be either, 1. [b] In *Pais*, or in the Country out of a Court of Record, as where a particular Tenant (not being an Infant or Feme Covert) maketh over a greater Eſtate, that lieth in Livery, than he may lawfully make, whereby the Remainder or Reverſion is deveſted. (But in Caſe of the King it is a Forfeiture, though the Remainder or Reverſion is not deveſted out of him). Therefore, if Leſſee for Life by Livery alieneth in Fee, or Leſſee for Life maketh a Leaſe for the Life of another, or a Gift in Tail, it is a Forfeiture of his Eſtate. Thus it is if Tenant in Tail after Poſſibility of Iſſue extinct, Tenant by the Curteſy, Tenant in Dower, Tenant for another's Life, Tenant for Years, Tenant by Statute-Merchant, Staple, or *Elegit*, do make a greater Eſtate than they lawfully may make. [c] But if a Copyholder for Life ſurrenders to the Uſe of another in Fee, this is no Forfeiture; for the Eſtate paſſeth by *Surrender* to the Lord, and not by *Livery*. A particular Eſtate of any Thing that lies in *Grant*, cannot be forfeited by Grant in Fee by Deed. For Nothing can paſs thereby but what may lawfully paſs. 2. By *Record*, as by *Alienation* in levying a *Fine*, or ſuffering a Common *Recovery* of Lands, whether it diveſt the Reverſion or Remainder, as in caſe of Things lying in Livery; or doth not diveſt them, as in caſe of Things lying in Grant, or by *claiming* a greater Eſtate in a Court of Record; by *affirming* the Remainder or Reverſion to be in a Stranger; as if a Stranger brings a Writ of Entry, and ſuppoſes the Reverſion to be in himſelf, and Tenant for Life confeſſeth the Action, this is a Forfeiture.

By Alienation of particular Tenant.
a 1 Inſt. 111. b.
b 1 Inſt. 233. b. 251. a. & b. 252. a.
8 Rep. 44.
2 Black. Com. 268.
c 4 Rep. 23.

[a] Where there is a Forfeiture by Alienation of the particular Tenant, Eſtates by him made and mean Charges ſhall not be avoided. [See Of *Fines* and *Recoveries*, *ch.* 3. *ante*; and as to *Forfeiture* of *Copyhold* Lands,

a 1 Inſt. 233 b. 234. a.
1 Rep. 67.

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[a] *Nemo debet rem ſuam ſine facto aut defectu ſuo amittere.* 1 Inſt. 263. a. 8 Rep. 92.

ſee of an *Eſtate by Copy of Court Roll, ch.* 1. *ante*; as to *Forſeiture* of *Offices*, ſee *ch.* 2. *ante*.]

By 11 H. 7. ch. 20. *Certain Alienations made by the Wife of the Lands of the deceaſed Huſband ſhall be void, and he to whom the Land ſhould come after the Death of the Wife may enter as if the Wife were Dead.* [See 6 *Ed.* 1. *ch.* 7. 32 *H.* 8. *ch.* 36.]

[See 14 *El. ch.* 8. and of *Recoveries, ch.* 3. *ante*.]

By Alienation in Mortmain. 2 Black. Com. 268. 2 Burn Juſt. tit. Mortmain. [b] 1 Inſt. 2. b. 2 Inſt. 75.

II. A Forfeiture of Lands may be by *Alienation* in *Mortmain*. [b] *Mortmain* (*Mort main* a dead Hand) is an Alienation of Lands and Tenements to any Corporation Sole or Aggregate, Eccleſiaſtical or Temporal. The Name of *Mortmain* is taken from the Effect; becauſe the Lords (or Landlords) had nothing from the Alienee, no more than from a dead Hand. For by Alienation in Mortmain, they loſt their Eſcheats, and many Services, which were heretofore due.

[c] F.N.B. 223. 1 Inſt. 2. b. 304. a. & b. 5 Rep. 56. 7 Rep. 26. 9 Rep. 96. 2 Inſt. 361, 640. Kitch. 280.

[c] An Appropriation of an Advowſon is a Mortmain, or a Grant of an Advowſon in Fee to a ſole or aggregate Corporation, and a Rent extinct by a Releaſe to a Corporation. But the Grant of an Annuity cannot be a Mortmain, becauſe it chargeth the Perſon only; nor an Appropriation of Tithes, becauſe they are Things merely Spiritual; the Cognizance whereof regularly belongs to the Eccleſiaſtical Court.

The Foundation of all the Statutes of Mortmain was *Magna Charta*, (*viz.*) 9 *H.* 3. *ch.* 36. By which,

It ſhall not be lawful to any, to give his Lands to any Religious Houſe, and to take the ſame Land again to hold of the ſame Houſe. If any give his Lands to any Religious Houſe, the Gift ſhall be void, and the Land ſhall accrue to the Lord of the Fee.

[d] 2 Inſt, 75.

[d] This Statute is interpreted to extend to Lands which a Religious Houſe kept in their own Hands, tho' they gave them not back again to hold of the ſame Houſe.

But Eccleſiaſtical Perſons found Means to creep out of this Statute, (*viz.*) Religious Men, as Abbots, Priors, and other Eccleſiaſtical Perſons Regular, by purchaſing Lands holden of themſelves, or by taking Leaſes for a long Term of Years, and many other Devices. And Biſhops, Parſons, and other Eccleſiaſtical Perſons ſecular, thought that they were out of this Statute. But,

By 7 Ed. 1. St. 2. *No Perſon Religious or other whatſoever* (Body Politick or Corporate, Eccleſiaſtical or Lay, Sole or Aggregate) *ſhall buy or ſell, or under the Colour of Gift or Leaſe, or by reaſon of any other Title, receive, or by any other Craft or Engine ſhall preſume to appropriate to himſelf any Lands or Tenements, whereby the ſame may in anywiſe come into Mortmain, under Pain of Forfeiture of the ſame. And within the Year after the Alienation, the immediate Lord of the Fee may enter; and if he do not enter within the Year, then the next immediate Lord may enter within half a Year after ſuch Year; and for Default of all the Meſne Lords, the King ſhall have the Lands ſo alienated for ever, and ſhall infeoff others by certain Services.*

This Statute is to be underſtood of ſuch Inheritances as may be *holden*; but of ſuch Inheritances as are not holden, as Rent-charges, Commons, Advowſons, the King ſhall have them preſently by a favourable Interpretation of the Statute.

But Eccleſiaſtical Perſons found out an Evaſion alſo of this Statute; becauſe it extended only to Gifts, Alienations, and Conveyances made between them and others. Therefore pretending a Title to the Land (which they meant to get) they brought a feigned Action againſt the Tenant of the Land; and he by Conſent and Colluſion was to make Default, and thereupon they recovered the Land and entered by Judgment of Law. Wherefore,

By Weſt. 2. *or* 13 Ed. 1. ch. 32. *When Religious Men and other Eccleſiaſtical Perſons do implead any, and the Party impleaded maketh Default, it ſhall be enquired by the Country, whether the Demandant had Right in the Thing demanded or no; and if it be found he had, then he ſhall recover Seiſin; but if otherwiſe, the Lands ſhall accrue to the next Lord of the Fee.*

[a] All Actions brought for any Lands or Tenements, wherein a *Freehold, Inheritance*, or a long *Term* is recovered, are within this Statute. a 2 Inſt. 429, 430.

All Recoveries alſo by Verdict, or otherwiſe, if they are had by Colluſion, are within this Statute, as well as Recoveries by Default.

Notwithſtanding all theſe Statutes, Eccleſiaſtical Perſons (not being able to get Lands by Purchaſe, Gift, Leaſe, or Recovery) procured Lands to be conveyed by Feoffment, or in other Manner, to divers Perſons and their Heirs, to the [b] *Uſe* of them and their Succeſſors, by reaſon whereof they took the Profits. But, b 2 Inſt. 75.

By 15 R. 2. ch. 5. *No Feoffment, or other Purchaſe of any Lands and Tenements, Advowſons, or other Poſſeſſions to the* Uſe *of any Spiritual Perſon, and whereof ſuch Spiritual Perſons take the Profits, ſhall hereafter be made without Licence of the King and of the Lords; upon pain of Forfeiture.*

The ſame Law ſhall likewiſe be of Lands, Advowſons, and other Poſſeſſions purchaſed by Guilds, Fraternities, perpetual Offices, and Corporations, or to their Uſe. And,

By 23 H. 8. ch. 10. *Where Feoffments, Fines, Recoveries, Deviſes, and other Acts and Aſſurances of Lands, Tenements and Hereditaments, and of any Truſts thereof, are made to the Uſe of Pariſh Churches, Chapels, Church-wardens, Guilds, Fraternities, Commonalties, Companies, or Brotherhoods, erected and made of Devotion, or by common Aſſent of the People without any Corporation, or to the Uſes and Intents to have perpetual* Obits, *or a continual Service of a Prieſt for ever, or for threeſcore or fourſcore Years, or to ſuch like Uſes or Intents, to the Prejudice of the King, and to other Lords and Subjects, as in caſe where Lands are aliened in Mortmain; all ſuch Uſes, Intents and Purpoſes, of whatever Name, Nature, or Quality they ſhall be called, ſhall be utterly void.*

Provided, That ſuch Uſes and Intents may be made and declared to continue twenty Years from the Time of limiting them, and no longer.

This Statute extends only to ſuperſtitious Uſes. Therefore [a] notwithſtanding this or any of the aforeſaid Statutes, any man at this Day may give Lands, Tenements or Hereditaments to any Perſon or Perſons, and their Heirs for finding a Preacher, Maintenance of a School, Relief of maimed Soldiers and the Poor, Reparation of Churches, Highways, or for any like charitable Uſes. And it is good Policy upon every ſuch Feoffment to reſerve a ſmall Rent to the Feoffor and his Heirs. For then the Feofees ſhall be ſeiſed to their own Uſe, and not to the Uſe of the Feoffor. Or it may be proper to expreſs ſome Conſideration of a ſmall Sum; and then 23 *H.* 8. cannot by any Pretence make void the Uſe. [But ſee 9 *Geo.* 2. *ch.* 36. *infra.*] a 1 Rep. 24, 25, 26. 11 Rep. 70, 71.

[See 32 *H.* 8. *ch.* 1. and 34 *&* 35 *H.* 8. *ch.* 5. Of *Wills.* And ſee 39 *El. ch.* 5. For the Erection of Hoſpitals and Houſes of Correction. 43 *El. ch.* 4. Concerning Commiſſioners authorized to enquire of Miſemployments of Lands and Goods given to charitable Uſes.]

By 17 Car. 2. ch. 3. *Owners of Impropriations, Tithes, or Portions of Tithes, may annex the ſame to the Parſonage or Vicarage where they lie, or ſettle them in Truſt for the Benefit of ſuch Parſonage or Vicarage, or of the Curates thereof, where the Parſonage is impropriate and no Vicar endowed, without any Licence of Mortmain.*

And if the ſettled Maintenance of any Parſonage or Vicarage with Cure ſhall not amount to one hundred Pounds per Annum *clear, the Incumbent may purchaſe to him and his Succeſſors Lands, Tenements, Rents, Tithes or other Hereditaments, without Licence of Mortmain.*

By 7 & 8 W. 3. ch. 37. *The* King *may* licenſe *any Perſon or Bodies Politick to alien in Mortmain, and to purchaſe, take, and hold in Mortmain, (in Perpetuity or otherwiſe) any Lands, Tenements, Rents or Hereditaments whatſoever, of whomſoever holden. And Lands ſo aliened or acquired and licenſed, ſhall not be ſubject to any Forfeiture by reaſon of ſuch Alienation or Acquiſition.* [See 18 Ed. 3. St. 3. ch. 3.]

By 2 An. ch. 11. *Any Perſon may veſt Lands,* &c. In the Corporation for the Bounty of Queen *Anne, by* Deed *inrolled according to* 27 H. 8. ch. 16. *or by* Will, *for Augmentation of Churches, which have not a competent Proviſion. The ſaid Corporation may take, purchaſe and hold for the ſaid Purpoſes without Licence or Writ of* Ad Quod Damnum. See 1 *Geo.* 1. *St.* 2. *ch.* 10.]

See the *Statutes* for the Diſſolution of Monaſteries Chauntries, *&c.* (*viz.*) 27 *H.* 8. *ch.* 28. 31 *H.* 8. *ch.* 13. 1 *Ed.* 6. *ch.* 14, *&c.*

By 9 G. 2. ch. 36. *After the* 24*th of* June 1736. *Manors, Lands, Tenements, Rents, Advowſons or other Hereditaments, corporeal or incorporeal, nor any Sum of Money, Goods, Chattels, Stocks in the Funds, Securities for Money to be laid out in the Purchaſe of Lands, Tenements or Hereditaments, ſhall be anywiſe conveyed or ſettled, to or upon any Perſon, Body Politick or Corporate, or otherwiſe for any Eſtate or Intereſt, or anywiſe charged or incumbred by any Perſon whatſoever, in Truſt, or for the Benefit of any charitable Uſe; unleſs ſuch Gift, Conveyance, Appointment, or Settlement (except of Stocks in the Funds) be made by Deed indented, ſealed and delivered in the Preſence of two or more credible Witneſſes, twelve Kalendar Months at leaſt before the Death of ſuch Donor or Grantor, including the Days of the Execution and Death, and be inrolled in Chancery within ſix Kalendar Months next after the Execution thereof; and unleſs ſuch Stocks be transferred in the publick Books ſix Kalendar Months before ſuch Death as aforeſaid; and unleſs the ſame be made to take Effect in Poſſeſſion for the charitable Uſe immediately, without any Power of Revocation, Reſervation, Truſt, Condition, Limitation or Agreement, for the Benefit of the Donor or Grantor, or any claiming under him; and all ſuch Gifts, Grants,* &c. *made in any other Manner or Form ſhall be abſolutely void.*

But not to extend to Purchaſes or Transfers made really and bona fide, *for a full and valuable Conſideration, or to any Diſpoſition, to or in Truſt for either of the two Univerſities, or any College or Houſe of Learning within them, or the Colleges of* Eaton, Wincheſter, *or* Weſtminſter, *for the better Support and Maintenance of the Scholars only upon the Foundations of* Eaton, Wincheſter, *and* Weſtminſter, *nor to the Diſpoſition of any Eſtate, real or perſonal, lying or being in* Scotland.

But no ſuch College or Houſe ſhall be capable of taking, purchaſing, or holding more Advowſons than ſhall be equal in Number to a Moiety of their Fellows, or Students where there are no Fellows, excluſive of the Advowſons annexed to the Headſhips.

III. By *Non-Performance* of a *Condition* (whether *expreſs* or *implied* by Law,) Lands, *&c.* may be forfeited or loſt. [See of *Eſtates upon Condition*, *B.* 2. *ch.* 1. Of the *Forfeiture* of *Offices* and *Franchiſes*, and of *Conditions*, *ch.* 3. *ante.*]

By Non-Performance of a Condition.
2 Black. Com. 281.

IV. By *Waſte*; therefore, 1. *What* is *Waſte*. 2. How are Lands *forfeited* in Waſte.

By Waſte.
2 Black. Com. 281.

1. [a] *Waſte* (*Vaſtum à Vaſtando*, to Waſte) is a Spoil or Deſtruction in Houſes, Gardens or Orchards, Dove-houſes, Parks, Warrens, Fiſh-ponds, Trees, Woods, Land, *&c.* to the Prejudice of the Heir, or of him in Remainder or Reverſion. A Licence or Conſent is ſuppoſed here to be wanting. [See Stat. of *Marlbridg.* or 52 *H.* 3. *ch.* 23.] The Leſſor by Law may enter at ſeaſonable Times, to ſee whether any Waſte is committed. And if the Leſſee hinders his entring, the Leſſor may bring his Action on the Caſe.

[a] 1 Inſt. 52. b. 53. a.
2 Inſt. 145.
2 Cro. 478.
2 Roll. Rep. 21.

There are *two* Kinds of Waſte, *voluntary* and *permiſſive*. *Voluntary*, by *Commiſſion* or by pulling down, *&c.* *Permiſſive*, by Negligence or *Omiſſion*, as in not repairing. Both are equally injurious to him that hath the Inheritance.

Waſte may be committed in *Houſes*, [b] by pulling them down, or by ſuffering them to be uncovered, whereby the Timber becomes rotten. But if the Houſe was uncovered when the Tenant entered, it is no Waſte in the Tenant to ſuffer the Houſe to fall down. But the Timber belongs to the Leſſor. If he pulls it down, it is Waſte, tho' it was ruinous, unleſs he builds it up again. [c] Alſo if Glaſs Windows (tho' glazed by the Tenant himſelf) be broken down or carried away, it is Waſte; for it is Part of the Houſe, the ſame is of New Chimney-pieces; tho' in ſome Places they pretend a Cuſtom to take them down within the Term, if they ſet up the old Chimney-pieces. Thus it is of Wainſcot faſtened by Nails, Scrues or Irons put thro' Poſts or Walls, Benches, Doors, Furnaces, *&c.* fix'd to the Houſe, either by him in Remainder or Reverſion, or by the Tenant himſelf. If Wainſcot, Benches, Furnaces, *&c.* are not fix'd, they may be taken away at any Time. And a fix'd Furnace may be taken away at any Time within the Term, if it is not fixed to the Walls or Poſts of the Houſe. [As to the Right of the Tenant to take away Chimney-pieces or other Fixtures, *put up by himſelf*, the Law is not ſo ſtrict now as formerly; but he muſt take them down during his Term, put up the old ones where they were, and leave the Houſe in as good Condition as he found it.] If one pulls down a Malt-Mill, and builds a Corn-Mill, it is Waſte, tho' the Corn-Mill is of greater Value. If the Tenant build a new Houſe it is Waſte. [But this muſt mean where the Tenant doth not build it equally good with the old one, or not the ſame Size;] and then if he ſuffers *that* to be waſted, it is a new Waſte. If the Houſe fall down by [a] Tempeſt, or is burnt by Lightning, or thrown down by Enemies, *&c.* without the Fault of the Tenant, he ſhall not be charged with Waſte, [b] unleſs he bound himſelf by Covenant, that he would leave it in as good a Condition as he found it. But in this Caſe, or where the Houſe was ruinous at his coming in

[b] 1 Inſt. 53. a.
2 Inſt. 145.
11 Rep. 81.

[c] 4 Rep. 63, 64.
10 Rep. 139.
1 Inſt. 53. a.

1 Roll. Abr. 507. cont.
2 Roll. Abr. 815.

[a] Plowd. 29.
1 Rep. 98.
1 Inſt. 283. a.
[b] Dr. & Stud. Dial 2. ch. 4.
1 Roll. Abr. 939.

falls down, the Tenant [c] may build the ſame again with ſuch Materials as remain, and with other Timber, which he may take growing on the Premiſſes. Yet he muſt not make the Houſe leſſer or larger than it was before; or ſell the Trees, and with the Money build it up; for the Sale is Waſte. If the Houſe is uncovered by a Tempeſt, the Tenant muſt in convenient Time repair it. And though there is no Timber growing upon the Ground, yet the Tenant at his Peril muſt keep the Houſe from Waſting. [d] A Tenant for Years is of courſe bound to ſuſtain or repair the Houſe. If one ſuffers the Houſes to be waſted, and then fells Timber to repair them, this is double Waſte. [e] But in many Caſes a Tenant for Life or Years may fell Timber to repair, tho' he is not forced to it. As if a Houſe is ruinous at the Time of the Leaſe made, he is not bound to repair it; but if he cuts down Timber, and doth repair it he may juſtify it. For the Law doth favour the Maintenance of Houſes for the Habitation of Mankind. So if the Leſſor covenants to repair the Houſe, the Leſſee (if the Leſſor does not do it) may with Timber growing on the Ground repair it, tho' he cannot be compelled to it. A Tenant may dig for [f] Gravel or Clay, (tho' no Pit was open at the time of the Leaſe) for Reparation of the Houſe, by the ſame Reaſon that he may cut down Timber to repair it. If the Houſe is burnt by Negligence or Miſchance it is Waſte. [*See* 6 *An. ch.* 3. *B.* 1. *ch.* 6. *ante.*] Thus of Waſte in *Houſes.*

If a Tenant cuts down or deſtroys any [g] *Fruit-Trees* growing in the *Garden* or *Orchard*, it is Waſte. But if ſuch Trees grow upon any Part of the Ground out of the Garden or Orchard it is no Waſte.

[h] If a Tenant of a *Dove-houſe, Park, Warren,* Vivary or *Fiſh-pond*, does take ſo many Pigeons, *&c.* as that ſuch ſufficient Store is not left as he found there when he firſt entered, it is Waſte. And to ſuffer the Park-Pales to decay, whereby the Deer are loſt or diſperſed is Waſte.

As to Waſte in *Trees* and *Woods.* [a] *Trees* are Parcel of the Inheritance; and the Leſſor, after that he hath made a Leaſe for Life, may by Deed grant the Trees, or reaſonable Eſtovers out of them, to another and his Heirs, and the ſame ſhall take Effect after the Death of the Leſſee. But ſuch a Gift to a Stranger is void during the Eſtate for Life; becauſe of the particular Prejudice it may be to the Leſſee. Timber is reſerved by Law to the Leſſor. Therefore if Timber is cut down by a Leſſee, the Leſſor may take it away. The Leſſee hath only an Intereſt in Trees while ſtanding, as in the Fruit, Shrowd, or Shadow. On this Account if he cuts down Timber-Trees, (*viz.*) Oak, Aſh, and Elm, (which are Timber-Trees in all Places, except Elms on ſome Copyhold Eſtates) or tops them, or doth any other Act, whereby the Timber may decay, [b] it is Waſte. And if the Leſſee has covenanted to leave the Wood in as good Plight at the End of the Term as he found it, the Leſſor ſhall [c] preſently have an Action of Covenant, for cutting down the Timber; for now it is not poſſible for him to perform the Covenant, or to leave the Wood in as good Plight as he found it: But it is otherwiſe as to a Covenant to leave a Houſe in good Repair at the End of the Term, for that may be repaired before the Term expires. Alſo in Counties where Timber is ſcarce, and Beech or other Trees ſerve to build Houſes, they are to be accounted Timber, and to cut them down is Waſte. It is the Cuſtom of the Country that makes ſome Trees Timber, which in their Nature generally ſpeaking, are not ſo; as Horſe-Cheſnut and Lime-Trees; ſo of Birch, Beech, and Aſp [d]. [e] If Timber-Trees are thrown down by

[c] 1 Inſt. 53. a. & b. 11 Rep. 82.

[d] Lit. 71.

[e] 1 Inſt. 54. b.

[f] 1 Inſt. 53. b.

[g] 1 Inſt. 53. a.

[h] 1 Inſt. 53. a. 2 Inſt. 304.

[a] 4 Rep. 62, 63. 5 Rep. 11, 76. 11 Rep. 48, 50, 81.

[b] 1 Inſt. 53. a.

[c] F. N. B. 145. 5 Rep. 21. 7 Rep. 15.

[d] 2 Wms. (606)

[e] 4 Rep. 63. 11 Rep. 81.

the Wind, the Landlord or Leſſor ſhall have them. If a Tenant ſuffers the young [f] Germins to be deſtroyed by Beaſts, or does ſtub them up, it is Deſtruction. To cut down Willows, Beech, Birch, Aſp, Maple, or other Trees, ſtanding in the Defence of the Houſe, is alſo Deſtruction. If there is a Quick-ſet Hedge of White-Thorn, and the Tenant ſtubs it up, or ſuffers it to be deſtroyed, it is Deſtruction. And for all theſe, and the like Deſtructions an Action of Waſte lieth. For *Waſte* and *Deſtruction* in a large Senſe are ſynonymous Terms.

To turn Trees into [g] Coals for Fuel, when there is ſufficient dead Wood, is Waſte.

The Tenant may take ſufficient Wood to repair Walls, Pales, Fences, Hedges, Ditches, as he found them; but not to make theſe a-new. And he may take ſufficient Plow-bote, Fire-bote and other Houſe-bote. He may alſo cut down [h] Underwood at ſeaſonable Times. [i] A Copyholder without Cuſtom may cut down Timber to repair his Copyhold Houſe; tho' by Cuſtom he may be reſtrained to cut them down without Aſſignment of the Lord or his Bailiff. A Tenant alſo may cut down [k] dead Wood.

As to Waſte in *Land*, it is to be obſerved, [l] That if a Tenant converts Arable Land into Wood, or Wood into Arable Land, or Meadow into Arable, or Arable into Meadow, or Paſture into Arable it is Waſte. For it not only changeth the Courſe of the Huſbandry, but the Proof of the Landlord's Evidence of his Eſtate. If ancient [m] Meadow-Ground beyond the Memory of Man, or Brook Meadow, is ploughed up, it is Waſte. But if Meadow-Ground hath been at any Time Arable, or ſometimes Meadow and ſometimes Paſture, it is no Waſte to plough it up. [a] Therefore ſuch Meadow muſt be defended from being plough'd up by Covenant, *(viz.)* To pay ſo much an Acre (as five Pounds an Acre, *&c.*) if the Tenant doth plough it up. For an abſolute Reſtraint to plough is void; [*Qu.*] becauſe Arable is to be preferr'd before Meadow. [b] It is Waſte to ſuffer a Wall of the Sea to be in decay, ſo that the Meadow or Marſh Ground is ſurrounded, and rendered unprofitable, by the Sea's flowing and reflowing. But if the Land is ſurrounded ſuddenly by the Violence of the Sea, occaſioned by a Tempeſt, without any Default of the Tenant, it is no Waſte that is puniſhable. So it is Waſte if the Tenant does not repair the Walls or Banks againſt Rivers, or other Waters, whereby the Meadows or Marſhes are ſurrounded, and become ruſhy and unprofitable.

To dig for *Gravel Lime*, *Clay*, *Stone*, *Brick*, *Earth*, or for *Mines* of Metal, Coal, or other Things, hidden in the Earth, when the Mines were not open when the Tenant came in, is Waſte; except the Gravel, Clay, *&c.* is for Reparation of the Houſe. [c] If one makes a Leaſe of his Land for Life or Years, in which there is a Mine, not mentioning any Mines in his Leaſe, the Tenant may dig and take the Profit of ſuch Mines as were open at the Time of the Leaſe made. But he cannot dig for any new Mine, that was not open; for that would be Waſte. And if there are open Mines, and the Owner makes a Leaſe of the Land with the Mines therein, this ſhall extend to the open Mines only. But if there is no open Mine, and the Leaſe is made of the Land with all Mines, the Tenant may dig for Mines, and have the Profits; otherwiſe thoſe Words would be void.

If

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[f] 1 Inſt. 53. a.

[g] 1 Inſt. 53. b.

1 Inſt. 53. b.

[h] 2 Roll. Abr. 817.

[i] 1 Roll. Abr. 508.

[k] 4 Rep. 63.

[l] 1 Inſt. 53. b.

[m] 2 Roll. Abr. 814.

[a] 2 Roll. Abr. 815.

[b] 1 Inſt. 53. b.

1 Wms. 406.
2 Burn. Eccl. law, 255.

[c] 1 Inſt. 54. b.
5 Rep. 12.

[d] F. N. B. 55. 5 Rep. 115. b. 1 Inſt. 53, 2 Inſt. 146, 299.

[e] 2 Vern. 738. 1 Salk 161. [f] 1 Wms. 528. [g] 2 Inſt. 306.

[h] 11 Rep. 49. 2 Roll. Abr. 813.

[d] If he that hath the Inheritance doth fear Waſte in any of the foregoing Inſtances, he may before any Waſte done have a *Pro'ibition* directed to the Sheriff, that he ſhall not permit Waſte to be done by the Tenant; and then the Sheriff may take the *Poſſe Comitatûs* and withſtand the doing of it. Or he in Remainder or Reverſion may have an *Injunction* out of the *Chancery* to ſtay the Waſte. [And the Court of Chancery will grant Injunctions to reſtrain Tenants for Life [e] or Years [f] *ſans Waſte* from pulling down a Manſion Houſe, or the Trees that are a Defence or Ornament to it, or from digging for Bricks.] [g] He in the Reverſion, either perſonally or by another, may enter into the Houſe or Lands, let for Life or Years, to ſee if Waſte is committed. [h] A Patron may have a Prohibition to hinder a Parſon from cutting down Trees to his own private Uſe. [See of *Action* of *Waſte, B.* 4. *ch.* 4. *poſt.*]

2. The *Forfeiture* and Judgment in Waſte appears in the following Statute. For,

By the Statute of Glouceſter *or* 5 & 6 Ed. 1. ch. 5. *The Party convicted of Waſte ſhall forfeit the Thing waſted, and recompenſe thrice ſo much as the Waſte is taxed at.* [See *Weſt.* 2. or 13 *Ed.* 1. *ch.* 14 and 8 & 9 *W.* 3. *ch.* 11. For Recovery of Coſts; and alſo 11 & 12 *W.* 3. *ch.* 4. Concerning wilful Waſte in the Lands of Papiſts diſabled.]

[a] 1 Inſt. 54. a. 2 Inſt. 303. 304.

If Waſte is done [a] *Sparſim* or here and there in Woods, ſo much ſhall be recovered wherein the Waſte was done. And ſo in Houſes, ſo many Rooms ſhall be recovered wherein the Waſte was done. But if the *Waſte* is committed here and there throughout, all ſhall be recovered.

[b] 1 Inſt. 233 b. 234. a.

Regularly he that enters or recovers by Force of an implied Condition, ſhall not avoid precedent Incumbrances. [b] But if a Tenant for Life grants a Leaſe for Years, and afterwards doth Waſte, and the Leſſor recovers in an Action of Waſte againſt the Tenant for Life, he ſhall avoid the Leaſe made before the Waſte done; becauſe the Action of Waſte muſt of neceſſity be brought againſt the Leſſee for Life, to recover the Place waſted; which muſt bind the Leſſee for Years. But a precedent Rent granted out of the Land ſhall not be avoided. For if Leſſee for Life grants a Rent Charge, and afterwards doth Waſte, and the Leſſor recovers in an Action of Waſte, he ſhall hold the Land charg'd during the Life of Tenant for Life. But if the Rent was granted after the Waſte was done, the Leſſor ſhall avoid it.

[c] 1 Inſt. 54. a. 2 Inſt. 306.

None ſhall have Judgment to recover in an Action of Waſte, where the Waſte is of [c] ſmall Value. Yet the Law will take Notice of Waſte in Trees to the Value of three Shillings and four Pence, and ſuffer Judgment. And many Things together may make Waſte to a Value, and amount to a Forfeiture.

[d] 3 Inſt. 204. 11 Rep. 49. 3 Lutw. 116. 3 Lev. 268.

[d] Dilapidation or Waſte of Eccleſiaſtical Palaces, Houſes and Buildings, is a good Cauſe of Deprivation. Some ſay an Action of the Caſe will lie for Dilapidations.

By Bankruptcy.

V. Lands and Tenements may be *loſt* by *Bankruptcy.* Therefore 1. *Who* may be a Bankrupt, and what *Acts* make a Bankrupt. 2. How are Lands and Tenements *forfeited* or *loſt* by Bankruptcy.

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[d] *Præſtat cautela quam medela.* 2 Inſt. 299.

[c] *De minimis non curat lex.* 1 Inſt. 54. a. 2 Inſt. 306. 1 Wilſon. 129.

[e] *Intereſt reipublicæ ne quis re ſua male utatur.* 6 Rep. 37.

1. A *Bankrupt* (from [e] *Bauque* a Table, and *Rout* the Sign of the Table that was fixed in the Earth) is deſcribed by our *Statute* Law; and is he or ſhe that hath gotten other Mens Goods into his or her Hands, and hides in order to deceive his or her Creditors. But more particularly,

4 Inſt. 277.
2 Black Com. 471, 285.
1 Burn Juſt. title Bankrupt.

By 13 El. ch. 7. *If any Perſon uſing the Trade of Merchandize, by way of bargaining, bartering, and Cheviſance in groſs, or in retail, or ſeeking his Living by buying and ſelling, being a natural born Subject or Denizen, doth depart the Realm, or begin to keep his or her Houſe, or otherwiſe abſent himſelf or herſelf, or ſuffers him or herſelf willingly to be arreſted, outlaw'd or impriſon'd without juſt or lawful Cauſe, or depart from his or her Dwelling-houſe, to the Intent to defraud or hinder Creditors*; *Or,*

By 1 Ja. 1. ch. 15. *Shall willingly and fraudulently procure him or herſelf to be arreſted, or his or her Goods to be attached or ſequeſtred, or make or cauſe to be made any fraudulent Grant or Conveyance of his or her Lands, Tenements, Goods or Chattels, to the Intent or whereby his or her Creditors ſhall or may be defeated or delayed for the Recovery of their juſt and true Debts, ſhall be deemed a Bankrupt. And,*

By 21 Ja. 1. ch. 19. *Every Perſon uſing the Trade of Merchandiſe,* &c. (as before) *or uſing the Trade or Profeſſion of a Scrivener, receiving other Mens Monies or Eſtates into his Truſt or Cuſtody, who ſhall either by himſelf or others obtain any Protection (except by Privilege of Parliament)* [See 7 *An. ch.* 12.] *or ſhall prefer or exhibit unto the King or any of his Courts any Petition or Bill, thereby to compel his Creditors to take leſs than their juſt Debts, or to gain Time for the Payment thereof; or being arreſted for Debt, ſhall after the Arreſt lie in Priſon two Months or more, or being arreſted for a juſt Debt of a hundred Pounds or more ſhall eſcape out of Priſon, ſhall be adjudged a Bankrupt.*

[*Note*, The other Deſcriptions contained in the former Act, and not mentioned above, are repealed by 10 *An. ch.* 15. and any ſingle Act is ſufficient to make a Bankrupt; and it ſeems that ſuch Act of Bankruptcy, if it is clear and plain in its Nature, can't be purged by length of Time [a]; or afterwards appearing publickly, or dealing largely [b]; but if it was not an expreſs but doubtful Act of Bankruptcy, then appearing abroad, and dealing after ſuch an Act, will be an Evidence to explain the Intent of it, and to ſhew that it was not done with Deſign to keep out of the Way of and defraud his Creditors.]

[a] Caſes Temp. Talbot 243.
[b] 1 Salk. 110.

By 21 Ja. 1. ch. 19. *All Statutes concerning Bankrupts extend to* Strangers *born, as well Aliens as Denizens, as effectually as to natural born Subjects, both to make them ſubject to the Laws as Bankrupts, as alſo to make them capable of the Benefit thereof as Creditors.*

It is not Buying or Selling of *Land* but of *perſonal* Things, that will make a Man ſubject to the Bankrupt Laws; nor is it Buying only, nor Selling only, but Buying and Selling, nor one ſingle Act of buying and ſelling, but where one gets his Livelihood by it. Such as live on their manual Labour only, as Huſbandmen or Labourers, are not Traders within the Statutes: But ſuch as buy Wares and convert them into ſaleable Commodities, and get their Livelihood by buying and ſelling, may be Bankrupts within the Statutes; as a [c] Shoemaker, Lockſmith, Clothier, &c. But not an [d] Inn-keeper; for he doth not properly ſell what

[c] 3 Cro. 31.
[d] 3 Cro. 549, 550.
1 Danv. Abr. 686, 687.
1 Salk. 110.
1 Ld. Ray. 287.

what he buys; but utters it at ſuch reaſonable Rates as he thinks fit, with reſpect to Attendance of Servants, *&c.*†

e 1 Ld. Ray. 443. [e] It hath been held that a Minor cannot be a Bankrupt.

By 5 Geo. 2. ch. 30. *Perſons dealing as* Bankers, Brokers, *and* Factors, *are liable to the Statutes concerning Bankrupts.*

By 14 Car. 2. ch. 24. *No Perſons Adventurers for putting into the* Eaſt-India *or* Guinea *Company, or the Royal* Fiſhing *Trade, ſhall be taken to be Traders within any of the Statutes of Bankrupts. Provided that Perſons trading in any other Way than the ſaid Companies, or Fiſhing Trade, ſhall be liable to Bankruptcy.*

By 7 An. ch. 7. *Members of the* Bank *of* England, *ſhall not, as ſuch, be adjudged liable to the Statutes of Bankrupts.*

By 9 An. ch. 21. 3 Geo. 1. ch. 9. *and* 5 Geo. 1. ch. 19. *Members of the* South Sea *Company ſhall not be liable, as ſuch, to the Statutes of Bankrupts.*

By 6 Geo. 1. ch. 4. *No Perſons concerned about circulating Exchequer Bills ſhall, as ſuch, be liable to the Statutes of Bankruptcy.*

By 5 Geo. 2. ch. 30. *No* Farmer, Grazier, *or* Drover *of Cattle or* Receiver-General *of Taxes granted by Parliament, ſhall, as ſuch, be deemed within the Statutes concerning Bankrupts.*

2. How are Lands, Tenements, and Hereditaments, *forfeited* and *loſt* by Bankruptcy?

1 Burr. 477, 478. When a Commiſſion hath iſſued under the Great Seal, upon Petition to the Lord Chancellor, of ſome one Creditor, whoſe Debt amounts to the Sum of 100 *l.* at leaſt, or of two Creditors whoſe Debts amount to 150 *l.* at leaſt, or of three or more Creditors whoſe Debts amount to 200 *l.* at leaſt, (who muſt alſo before the granting the Commiſſion make Affidavit of the Truth of their Debts, and that the Party hath committed an Act of Bankruptcy, and alſo give Bond in 200 *l.* Penalty for the proving their Debts, and the Bankruptcy, and duly proceeding on the Commiſſion) and the Commiſſioners appointed by ſuch Commiſſion, or the major Part of them, have met and dealt in the ſaid Commiſſion, and found the Party a Bankrupt; all the Lands, Tenements, and Hereditaments, as well Copyhold as Freehold, which ſuch Bankrupt had at the Time of his committing the Act of Bankruptcy, in his own Right, or in Right of his Wife, or jointly with his Wife, Children, or other Perſon, as to the Bankrupt's Right therein, whether in Poſſeſſion, Reverſion, or Remainder, or whether in Fee-ſimple, Fee-tail, for Life, or Years; and alſo all ſuch Eſtates as ſhall come to the Bankrupt after the Act of Bankruptcy, and before the Obtaining and Allowance of his Certificate, if all his Debts are not ſatisfied, may be ſold and conveyed by the Commiſſioners, or the major Part of them, for the Benefit of the Bankrupt's Creditors, by Virtue of and according to the Directions of the ſaid ſeveral Statutes of 13 *El. ch.* 1. and 21 *Ja.* 1. but more particularly according to 5 *Geo.* 2. *ch.* 30. and ſuch Sale ſhall bind the Bankrupt and his Iſſue, and all other Perſons whom the Bankrupt might

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† One who buys a Coal Mine, works it and ſells the Coals, is not a Trader within the Statutes of Bankrupt. Reſolved, 2 *Wilſon*, 169. A Victualler is not liable to be a Bankrupt. 2 *Wilſon*, 382. See 1 & 2 *Bur. Rep.* in the Tables of principal Matters, title *Bankrupt.*

have barr'd by Common Recovery or otherwiſe, (unleſs the Reverſion or Remainder be in the King, and the Eſtate be of the King's Gift) and alſo ſhall be good againſt all Perſons claiming under him by any Act done by him after his committing an Act of Bankruptcy, and alſo againſt the Lord of the Manor [a] under whom ſuch Copyhold Lands are held.

[a] 2 Ld. Ray. 1002.

The *Statutes* do not extend to any Eſtate conveyed *Boná Fide* by the Bankrupt before he became a Bankrupt.

And by 21 Ja. 1. ch. 19. *No Purchaſor for good and valuable Conſideration ſhall be impeached by Virtue of that or any former Statute againſt Bankrupts, unleſs the Commiſſion be ſued forth within five Years after the Act of Bankruptcy. And if any Bankrupt ſhall convey, or cauſe to be conveyed, to his Children, or to any other Perſon, Lands or Goods (except the ſame ſhall be transferred upon Marriage of any Child,* [*See* 5 Geo. 2. ch. 30.] *or upon ſome valuable Conſideration) the Commiſſioners may diſpoſe thereof.*

Though it ſhould ſeem that a voluntary Settlement on a Child will be good, [b] if the Party was not then in Trade and in Debt.

[b] 3 Wms. 298.

If a Bankrupt hath *mortgaged* any Lands to another, the Commiſſioners have Power to aſſign a Perſon to make a Tender and Payment of the Money. And after ſuch Tender and Payment, they ſhall have Power to ſell the Eſtate. And any Eſtate whereof the Bankrupt is *jointly ſeiſed* may be ſold, (as to his Share) by the Commiſſioners: But not ſuch as he hath only as a Truſtee [a] for another.

[a] 1 Wms. 314.

If a Bankrupt hath Land in the Right of his *Wife*, only his Right therein during the Coverture can be ſold by the Commiſſioners. And notwithſtanding the Bankruptcy, the Bankrupt's Wife ſhall have her Dower in *his* Eſtate, and the Eſtate muſt be ſold ſubject thereto, if the Marriage was had and the Eſtate came to the Bankrupt before he committed any Act of Bankruptcy. *Offices* of Truſt which are annexed to the Perſon, cannot be ſold; but Offices of Inheritance, as Keeper of a Foreſt, Warden of the Fleet may. And a Poſſibility of Right, or a contingent Intereſt in the Bankrupt, is aſſignable [b]. [See 5 *Geo.* 2. *ch.* 30.]

[b] 1 Wms. 358. 3 Wms 132.

When the Bankrupt's Lands are ſold by the Commiſſioners, they muſt be ſold by Deed indented and inrolled in one of the Courts of Record at *Weſtminſter*. And,

By 5 Geo. 2. ch. 30. *To enable Purchaſers under Commiſſions of Bankruptcy to make out their Title to the Lands purchaſed, the Lord Chancellor may, upon the Petition of any Perſon, order the Commiſſion, and the Depoſitions and Proceedings thereupon, to be entered of* Record. *A true* Copy *of which Record, ſigned and atteſted by the proper Officer, may be given in Evidence, to prove the Commiſſion and Bankruptcy of the Perſon, and other Matters, in caſe of the Death of the Witneſſes proving ſuch Bankruptcy, or the Loſs of the original Proceedings.*

The Commiſſioners alſo have Power by the aforeſaid *Statutes*, to diſpoſe of the Bankrupt's perſonal Eſtate, or ſuch *Goods*, *Chattels*, *Debts*, and perſonal *Effects*, as he had, and was poſſeſſed of, or intitled to, either in his own Right or in Right of his Wife, or which any other Perſon had or was poſſeſſed of in Truſt for him, at the Time of his becoming a Bankrupt, (though the Bankrupt hath ſold them in Market-Overt; for the Sale of the Commiſſioners ſhall have Relation to the firſt Act of Bankruptcy) and alſo of all ſuch perſonal Effects as ſhall come to him at any Time after ſuch Act of Bankruptcy, and before his obtaining his Certificate or Diſcharge under the Commiſſion; and if the Bankrupt makes his Debts payable to other Men, they are as liable as if they were payable to himſelf.

But by 1 Ja. 1. ch. 15. *No Debtor of a Bankrupt ſhall be in Danger for having truly and* Bonâ Fide *paid his Debt to the Bankrupt, before he had Notice that he was become a Bankrupt.* [See 19 G. 2. *ch.* 32. *infra.*]

By 21 Ja. 1. ch. 19 *The Commiſſioners, or any other Perſons appointed by their Warrant under the Hands and Seals of the greater Part of them, may break open the Houſe, Shops, Warehouſes, Trunks, or Cheſts of the ſaid Bankrupt, where the Bankrupt, or any of his Goods, or his Writings, ſhall be, or be reputed to be, and then ſeize the Bankrupt, and his Goods and Chattels,* &c. *and ſend the Bankrupt to Priſon.* [But ſee 5 G. 2. *ch.* 30. As to Apprehending the Bankrupt.]

And (after reciting, that many Perſons before they become Bankrupts convey their Goods to other Men upon good Conſideration, yet ſtill keep the ſame, and are reputed the Owners thereof, and diſpoſe the ſame as their own) it is enacted, That if any Perſon ſhall, at the Time of his becoming Bankrupt, have, by the Conſent of the true Owner, in his Poſſeſſion, Order and Diſpoſition, any Goods or Chattels whereof he ſhall be reputed Owner, and take upon him the Sale and Diſpoſition as Owner, the Commiſſioners may ſell and diſpoſe of the ſame for the Benefit of his Creditors.

The 5 *Geo.* 2. *ch.* 30. is the Statute by which the Proceedings upon Commiſſions of Bankruptcy are now principally regulated; and purſuant to the Directions of that Act, the Perſon againſt whom a Commiſſion hath iſſued, and who hath been found and declared a Bankrupt, muſt, within forty-two Days after Notice in Writing left at his Place of Abode, or perſonal Notice if he is in Priſon, and Notice given in the *London Gazette*, or within ſuch further Time as the Lord Chancellor ſhall think fit to allow him, not exceeding fifty Days, to be computed from the End of the ſaid forty-two Days, and to be obtained ſix Days before the End of the forty-two Days, ſurrender himſelf to the Commiſſioners, and conform to the ſeveral Statutes concerning Bankrupts, and make a full and true Diſcovery of his Eſtate and Effects; and the Commiſſioners are forthwith, after they have declared the Perſon, againſt whom the Commiſſion hath iſſued, a Bankrupt, to cauſe Notice thereof to be given in the *London Gazette*, and appoint a Time and Place for the Creditors to meet for the Choice of Aſſignees of the Bankrupt's Eſtate, and aſſign the Bankrupt's Eſtate and Effects to ſuch Perſons, as the major Part in Value of the Creditors for ten Pounds or upwards, according to the ſeveral Debts then proved, ſhall chooſe. But the Commiſſioners may, if they ſee Cauſe, for the better preſerving and ſecuring the Bankrupt's Eſtate, immediately (*i. e.* after they have dealt in the Commiſſion, and found the Party a Bankrupt) appoint an Aſſignee or Aſſignees of the Eſtate and Effects, or any Part thereof, who, at the future Meeting of the Creditors for the Choice of Aſſignees, may be removed if the Creditors think fit; and in ſuch Caſe, ſuch immediate Aſſignees muſt aſſign over and deliver up the Bankrupt's Effects to the new Aſſignees choſen by the Creditors; and the Effects delivered up or aſſigned to ſuch new Aſſignees are as effectually veſted in them, as if the firſt Aſſignment had been made to them by the Commiſſioners.

The Commiſſioners at their firſt Meeting, having found the Party a Bankrupt, are to appoint three other Meetings, the laſt of which is to be on the forty-ſecond Day, and they uſually appoint the ſecond of ſuch Meetings for the Choice of Aſſignees, and ſeldom make an *immediate* Aſſignment of the Bankrupt's Effects, unleſs there is Danger of an Extent coming out againſt them (which if it does before the Commiſſioners have actually aſſigned the Effects, it will bind them): And if there is any real Eſtate belonging to the Bankrupt, the Commiſſioners not only make an Aſſignment of his Effects to the Aſſignees, but alſo a Conveyance to them by Bargain and Sale inrolled of ſuch real Eſtate; and by Virtue of ſuch Aſſignment, and Bargain and Sale, the Aſſignees have full Power to ſell and diſpoſe of, receive, bring Actions for, and recover in their own Names, any Part of the Bankrupt's Eſtate, Credits, or Effects; and they or the Commiſſioners may, by 5 *Geo.* 2. *ch.* 30. where there are mutual Debts between the Bankrupt and any other Perſon before his Bankruptcy, ſtate and adjuſt the Account; and what ſhall appear due on the Balance, and no more, ſhall be claimed or paid on either ſide reſpectively. But by the ſame Statute the Aſſignees ſhall not commence any Suit in Equity, without the Conſent of the major Part of the Creditors preſent at a Meeting purſuant to Notice given in the *London Gazette* for that purpoſe; and with the like Conſent, the Aſſignees may alſo ſubmit any Matter relating to the Bankrupt's Effects to Arbitration, or compound with any Debtor to the Bankrupt's Eſtate.

It is not now neceſſary for the Creditors to pay any Contribution Money towards the Expences of the Commiſſion before they prove their Debts; for by 5 *Geo.* 2. *ch.* 30. the petitioning Creditor is to ſue forth and proſecute the Commiſſion at his own Coſts till the Aſſignees are choſen; and at the Meeting for the Choice of Aſſignees, the Commiſſioners are to aſcertain the ſame, and order the Aſſignees to reimburſe the petitioning Creditor out of the firſt Effects of the Bankrupt that they ſhall receive.

The Commiſſioners may examine, as well by Word of Mouth as on Interogatories in Writing, the Bankrupt and his Wife[a], touching his Trade, Dealings and Effects, and alſo every other Perſon (for which Purpoſe they may ſummon any one before them) touching the Perſon, Trade, Dealings, and Effects of the Bankrupt, and any Act of Bankruptcy committed by him.

When the Bankrupt's Eſtate and Effects have been gotten in by the Aſſignees, the ſame are then to be diſtributed among ſuch of the Bankrupt's Creditors as have proved their Debts under the Commiſſion, which Debts may be proved perſonally at any Meeting of the Commiſſioners, or by Affidavit in caſe the Creditor lives remote from the Place of Meeting; but before the making of ſuch Dividend, twenty-one Days Notice of the Time and Place of the Commiſſioners and Aſſignees meeting for that Purpoſe muſt be given in the *London Gazette*; and at ſuch Meetings the Aſſignees muſt produce Accounts of all their Receipts and Payments, and of what Effects ſhall remain outſtanding, and, if required by the Creditors preſent, be examined upon Oath as to the Truth thereof, and ſhall have all juſt Allowances for what they have expended on account of the Bankrupt's Eſtate; and the Commiſſioners by Order in Writing under their Hands, ſhall direct ſo much, as they ſhall think fit, of the neat Produce of the Bankrupt's Eſtate remaining in the Hands of the Aſſignees, to be divided among the Creditors; and the Aſſignees muſt forthwith pay the ſame to the Creditors in Purſuance of ſuch Order, taking only a Receipt from each Creditor for his Share. The firſt Dividend ought, by 5 *Geo.* 2. to be made within twelve Months; and a ſecond Dividend within eighteen Months after the

[a] 1 Wms. 611.

Iſſuing the Commiſſion; but theſe Times are not uſually obſerved, though any Creditor who has proved his Debt may petition the Lord Chancellor, and thereby compel the Aſſignees to make a Dividend.

By 5 *Geo.* 2. *ch.* 30. When a Bankrupt has obtained his Certificate of having duly conformed to the Statutes (which Certificate the Commiſſioners are to ſign, and the Lord Chancellor to allow; four Parts in five both in Number and Value of the Creditors who have proved their Debts, not leſs than twenty Pounds reſpectively, having firſt ſigned their Conſent to ſuch Certificate and Allowance, and the Bankrupt's Diſcharge) he is then free from any future Arreſt for Debts contracted before his Bankruptcy; his future Effects are not liable to the Commiſſion (unleſs he has before been a Bankrupt, compounded with his Creditors, or taken the Benefit of an Inſolvent Act, and hath not ſufficient to pay fifteen Shillings in the Pound); and he is intitled to five *per Cent.* out of the neat Produce of his Eſtate recovered in, if ſufficient to pay his Creditors ten Shillings in the Pound after the Allowance made, ſo as the ſaid Allowance is not above two hundred Pounds; and in caſe his Eſtate will pay twelve Shillings and Six-pence in the Pound, then ſeven Pounds and ten Shillings *per Cent.* ſo as not to exceed two hundred and fifty Pounds; and if it will pay fifteen Shillings in the Pound, then ten Pounds *per Cent.* ſo as not to exceed three hundred Pounds; but if the neat Produce of the Effects will not pay ten Shillings in the Pound, then the Bankrupt ſhall be allowed ſo much as the Commiſſioners and Aſſignees ſhall think fit, not exceeding three Pounds *per Cent.* But,

This Allowance, or any other Privilege or Advantage, ſhall not extend to any Bankrupt whatſoever, who ſhall upon Marriage of any of his Children have given (when he was not able to pay his Debts) above the Value of 100 *l.* or who ſhall have loſt in one Day the Sum of 5 *l.* or in the whole the Sum of 100 *l.* within a Year before he became a Bankrupt, in playing at any Game whatſoever. [See 5 *Geo.* 2. *ch.* 30. At large.]

If an Executor becomes a Bankrupt, a *Legatee* ſhall be relieved as a Creditor. A *Surety* or Bail may come in as Creditor, if he hath paid the Debt. By 7 *Geo.* 1. *ch.* 31. One that hath a Debt *not yet payable* [a] may prove his Debt and receive a Dividend, upon Allowance for Payment before the Time, and by *G.* 2. *ch.* 30. may petition for a Commiſſion); but not if it depends upon a Contingency whether it will ever become due or not, unleſs ſuch Contingency has happened [b]. If one truſts a Bankrupt, [c] after he becomes a Bankrupt, he ſhall not be relieved as a Creditor.

In the Diſtribution of the Bankrupt's Eſtate, no more Reſpect ſhall be had unto Debts upon Judgments, Statutes, Recognizances, or Specialties, than to other Debts; [d] and even tho' ſuch Creditors have ſued out Execution before the Iſſuing of the Commiſſion, they can have no Advantage thereof, but muſt come in only for a rateable Proportion with the other Creditors, unleſs ſuch Execution was executed before the Bankrupt committed any Act of Bankruptcy. And every one of the Creditors muſt have a Share, Rate and Rate like, according to the Quantity of his Debt. [See 21 *Ja.* 1. *ch.* 19.]

[e] If the Bankrupt happens to die after the Commiſſioners have dealt in the Commiſſion, tho' before Diſtribution, yet nevertheleſs the Commiſſioners may proceed to execute the ſaid Commiſſion concerning the Bank-

[a] 2 Str. 1211.

[b] 2 Ld. Ray. 1549. 2 Str. 867. S. C. 1043, 1160. 2 Wms. 496.

[c] Caſ. Temp. Talbot 243.

[d] 1 Wms. 92, 739.

[e] Caſ. Temp. Talbot 184.

Bankrupt's Lands, Tenements, Hereditaments, Goods and Chattels, in ſuch Sort as they might have done if he had been living. But the Commiſſioners muſt account to his Heirs or Executors, and pay the Overplus to them, in the ſame Manner as to the Bankrupt when living. [See 13 *El. ch.* 7. 1 *Ja.* 1. *ch.* 15. 21 *Ja.* 1. *ch.* 19. 10 *An. ch.* 15. 3 *Geo.* 1. *ch.* 12. 7 *Geo.* 1. *ch.* 31. 5 *Geo.* 2. *ch.* 30. All which Statutes ſhall be beneficially conſtrued for the Aid and Relief of Creditors.]

If the Commiſſion is not duly taken out, or if the Commiſſioners do not purſue their Commiſſion, the Party injured may by Petition apply to the Lord Chancellor to ſuperſede the Commiſſion, or to compel the Commiſſioners to proceed to give the Party relief.

Note; The Commiſſion is uſually directed to five Commiſſioners; but three of them are ſufficient to do any Act under the Commiſſion; and therefore no more than three are ſummoned to meet.

By 10 An. ch. 15. *The Diſcharge of any Bankrupt ſhall not diſcharge any* Partner *in Trade with the Bankrupt at the Time he became a Bankrupt; nor one that was* jointly *bound, or had made any joint Contract with ſuch Bankrupt.*

By 19 Geo. 2. ch. 32. *No Perſon, who is* bona fide *a Creditor of any Bankrupt, in reſpect of* Goods bona fide *ſold to ſuch Bankrupt, or any Bill of Exchange* bona fide *drawn, negotiated or accepted by ſuch Bankrupt in the uſual and ordinary Courſe of Trade, ſhall be liable to repay to the Aſſignee any Money, which before the Suing forth of ſuch Commiſſion was* bona fide, *and in the uſual Courſe of Trade, received by ſuch Perſon of ſuch Bankrupt before the Perſon receiving the ſame ſhall have Notice that he is become Bankrupt, or is in inſolvent Circumſtances.*

The Obligee in any Bottomree or Reſpondentia Bond, and the Aſſured in any Policy of Inſurance made and entered into, upon a valuable Conſideration, bona fide, *ſhall be admitted to Claim, and after the Loſs, or Contingency ſhall have happened, to prove his Debt, and receive a Dividend, in like Manner as if it had happened before the Date of the Commiſſion; and the Bankrupt ſhall be diſcharged from ſuch Bond and Policy, and have the Benefit of the ſeveral Statutes againſt Bankrupts, as if the Loſs had happened, and the Money had become payable, before the iſſuing of the Commiſſion.*

VI. Lands may be loſt by *Eſcheat.* *Eſcheat* (from *Eſcheair*, *Eſchier*, to fall) is when Lands [a] fall by Accident to the Lord of whom they are holden; as for want of *Heir* general or ſpecial, or for *Felony* of his Tenant, whether the Judgment is becauſe of Outlawry, or to be hanged. Corruption of Blood makes the Eſcheat to the Lord upon Attainder of Felony; becauſe the Eſtate cannot deſcend. But in Treaſon it is a Forfeiture to the King. [See of *Eſcheats* in *Treaſon*, *Felony*, &c. under the Title *Forfeitures*, *B.* 4. *ch.* 5. *poſt.*]

By Eſcheat.
1 Black. Com. 302.
2 Black. Com. 11, 72, 89, 244.
4 Black. Com. 406, 411.
[a] 1 Inſt. 13. a. & b. 92. b. 268. a. &. b.

VII. Lands may be loſt by *Diſſeiſin*, *Abatement* and *Intruſion*. [b] A *Diſſeiſin* is a wrongful putting out of him that is actually ſeiſed of a Freehold. [See 32 *H.* 8. *ch.* 33.] An *Abatement* is when a Man dieth ſeiſed of an Eſtate of Inheritance, and between the Death and Entry of the Heir, a Stranger doth enter. An *Intruſion* is when, between the Death of Tenant for Life and the Entry of the Heir of him who died ſeiſed of the Remainder, a Stranger doth intrude. An Entry alſo upon the King's Poſſeſſions is called an Intruſion.

By Diſſeiſin.
2 Black. Com. 195.
Abatement, Intruſion, &c.
3 Black. Com. 168, 169.
[b] 1 Inſt. 277. a & b. 331. b.

See of Fines ch. 3. ante.

A *Deforcement* not only comprehends theſe three before-mentioned; but alſo where any one holdeth Land whereunto another hath a Right by Deſcent or Purchaſe, he is ſaid to be a Deforceor.

See B. 4. ch. 3. poſt. 3 Black. Com. 171.

A *Diſcontinuance* taketh away an *Entry* only; but is always by Wrong.

See p. 161. ante.

An *Uſurpation* is when a Stranger preſents to a Church, and his Clerk is inſtituted, as before obſerved; or it may be when a Subject unjuſtly uſes Royal Franchiſes.

[a] 2 Inſt. 38. 272.
[b] See B. 3. ch. 3. poſt.

[a] A *Purpreſture* (*Pourpriſe* an Incloſure) is when any Thing is done to the Nuſance [b] of the King's Demeſns, the King's Highways, *&c.* by Incloſure or Building, endeavouring to make that private, which ought to be publick.

Thus have I ſhewed how *Eſtates* in *Lands, Tenements,* or *Hereditaments* may be *divided,* how *acquired,* and how they may be *forſeited* or *loſt.*

CHAP. V.

Of *Eſtates* in *Goods* and *Chattels* perſonal.

Of Eſtates in Goods and Chattels perſonal.
[c] 1 Inſt. 118. b. Noy's Max. 49, 50, 99. 2 Black. Com. ch. 24.

[c] CHattels (a *French* Word ſignifying *Goods*) are all Goods moveable or immoveable, that are not Freehold; and may be either *real* or *perſonal.* The Word *Bona* includes them both. *Real,* which concern the Realty, or Lands and Tenements, as Guardianſhips, Leaſes, Lands, or Tenements for Years, or at Will, the Intereſt in an Advowſon for one Turn, Intereſt by *Statute-Merchant, Staple, Elegit,* &c. Of theſe I have already treated. *Perſonal,* as Gold, Silver, Plate, Jewels, Implements of Houſhold, and all moveable Goods whatſoever, Cattle of all Sorts, Corn ſown upon the Ground, (becauſe it comes not without Induſtry, and may be given by Will, or forfeited by Outlawry.) Theſe are called Goods and Chattels perſonal, becauſe they belong immediately to the Perſon of a Man; and becauſe when they are wrongfully detained, there is no other way to recover them than by a perſonal Action. [d] But Charters or Evidences concerning Freehold, or Obligations, or Deeds, being Things in Action, are not properly comprehended under the Words *Goods* and *Chattels.* [e] Yet Writings pawned for Money lent are ſaid to be Chattels, and Bonds and Notes, and alſo Writings that concern perſonal Effects only, will paſs either in a Deed or Will by the Name of Goods and Chattels[f].

[d] Dyer 5. 8 Rep. 33. Perk. 115.
[e] Noy's Max. 50.
[f] 2 Roll. Abr. 58.
[g] Noy's Max. 20.

The Ownerſhip of a perſonal Chattel is called a *Property*; and we are ſaid to be [g] *poſſeſſed* of Goods and Chattels, whether real or perſonal; but to be *ſeiſed* of a Freehold. For no Eſtate of Inheritance or Freehold can be termed Goods and Chattels.

[h] 7 Rep. 17. 18. 11 Rep. 50. Finch. 176, 177. Dalt. ch. 156. p. 371. 372. H. P. C. 68.
† Stat. Geo. 3. againſt Dog Stealers.

[h] One may have an *abſolute* or a qualified Property. *Abſolute,* as in Hens, Geeſe, Ducks, Peacocks, but not in Creatures that are *Feræ Naturæ,* as Wild Beaſts, Fowls of the Air, Fiſhes of the Sea or in the Rivers, Partridges, Deer, Conies, Hares. *&c.* And one may have an abſolute Property in Things of a *baſe Nature,* as Maſtiffs, Hounds, Greyhounds, and Spaniels. But it is not Felony to ſteal them; tho' † an In-

dictment may be preferred for a Treſpaſs, or an Action brought for Damages for taking them away. A *qualified* and poſſeſſory Property is only for a Time, and may be obtained by *Induſtry*, as by taking Creatures *Feræ Naturæ* and making them Tame; and then we have only a Property in them ſo long as they remain tame, and do not regain their natural Liberty, and have not a Cuſtom of returning. Of theſe Felony may be committed. Or ſuch a Property may be obtained by Reaſon of *Impotency* and *Place* in Things wild by Nature; as of young Hawks that are in my Ground, of young Pigeons in the Neſt. And of theſe Felony may be committed. And for theſe the Owner of the Soil ſhall have Action of Treſpaſs, if they are taken when they cannot fly. [See 11 *H.* 7. *ch.* 17. Concerning the Eggs of Swans and Hawks.] Or a qualified Property may be gained by Reaſon of *Privilege*, as of a Park or Warren; but one cannot bring an Action for theſe, and ſay *his* Deer, [a] *his* Conies, Hares, Pheaſants, Partridges; for one hath no *real* Property in them, but they belong to him by reaſon of Privilege for his Game and Pleaſure, ſo long as they remain in the privileged Place. [But *Qu.* for it hath been held that a Man may have a Kind of Property in theſe while they are in his own Ground, independent of ſuch Privilege [b].] Tho' of theſe Felony cannot be committed; unleſs reduced to a Tameneſs, and known to be tame by the Offender [c]. Deer chaſed out of a Park, and followed by the Keeper with freſh Purſuit, Fiſhes that are in Trunks or Ponds remain in Poſſeſſion and ſuch a Property. But if Deer get out of the Park and ſtray, or Conies out of the Warren, it is lawful for any one to take them [d].

Property is either of Things in *Poſſeſſion* or *Action*. In *Poſſeſſion*, either *generally*, when no other can have them from me, or with me, without my Act or Default; or *ſpecially*, when ſome other hath an Intereſt with me, or where there is a Property alſo in another as well as in the Owner; as by Bailment, *i. e.* by *Delivery* of Things to a Carrier, to an Innkeeper to ſecure Goods in his Inn; in Goods *pledged* or pawned; in Goods granted *conditionally*; in Things *diſtrained*; in Goods *demiſed* or leaſed out for a Term, or in *Action*, as an Intereſt to ſue at Law either for the Things themſelves, or Damages for them, as for Debts or Wrongs. All theſe Things in *Poſſeſſion* or *Action* one may have in his *own* Right, or in the Right of *another*, as an Executor in Right of his Teſtator. [See the Difference betwixt a *Poſſeſſion*, a *Charge*, and a *ſpecial Uſe* in Title *Felony* againſt the *Goods* of a Subject, *B.* 3. *ch.* 1. *poſt.*

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[a] Godb. 174. Vide Comy. 34. Salk. 556. and 1 Ld. Ray, 250. contra.

[b] Ibid.

[c] See of Game, B. 3. ch. 3. poſt.

[d] See of Larceny, poſt. B. 3. ch. 1.

CHAP. VI.

2 Black. Com. ch. 24. ch 25. ch. 26. ch. 27. ch. 28. ch. 29. ch. 30. ch. 31. ch. 32.

How *Eſtates* in *Goods* and *Chattels* may be *acquired*, (*viz.*) 1. By the King's *Prerogative*. 2. By *Gift*. 3. By *Sale*. 4. By *Theft*. 5. By *Teſtament*. 6. By *Adminiſtration*.

How Eſtates in Goods and Chattles may be acquired, &c. Bac. Elem. 72.

ESTATES in *Goods* and *Chattels* may be *acquired*, 1. By the King's *Prerogative*. 2. By *Gift*. 3. By *Sale*. 4. By *Theft*. 5. By *Teſtament*. 6. By *Adminiſtration*.

By the King's Prerogative. See p. 207. ante. & B. 4. ch. 5. at the End, poſt.

I. By the King's *Prerogative*.

As by *Deodands*, *Treaſure-Trove*, *Waiving*, *Straying*, *Wreck* of the Sea, and by *Forfeiture*.

By Gift. See of Grants, p 252. ante. 2 Black. Com. ch. 30. [a] 3 Rep. 26. 27. [b] See p. 62. ante.

II. By *Gift*.

Here by *Gift*, the Transferring of Things *immoveable*, (as Leaſes for Years), and of Things *moveable*, to one another, may be underſtood. Such a Gift is ſometimes by the Act of the *Party*; as when one doth give a Thing to another, and even tho' the Donee be [a] abſent, for the Property veſts in him, till he diſagrees. Sometimes by Act of the *Law*; as when a Woman is married, all her Goods and Chattels are given to the Huſband by the Marriage [b]; or when one is made Executor, the Law gives all the Goods and Chattels of the Teſtator to the Executor.

[c] Perk. 57. Hob. 230. [d] 3 Rep. 80, &c.

[c] All Chattels real [But ſee 29 *Car.* 2. *ch.* 3.] or perſonal may be granted or given without Deed, except in ſome ſpecial Caſes; and a free Gift is good without a Conſideration. But if there is a [d] *general* Gift of all one's Goods without Exception of Apparel, or other Things of Neceſſity, as Bedding, though it is by Deed, this may reaſonably be ſuſpected to be fraudulent to deceive Creditors. And though there may be a true Debt owing, a Gift of all one's Goods in Satiſfaction of the Debt, is void againſt other Creditors, tho' good againſt the Giver, his Executors or Adminiſtrators. For tho' it may be a Gift upon valuable Conſideration, yet it may not be done *Bonâ Fide*, as the Statute of 13 *El. ch.* 5. [e] does require. By giving all one's Goods, there ſeems to be a ſecret Truſt and Confidence, that the Donee ſhall deal favourably with the Donor in reſpect of his Poverty, or permit him, or ſome other for his Benefit or Uſe, to be in Poſſeſſion, and ſuch a ſweeping Deed will amount to an Act of Bankruptcy. And therefore when any Gift ſhall be made in ſatiſfaction of a Debt, let it be made, 1. In a [*] *publick* Manner before Neighbours, and not in private. 2. Let the Goods and Chattels be *appraiſed* to the full Value, and the Gift made of ſpecifick Goods in Satiſfaction of the Debt. 3. After the Gift let the Donee take *Poſſeſſion* of

[e] See p. 215. ante.

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[d] *Doloſus verſatur in generalibus.* 3 Rep. 80.

[*] *Dona clandeſtina ſunt ſemper ſuſpicioſa.* 3 Rep. 80.

Clauſulæ inconſuetæ ſemper inducunt ſuſpicionem. Ibid.

them; for the Continuance of the Poſſeſſion in the Donor is a ſign of a Truſt.

See 3 *H.* 7. *ch.* 4. Concerning Deeds of Gift, of Goods and Chattels made in Truſt to the Uſe of the Grantor; and ſee the 13 *El. ch.* 5. *p.* 215. *ante.*

* A Gift may be upon Condition.

[See of *Election* under Title *Grants, ch.* 3. *ante.*]

III. By *Sale*.

By Sale.

2 Black. Com. ch. 30.

[a] Noy's Max. 87. Bacon's Ele. 73. See p. 249. ante.

A *Sale* or Selling is a Transferring of the Property of Goods and Chattels from one to another upon valuable Conſideration. A *Gift* may be without a Conſideration; [a] but a Sale can never be without a valuable Conſideration. A Man may ſell his Goods at any Time, tho' he fears an Execution for Debt; except there is a Truſt betwixt the Parties, as that by paying the Money he may have the Goods again; and except the Writ of Execution is delivered to the Sheriff; for then by 29 *Car.* 1. *ch.* 3. The Property of the Goods is bound from the Time of the Delivery.

[b] 8 Rep. 171. 3 Rep. 82.

[c] See of Forfeiture, B. 4. ch. 5. poſt.

[b] One became indebted to the King by Bond, and ſold a Leaſe for Years for a valuable Conſideration: The Sale binds the King, becauſe it was but a Chattel. The King's Debtor ſhall not be in a worſe Condition than a Felon or Traitor, who may ſell his Goods and Chattels after the Felony or Treaſon [c] committed, and before Conviction, for his Maintenance.

[d] Noy's Max. 87. Hob. 41.

[e] Noy's Max. 88.

If one agrees for Wares, [d] he muſt not carry them away, before he hath paid for them, unleſs a Day of Payment is allowed him. If the Bargain is, that you ſhall give me five Pounds for my Horſe, and you give me a Penny in *Earneſt*, which I accept, this is a perfect Sale. If I ſay I will ſell my Horſe for five Pounds, and you ſay, you will give me five Pounds, and preſently go to tell out the Money to pay for him, I cannot ſell my Horſe to any other. But if you do not pay me preſently, it is no Contract. [e] If I ſell my Horſe for Money, I may keep him till I am paid. And if a Horſe dies in my Stable after I have ſold him, and before I have delivered him to the Buyer, I may notwithſtanding have an Action for my Money; becauſe the Property was in the Buyer.

Pr. Ch. 533. 560.

By 29 Car. 2. ch. 3. *No Contract for the Sale of Goods for* ten *Pounds or upwards, ſhall be good, except the Buyer actually receives Part of the Goods ſold, or gives ſomething in Earneſt to bind the Bargain, or in Part of Payment, or ſome Note thereof in Writing be made and ſigned by the Parties to be charged with the Contract, or by their Agents thereunto lawfully authorized.*

And no Action ſhall be brought upon any Agreement that is not to be performed within the Space of a Year from the making thereof, unleſs the ſame, or ſome Memorandum thereof, be put in Writing, and ſigned by the Party to be charged therewith, or ſome other by him thereunto lawfully authorized.

So that if any Agreement is for Wares *under* ten Pounds, and they are not to be delivered within the Year, it is void, unleſs put in Writing, though Earneſt be given, by the laſt Part of the Statute. As to Agreements that are not to be performed within a Year, if no Day is ſet, or the Time is uncertain, (as to pay a Sum at the Day of Death), they are good notwithſtanding the Statute. For it doth not appear to the contrary, but that the Payment may be within the Year. [*See* 7 Geo. 2. ch. 9. *againſt Stockjobbing.*]

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* *Cujus eſt dare, ejus eſt diſponere.* 2 Rep. 71. 7 Rep. 6.

By Theft.
See p 205. ante.

IV. By *Theft.*

As when one ſteals Goods, and ſells them in Fairs and Markets Overt. But the Owner may ſeize his Goods ſtolen at any Time, till they are ſold in the Fair or Market.

By Teſtament.
2 Black. Com. ch. 32.
Shep. Touchſt. ch. 23.
4 Burn. Eccl. law title Wills.
a Terms of the Law, v. Teſtament.
Finch 167, 168,
1 Inſt 111. a. 322, b.
Weſt's Symb Part 1. § 633.

V. By *Teſtament.*

Here it will be neceſſary to ſhew, 1. *What* is a *Teſtament,* and its ſeveral *Kinds*; 2. Who may *make* a Teſtament; 3. What is an *Executor*; 4. What is a *Legacy*; 5. How a Teſtament may be made *void.*

1. [a] A *Teſtament* (*Teſtatio Mentis*) is a voluntary Diſpoſition of what one would have to be done concerning his Goods and Chattels, real and perſonal, after his Deceaſe, with the Appointment of an Executor. If he appoints no Executor, the Ordinary muſt commit Adminiſtration *Cum Teſtamento Annexo,* (with the Will annexed) and ſuch Adminiſtrator is to perform the Will inſtead of an Executor.

b 2 Ld. Ray. 1282.

A Teſtament is either *written* or *nuncupative.* A *written* Teſtament is not only ſuch as I have before ſpoken of in the 3d *Chapter* (more properly called a Deviſe of Lands and Tenements,) but it is that Teſtament concerning Goods and Chattels, which at the Time of making thereof is committed to *Writing.* Signing and Sealing is not neceſſary to this Sort of Teſtament, for it may be made good by Proof[b], without it. A *nuncupative* Teſtament, or Will, is when the Teſtator doth by *Word* of Mouth only declare his Will concerning his Goods and Chattels (for Lands cannot paſs by Words) before a ſufficient Number of Witneſſes, who after his Death put into Writing what the Teſtator ordered in his Lifetime. [See 29 *Car.* 2. *ch.* 3. *infra.*]

c Lit. 168.
1 Inſt. 112. b.
d Perk. 479.

[c] No Teſtament is of any Effect till after the Death of the Teſtator. For one may alter and make void his Will at his Pleaſure; and he may make as many new Teſtaments as he pleaſes; but the laſt Teſtament only ſhall ſtand, the reſt being revoked by the laſt. Yet a new [d] Publication of the firſt Will does revoke the laſt that was made. When the laſt Teſtament is known, it ſhall be favourably expounded according to the Meaning of the Teſtator.

e Weſt. Symb. Part 1. § 636.

A [e] *Codicil* (*Codicillus* from *Codex* a Book, a Writing) is a Supplement to a Will, adding what is omitted, or altering, retracting, or explaining ſomething in it. It is the ſame with a Teſtament, except that it is without the Appointment of an Executor; and except that one may leave behind him only one Teſtament, but as many Codicils as he pleaſes.

If the Teſtament or Codicils are kept from the Executor, he may force the Party detaining them to deliver them up by the Eccleſiaſtical Law, and recover them in the Spiritual Court.

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c *Omne Teſtamentum morte conſummatum eſt.* 1 Inſt. 322. b. 4 Rep. 61.
Voluntas teſtatoris ambulatoria eſt uſque ad mortem. 1 Inſt. 112. b. 4 Rep. 61.
In contractibus benigna, in teſtamentis benignior, in reſtitutionibus benigniſſima interpretatio facienda eſt. Ibid. and 3 Inſt. 241.
De bonis defuncti trina debet eſſe diſpoſitio; neceſſitatis, utilitatis, voluntatis. 8 Rep. 136.

By 29 Car. 2: ch. 3. *No Will in* Writing *concerning perſonal Eſtate, nor any Clauſe thereof, ſhall be repealed or altered by any Words or Will by Word of Mouth only, except the ſame be in the Life of the Teſtator committed to Writing; and after the Writing thereof, read unto the Teſtator, and allowed by him, and proved to be ſo done by three Witneſſes at leaſt.*

And no Nuncupative *Will ſhall be good, where the Eſtate thereby bequeathed exceeds thirty Pounds, that is not proved by the Oaths of three Witneſſes at leaſt, that were preſent at the making thereof; nor unleſs it be proved that the Perſons preſent or ſome of them were bidden to bear Witneſs by the Teſtator; nor unleſs made in his laſt Sickneſs, and in his own Houſe, or where he had been reſident for ten Days before the making; except ſurpriſed by Sickneſs from home, and dying before he returned.*

A Nuncupative *Will ſhall not be proved by the Witneſſes after ſix Months, except the Subſtance thereof was committed to Writing within ſix Days after the making of the ſaid Will. Neither ſhall any Probate of a Nuncupative Will paſs the Seals of any Court, till fourteen Days after the Deceaſe of the Teſtator; nor be proved till Proceſs hath firſt iſſued to call in the Widow, or next of Kin, to conteſt the ſame if they pleaſe.*

Soldiers in actual Military Service, and Mariners at Sea, may diſpoſe of their Perſonal Eſtates, as before the making of this Act.

By 4 An. ch. 16. *Such Witneſſes as are good Witneſſes upon Trials at Law, ſhall be deemed good Witneſſes, to prove a Nuncupative Will, or any Thing relating thereunto.*

2. *Who* may *make* a Teſtament[f].

All Perſons (the [a] King and all his Subjects) may *make* their Teſtaments, except as followeth. An [b] *Infant* Male under fourteen Years of Age, an Infant Female under twelve Years, (or as others ſay) under ſeventeen Years of Age, cannot make their Wills of Goods and Chattels. But an Infant of the Age of ſeventeen certainly may make a Teſtament of his Goods and Chattels, and conſtitute Executors. Yet ſometimes Wills are made by Infants of fourteen Years of Age, and the Common-Law will not intermeddle. A *Woman Covert* cannot make a Teſtament of Goods and Chattels, without her [c] Huſband's Conſent and Licence firſt obtained. Yet if ſhe then diſpoſeth of any Thing, the Legatee hath it rather of the Gift of the Huſband. But of Goods that ſhe hath as [d] Executrix ſhe may make an Executor without the Huſband's Conſent, or ſhe may make her Huſband Executor.

[e] If a Woman maketh her Will before Marriage, Taking Huſband and being Covert at the Time of her Death, is a Countermand of it.

Idiots, *Lunaticks* (except in the Time of their lucid Intervals, where no Commiſſion of Lunacy hath iſſued out of Chancery) *Non Compos Mentis*, or thoſe that have not a [f] ſound, perfect, and diſpoſing Memory, (for it is not ſufficient that the Teſtator hath a Memory) an *Alien* Enemy, Perſons convicted and *attainted*, *Recuſants* Convict, *Corporations* cannot make a Teſtament. An [a] *Outlaw* in a perſonal Action may make a Teſtament of his Goods, and deviſe his Lands. He who is himſelf an *Executor*, cannot give away by Will the Goods, Chattels, and Credits, which he hath as Executor, if the Property is not altered by him by Payment of his own Money. Yet if he hath proved the Will, he may make a Continuation of the Executorſhip; and his Executor ſhall have the Goods, Chattels, and Credits, as Executor to the firſt Teſtator. But he may give them by Word or Deed in his Lifetime. An Ad-

[f] 4 Burn. Eccl. law tit. Wills 42, &c,

[a] 4 Inſt. 335.

[b] 1 Inſt. 89. b. 2 Danv. Abr. Tit. Deviſe, 512, 513. Pr. Ch. 316, 537. See p. 13. ante.

[c] Perk. 501. 4 Rep. 51. 3 Cro. 219, 597.

[d] Perk. 502, Weſt. Symb. Part 1. § 634. 1 Roll. Abr. 912, 913, 915.

[e] 4 Rep. 61.

[f] 6 Rep. 23.

[a] 5 Rep. 111. 1 Roll. Abr. 912, &c.

miniſtrator of a Term cannot *deviſe* it, tho' he may ſell it in his Lifetime. For the Deviſe doth not take Effect 'till his Death; and immediately upon his Death the Law veſts it in the Adminiſtrator *de Bonis non*, of the Inteſtate [See of the *Intereſt* of an *Executor Infra.*]

By 4 & 5 W. & M. ch. 2. *Perſons inhabiting, or having any Goods, within the Province of* York *may by their laſt Wills diſpoſe of all their perſonal Eſtate, notwithſtanding any Cuſtom to the contrary.* [*See* 2 An. ch. 5. *As to Citizens of* York *City.*]

By 7 & 8 W. 3. ch. 38. *Any Perſon reſiding, or having Goods, in the Principality of* Wales *may make his Will thereof, and diſpoſe of them to his Executors or others, as he ſhall think fit; notwithſtanding the Cuſtom by which Widows and Children claim a reaſonable Part.*

By 11 Geo. 1. ch. 18. *Freemen of* London, *become ſuch ſince the firſt Day of* June 1725, *or old Freemen unmarried and without Children, are enabled to diſpoſe of their effects by Will, notwithſtanding the Cuſtom.*

But if any Perſon who ſhall be free of the City, hath agreed or ſhall agree by Writing, in Conſideration of Marriage or otherwiſe, that his perſonal Eſtate ſhall be diſtributed according to the Cuſtom, or in caſe any Perſon ſo free ſhall die inteſtate, his perſonal Eſtate ſhall be ſubject to the Cuſtom.

3. What is an *Executor?*

An [b] *Executor* is he to whom the Execution or Performance of another Man's will is committed after his Death. He may be appointed by expreſs Words or by Words of Circumlocuton that amount to a direct Appointment. Where there [c] is no Executor, there is no Teſtament properly ſpeaking. Land was not originally Teſtamentary. Therefore *that* ſtill may be deviſed in Writing, without making an Executor. He that appoints the Executor is call'd the *Teſtator*. If an Executor is only named by the Teſtator; and nothing given away in the Will to any other, yet it is a Teſtament.

[d] All that are capable of making a Teſtament are capable of being Executors. When the [e] King is made Executor, he appoints others to take the Execution of the Will upon them, and others to take Account. But ſome that cannot make a Teſtament are capable of being Executors. A [f] Mayor and Commonalty may be Executors. (*Q.*) An Infant *in ventre ſa mere*, or in his Mother's Womb, may be an Executor. But when he is born he cannot act as ſuch till Seventeen Years of Age. And therefore the Ordinary muſt grant [g] Adminiſtration *durante minore ætate* till that Age. A Woman Covert may be Executor. [a] So may an excommunicate or outlaw'd Perſon, or attainted or Alien. But Popiſh Recuſants Convict cannot be Executors. [See 3 *Ja.* 1. *ch*. 5.] Nor thoſe that have been convicted of executing an Office without taking the Oaths to the Government [b]. [See 13 & 14 *W*. 3. *ch*. 6. and 1 *Geo.* 1. *ch.* 13.] Nor Artificers exercising or teaching their Trades in foreign Parts, and not returning within ſix Months after Warning. [See 5 *Geo.* 1. *ch*. 27.]

[c] He that may make one Executor may make two, three, or more; but all of them in the Eye of the Law are but one Executor. In which reſpect moſt Acts done by or to any one of them, are Acts done by or to all.

[b] Terms of the Law, v. Executor. Shep. Touchſt. 400, 401. Noy's Max. 102. 4 Burn Eccl. law, tit. Wills. See the Table there.

[c] Finch 167, 168. Weſt's Symb. Part 1. § 633. 637.

[d] Weſt's Symb. Part. 1. § 635. 3 Cro. 9.

[e] 4 Inſt. 335.

[f] 1 Roll. Abr. 915.

[g] 5 Rep. 29. 6 Rep. 67.

[a] 1 Cro. 683. 3 Cro. 8, 9.

[b] See p. 198. ante. See of Forfeitures, B. 4 ch. 5. poſt.

[c] Weſt's Symb. 1 Part, 637. 1 Roll. Abr. 924.

An Executor may be made to a fix'd *Time*, upon *Condition*, (as if the Executor will find Sureties to perform the Will) or to ſome certain *Part* of the Eſtate, or to ſome cerrtain *Act*.

Every [d] *Intermeddling* with the Goods of the Deceaſed is not an Acceptance of the Executorſhip, to make one chargeable as Executor, or as Executor of his own Wrong. As if one does an Act of Charity or Humanity, by locking up the Goods of the Deceaſed that they be not waſted; or if he does bury the Deceaſed, and ſell his Goods to do it; or if one does take away his own Goods, that were in the Houſe of the Deceaſed; or uſe ſome of the Goods of the Deceaſed in the neceſſary Occaſions of the Family; or take the Goods by Letters *ad Colligendum*. Theſe Acts will not amount to an Acceptance of the Executorſhip, if the ſpecial Matter is pleaded.

[d] Dyer 166, 167. Noy's Max. 102, 103.

When an Executor hath *accepted* the Executorſhip, he cannot [e] *aſſign* it over. [f] He may *accept* or *refuſe* the Executorſhip. But as an Executor, after he hath once refuſed the Executorſhip, he can never afterwards intermeddle; ſo after he hath once legally accepted it, he can never after refuſe it. For he cannot accept and refuſe too. So if an Executor is cited by the Ordinary to prove the Will, [See 21 *H.* 8. *ch.* 5.] and he appears, and refuſes to prove the Will, he cannot afterwards accept and intermeddle with the Eſtate. Thus it is where there is but *one* Executor. But where there are [g] *many* Executors named, and all are cited, and ſome of them only appear and refuſe the Executorſhip, and afterwards one of the Executors proves the Will, and takes upon him the Executorſhip, or where one only appears and proves the Will, this ſuffiiceth for them all; and they that did refuſe, or did not come in and prove, may at any Time join with him, and intermeddle with the Eſtate, and come in and take out Probate of the Will. And if the [h] acting Executor dies, and makes an Executor, the ſurviving Executors may act; for their Refuſal before the Ordinary is void in this Caſe. But where *all* refuſe, no one can ever after come in and prove the Will. For the Teſtator now dies Inteſtate, and without an Executor; ſo that the Ordinary may grant Adminiſtration *cum Teſtamento annexo*, [to the reſiduary Legatee, if there be ſuch, or if none, then to the next of Kin] or [i] ſequeſter the Goods in the mean Time, till the Adminiſtration is granted.

[e] Vaugh. 182, 1 Roll. Abr. 918.

[f] 9 Rep. 37. 38.

[g] Perk. 485. 9 Rep. 37, 38. Noy's Max. 102. 3 Wms. 251.

[h] 9 Rep. 37. 1 Inſt. 113. a. Dyer 372. 1 Salk. 311. Noy's Max. 102. Shower 26. 1 Vern. 200.

[i] 9 Rep. 38, 39.

In Caſe where one accepts, and all the reſt refuſe, he muſt bring *Actions* in all their Names, and one may releaſe the Action; for the Poſſeſſion of the one is the Poſſeſſion of all of them. But an Action may be brought [a] againſt him or them only that act or adminiſter. [See 9 *Ed.* 3. *St.* 1. *ch.* 3. 21 *H.* 8. *ch.* 4.]

[a] Perk. 485. Noy's Max. 102, 103. Finch 264, 265.

* Regularly one Executor cannot ſue the other at Law, but he may have Relief in *Equity*.

* Office of Executor, ch 9.

An Executor of his own [b] *Wrong* is he that is neither Executor nor Adminiſtrator, and yet acts as an Executor; as when he takes into his Hands the Goods of the Deceaſed, and converts them to his own Uſe, and alſo if he alters the Property by Gift or Sale, tho' he had Letters *Ad Colligendum Bona Defuncti*; for the Ordinary himſelf has no Power to give or ſell them; or if he delivers the Goods of the Deceaſed to Creditors or Legatees in Satiſfaction of their Debts or Legacies; or receives any Debt due to the Deceaſed; or releaſes any Debt due to the Deceaſed, before it is paid; or pays any Debt due from the Deceaſed, except it be with his own Money. So that if a Man dieth Inteſtate,

[b] Terms of the Law, v. Adminiſtrator. 5 Rep. 31, 32, 33. 8 Rep. 135. 9 Rep. 39. Noy's Max. 102.

and a [c] Stranger taketh the Inteſtate's Goods and uſeth them; he is an Executor of his own Wrong, and muſt be ſued as Executor. For no one can be an Adminiſtrator of his own Wrong. [See 31 *Ed.* 3. *ch.* 11.] [It is the taking *Poſſeſſion* [d] of the Goods of the Deceaſed that makes him liable as Executor in his own Wrong, to anſwer the Value of them to the Creditors, even without any ſelling, uſing, or converting of them.] If there is a legal Executor that hath proved the Will, or if a legal Adminiſtration is granted, before the Stranger intermeddled, a Stranger cannot be an Executor of his own Wrong, but is a Treſpaſſer againſt the Executor, *&c.* and Creditors may have their Remedy againſt the lawful Executor, *&c.* [But this muſt be underſtood, where he takes them *out of the Poſſeſſion* of the legal Executor or Adminiſtrator; [e] for if the legal Repreſentative of the Deceaſed was never poſſeſſed of them, they never were Aſſets in his Hands; and the Perſon who took them, tho' after a legal Adminiſtration granted, is liable as Executor of his own Wrong to the Creditors, or may be ſued for them by the legal Repreſentative.] And tho' there be an Executor or Adminiſtrator, if the Stranger takes the Goods, and *claims* to be Executor, by paying and receiving Debts, there he may be charged as Executor of his own Wrong by ſuch expreſs Adminiſtration. But all lawful Acts, which he doth as Executor of his own Wrong, are good; and he muſt anſwer only as far as he acts. An Executor of his own Wrong cannot [f] *retain* for his own Debt againſt another Creditor, becauſe then the Creditors would ſtrive amongſt themſelves, to ſeize the Goods of the Teſtator.

By 43 El. ch. 8. *If any Perſon ſhall obtain any Releaſe of a Debt, or any Goods or Debts of an Inteſtate, by Fraud, and not upon valuable Conſideration, he ſhall be charged as Executor of his own Wrong, ſo far as the Value of the Goods or Debts ſo obtained ſhall amount. Howbeit, he ſhall be allow'd ſuch reaſonable Deductions, as other Executors or Adminiſtrators ought to have.*

See 30 *Car.* 2. *ch.* 7. To enable Creditors to recover their Debts of Executors or Adminiſtrators of Executors in their own Wrong; and 4 & 5 *W.* & *M. ch.* 24. As to Executors or Adminiſtrators of Executors or Adminiſtrators, who ſhall waſte the Goods of the Teſtator or Inteſtate. See alſo 25 *Ed.* 3. *St.* 5. *ch.* 5.

This is the Deſcription of an Executor. Let us ſee what is his *Intereſt*; and what are *Aſſets*; his *Power*; his *Office* and *Duty*.

1. The [a] *Intereſt* of an Executor ariſes at Common Law, by Virtue of the Teſtament, which gives him all the Chattels real and perſonal of the Teſtator; and the Probate of the Ordinary is only a Confirmation. The Law gives him not only thoſe in *Poſſeſſion*, as [b] Leaſes for Years, and Charters and Evidences concerning them, Arrears of Rent due at the Death of the Teſtator, Grants of next Advowſons and Preſentations of the Teſtator's Inheritance becoming void in his Lifetime; Corn cut or growing, where the Teſtator had an Eſtate for Life; Gold, Silver, Jewels, Plate, Houſhold-Stuff. Cattle, Implements of Huſbandry, but alſo thoſe Things that lie in *Action*, as Rights and Intereſts upon Judgments, Statutes, Recognizances, Obligations and Bonds, and all other Debts due to the Teſtator; becauſe on the other Hand the Law ſubjects the Executor to every Man's Claim and Action, which he had againſt the Teſtator for the ſame. For this Reaſon the Executor is ſaid

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[c] 5 Rep. 33, 82, 83.

[d] See Office of Executors, ch. 14. Swinb. Part 4. S. 23.

[e] Ibid.

[f] 5 Rep. 30.

[a] Plowd. 280. 9 Rep. 37, 38. Noy's Max. 103.

[b] Noy's Max. 103, 104. 1 Inst. 209. a. 388. a. 3 Cro. 515.

to be the Teſtator's[c] Aſſignee, and to repreſent the Perſon of the Teſtator. But for perſonal[d] Wrongs done by the Teſtator to the Perſon, Goods or Land of another, he does not repreſent him; becauſe perſonal Actions die with the Perſon. [But ſee 13 *El. ch.* 10. where Grantees of Goods ſhall be liable to the Succeſſors Suit in the Eccleſiaſtical Court for Dilapidations, as if they were Executors or Adminiſtrators.] But after all that hath been ſaid concerning the *Intereſt* of an Executor; if one makes his Will, and appoints an Executor, and gives him ever ſo ſmall a Legacy, and makes no Diſpoſition of the *Reſidue* of his perſonal Eſtate after Debts and Legacies paid; This Reſidue ſhall not go to the Executor for his own Benefit, but ſhall be diſtributed amongſt the next of Kin to the Teſtator, according to the Statute of Diſtribution of 22 & 23 *Car.* 2. *ch.* 10. [which ſee *infra.*] For the Teſtator is eſteem'd to die inteſtate as to that Reſidue. [But an Executor is not compellable by the Spiritual Court[e] to make Diſtribution, but only in a Court of Equity, which conſiders him as a Truſtee for the next of Kin.]

[c] 1 Inſt. 209. b. 210 a.
[d] 9 Rep. 89. Noy's Max. 104.
1 Wms. 7, 544, &c. Pr. Ch. 169. 1 Str. 568. 2 Wms. 158. S C. 3 Wms. 43, 194.
[e] 2 Str. 865.

The *Wife* of the Teſtator must have her wearing Apparel, which is neceſſary and convenient for one of her Station and Character.

See p. 64. ante.

2. Of *Aſſets.* [See of *Anceſtor* and *Heir*, *B.* 1. *ch.* 6. *ante.* As to real Aſſets.]

2 Black. Com. 510.

[f] All thoſe Goods and Chattels which belonged to the Teſtator at the Time of his Death in any Part of the World, and which do come to the Hands of the Executor, ſhall be[g] *Aſſets* (from the *French Aſſez*, enough) or *ſufficient* Goods and Chattels to make the Executor chargeable (as far as the ſaid Goods and Chattels extend) to a Creditor or Legatee. If a Stranger takes Goods out of his Poſſeſſion, yet they are Aſſets in his Hands. Aſſets in the Hands of one Executor are Aſſets in the Hands of all the Executors; [but each Executor is chargeable for no more than he actually receives, (or joins in giving a Receipt for[h], as to Creditors, *Qu.* in Equity) either to Creditors or Legatees.] Such Things as are not valuable, or not to be ſold, (as[i] Preſentation to a Church actually void,) ſhall not be accounted Aſſets. [k] If the Cattle of the Teſtator do breed after his Death, the Young ſhall be Aſſets. So Wool growing on the Sheeps Backs, Goods and Chattels mortgaged to to the Teſtator, and not redeem'd, or the Money wherewith they are redeemed, ſhall be Aſſets. [a] But if the Lands are only deviſed to be ſold, the Money and Profits of the ſaid Lands ſhall not be accounted any of the Teſtator's Goods. The Law ſeems to be otherwiſe now[b].] Alſo all Goods and Chattels, and Debts that are received or recovered by the Executor by *Action*, after the Death of the Teſtator, ſhall be accounted Aſſets; but not before they are received or recovered. For if the Executor do never recover, or get a Debt into his Poſſeſſion, he ſhall never be charged; [c] provided he has uſed his utmoſt Endeavour to recover it, and cannot do it. [d] *Damages* alſo recovered for Goods taken away in the Life of the Teſtator ſhall be Aſſets. [See 4 *Ed.* 3. *ch.* 7.] [e] If an Obligee or Creditor is made Executor, he may pay himſelf before any other in equal or inferior Degree. If the Obligee or Creditor makes the Obligor or Debtor Executor, it is a Releaſe of the Debt in Law, even in the Caſe of an Infant[f]. But his Debt ſhall be Aſſets for ſo much to other Creditors, [and to Legatees, or even to a Re-

[f] 6 Rep. 47.
[g] Terms of the Law, v. Aſſets. 1 Inſt 374. b. Noy's Max. 104.
[h] 2 Vern. 504. 570.
1 Wms. 241. 1 Salk. 318. S. C. Weſtby v. Clarke, in Chan. Trin. Term 32 & 33 G. 2.
[i] 1 Inſt. 338. a.
[k] Office of Executor, ch 9. p. 119.
[a] 5 Rep. 34.
[b] 1 Lev. 224. See p. 158. ante.
[c] 1 Rep. 98. Office of Executor, ch. 6. p. 92.
[d] Lit. 192. 1 Inſt. 124. a.
[e] 1 Inſt. 264 b. Office of Executor, ch. 2. p 43.
[f] See p. 266. ante.

Reſiduary Legatee in Equity[g],] [h] if there is not Aſſets beſides. [i] If an Executor of his own *Wrong*, to whom twenty Pounds is owing, doth ſeize Goods to the Value of twenty Pounds, intending to pay himſelf a Debt of that Value, this ſhall be Aſſets in his Hands, to make him chargeable to any Creditor or Legatee, as hath been hinted before. If an Executor alters the Property of any Thing belonging to the Teſtator, as by laying down his own Money in lieu of it, it belongs to him. If one recovers againſt an Executor a juſt Debt of an hundred Pounds, and the Executor [k] compounds for ſixty Pounds, he ſhall not be allowed an hundred Pounds, to defraud other Creditors.

[g] 1 Chanc. Rep. 292. Caſ. Temp. Talb. 242.]
[h] 1 Roll. Abr. 920. 921.
[i] 5 Rep. 30.
[k] 8 Rep. 132, 133.

[l] Tho' a Plantation be an Inheritance, yet, being in a Foreign Country, it is a Chattel to pay Debts, and a Thing that is Teſtamentary.

[l] 2 Ventr. 358.

By 29 Car. 2. ch. 3. *An Eſtate for the Life of another, ſhall be Aſſets in the Hands of the Executor or Adminiſtrator, if there be no ſpecial Occupant, nor Deviſe made thereof, and by* 14 G. 2. ch. 20. ſ. 9. *is diſtributable among the next of Kin as perſonal Eſtate.*

[m] Aſſets ſhall be always intended, till the Executor alledges the Want of them in Excuſe.

[m] 9 Rep. 90, 94.

After all the Debts and Legacies are paid, that which remains belongs to the Executor by Virtue of his Executorſhip. [But ſee of the Intereſt of an Executor above.] [n] Tho' the Intereſt which the Executor hath as Executor in the Goods of the Teſtator before ſuch Payments, is different from the Intereſt which every one hath in his own proper Goods. For an Executor cannot by Will give away the Goods which he hath as Executor. But his Executor ſhall be Executor to the firſt Teſtator. Neither are the Goods which a Man hath as Executor, liable to pay his own Debts. But if an Executor [o] alters the Property from the Teſtator to himſelf, by paying a Debt to the Value of ſuch particular Goods named by him, or by [p] paying the Rent, and receiving the Profits of a Leaſe, or Part of the Profits equal to the Rent, the Goods and Profits received are his own.

[n] Plowd 525, 526. Dyer 160. Noy's Max. 107. 9 Rep 88. 1 Roll. Abr. 907.
[o] Dyer 185, 187.
[p] 5 Rep. 31.

3. The [q] *Power* which an Executor hath is wholly by the Will. And therefore he may releaſe an Action, Debts or Duties, aſſent to a Legacy, receive Debts, and take Poſſeſſion of the Teſtator's Goods, or do any Thing as Executor before the Probate of the Will, if he afterwards proves it. But before Probate he cannot bring Actions for Debts, &c. due to the Teſtator, for he muſt ſhew the Teſtament proved under the Seal of the Ordinary. [[a] But if there is but one Executor, and he dies before Probate, his Executor or Adminiſtrator cannot prove the Will; but Adminiſtration muſt be granted with the Will annext, to the reſiduary Legatee, if there is any ſuch, or if not, then to the next of Kin.]

[q] Plowd. 277, 278, 280. 5 Rep. 28. 9 Rep. 38. 1 Inſt. 292. b. 1 Roll. Abr. 917. Noy's Max. 103.
[a] Dyer 372. 1 Vern. 200. Shower 26.

An [b] *Infant* Executor, after ſeventeen Years of Age, hath as much Power as another Executor of full Age. But he is diſabled to do any Thing to his own Hurt; and therefore, if he releaſes a Debt before he receives it, the Releaſe is void; tho' it might have been good upon Payment. And if an Infant above ſeventeen Years of Age aſſents to a Legacy before the Debts are paid, the Aſſent is void; or if he do any Act that will be a *Devaſtavit*, or a Waſting of the Goods, in another Executor of full Age, it ſhall not bind him. He cannot ſell a Leaſe for Years, which he hath as Executor, before he is twenty-one Years of Age. If he does, ſuch Sale ſhall be void.

[b] 5 Rep. 27, 29. 1 Inſt. 264. b. 3 Cro. 490.

A [c] *Feme Covert* Executrix may do any lawful Act, which another Executor may do. But ſhe cannot prejudice her Huſband releaſing a Debt before it is paid; by aſſenting to a Legacy before the Debts are paid. Yet the Huſband may do it.

c 5 Rep. 27.

If the Goods of the Deceaſed are kept from the Executor, he may ſue for them at Common Law. [d] If one ſeiſed of a Meſſuage in Fee-ſimple, Fee-tail, or for Life, hath Goods in the Houſe, and makes his Executors and dies; his Executors ſhall have free Entry, Egreſs and Regreſs to carry the Goods out of the Houſe (to whomſoever it does belong) in a reaſonable Time.

Swinb. 18.
d Lit. 69.

One Executor may ſell a [e] Leaſe for Years, and the Sale ſhall bind the other.

e 1 Roll. Abr. 924.

4. The *Office* and *Duty* of an Executor is, 1. To *bury* the Teſtator in a decent Manner according to his Rank and Character, but with regard to his Eſtate left after Debts paid. For Funeral Expences that are unreaſonable ought not to be allowed out of the Teſtator's Eſtate. Whatever the Executor lays out extravagantly, if there is not enough to pay the Debts, he muſt bear it at his own Expence. [f] If they are reaſonable and neceſſary, Funeral Charges muſt be allowed before Debts and Legacies. 2. The Executor ought to make an *Inventory*, *i. e.* as Schedule containing a true and perfect Deſcription of all the Goods and Chattels of the deceaſed at the Time of his Death, with their Value, and of all Debts due to him. And this Inventory ought to be made and appraiſed in the Preſence of the Executor by two or more of the Creditors, or two of the next of Kin, or in their Default by two or more of the Neighbours or Friends to the Deceaſed; [See 21 *H.* 8. *ch.* 5.] and then the Executor muſt deliver the ſame upon Oath to the Ordinary; unleſs the Ordinary gives him Time to bring in the Inventory, or upon good Cauſe diſpenſes with it. 3. The Executor muſt [g] *prove* the Will before the Ordinary, either in *common Form* by his own Oath, or by *Witneſſes* beſides his own Oath, if any that have Intereſt call him to do it. And tho' a Will is proved in *common Form*, yet the Executor may afterwards be forced to prove it again *per Teſtes*, by thoſe that have a Right to Queſtion it. A *Caveat* is frequently entered into the Regiſter's Office againſt the Probate in common Form. When the Will is proved, either in *common Form*, or *per Teſtes*, it muſt be exhibited in the Office belonging to the Eccleſiaſtical Court, to be kept by the Regiſter; and a Copy thereof in Parchment is to be delivered to the Executor under the Ordinary's Seal, which Copy in Parchment ſo ſealed is called the *Probate*. But it is rather the Certificate of the Probate. [See 21 *H.* 8. *ch.* 5.] One may prove a Will before the Ordinary which relates both to Goods and [a] Lands; tho' formerly a Prohibition uſed to be granted as to the Lands. If there is a Deviſe of Lands and Tenements of Freehold in the Teſtament, it is proper alſo to prove the Will by Witneſſes in the Court of *Chancery*. The Probate of the Will with reſpect to Goods and Chattels is neceſſary; for tho' as to Freehold Lands deviſed, it is not at all material to prove the Will before the Ordinary, yet as to Goods and Chattels it is neceſſary to give the Executor Power to bring Actions, [b] and to confirm the Acts which he did as Executor before Probate. If all the Goods and Chattels of the Deceaſed (under which I comprehend [c] Specialties, as Bonds, Statutes, &c. be within the ſame Dioceſs wherein the Teſtator lived and died, the Executor muſt prove it before the Biſhop of the Dioceſs, or his Commiſſary, or before the Archdeacon, or his Official, according as the *Com-*

Pr Ch. 27.
2 Black. Com. 503, to 507.
4 Burn Eccl. Law, ſee title Wills in the Table.
f Dr. & Stud. Dial 2 ch. 10.
1 Roll. Abr. 926.
g Perk. 486.
9 Rep. 37, 38.
2 Inſt. 488.
a 1 Ventr. 207.
6 Rep. 23.
b 1 Roll. Abr. 917.
Noy's Max. 103.
c Dyer 305.
1 Roll. Abr. 908, 909.

poſition has been made with the Biſhop, or as *Preſcription* directs. [But it hath been lately expreſly held [d], that it is not the Death of the Party; but his having Goods or Chattels at his Death within the Dioceſs, that gives the Juriſdiction to the Ordinary; and if the Party has no Goods or Chattels within the Dioceſs where he lived and died, or not to the Value of five Pounds, but hath Goods or Chattels in another Dioceſs to that Value, the Probate muſt be granted by the Ordinary of that other Dioceſs.] Sometimes the Executor hath been driven to ſhew, how an [e] Archdeacon hath Power to prove a Will; whereas the Power of the Biſhop or his Commiſſary will be allowed of Courſe. Debts without Specialty are to be accounted Goods in that Dioceſs where the Debtor lives. If all the Goods and Chattels lie in a *peculiar* Juriſdiction, then the Will ought to be proved before him that is Judge of the Peculiar. [f] If ſome Part of the Goods, to the Value of five Pounds, is in a Dioceſs, and Part to the ſame Value in a Peculiar of the ſame Dioceſs, [or in one Dioceſs in one Province, and in another Dioceſs in another Province] there muſt be two ſeveral Probates. But if the Goods are within two Peculiars within the ſame [g] Dioceſs, then the Will muſt be proved before the Archbiſhop of the Province. And ſo before the Archbiſhop, if there are *Bona Notabilia, i. e.* If the Teſtator had Goods and Chattels at the Time of his Death of the Value of five Pounds, or more, lying in different Dioceſſes within the ſame Province [or if there are *Bona Notabilia* in different Dioceſſes in one Province, and alſo in different Dioceſſes in another Province [h], it muſt be proved before the Archbiſhop of each Province. But if there are *Bona Notabilia*, only in one Dioceſs in one of the Provinces, in that Caſe it is ſufficient to prove it before the Ordinary of that Dioceſs, and the Archbiſhop of the other Province, without any regard to the Place of the Teſtator's Death, as before obſerved.]

[d] Griffiths v. Griffiths, K. B. Eaſt. T. 26 G 2. 1 Salk. 37. to the contrary not law.

[e] Perk. 491, 492. Can. 92. &93.

[f] 1 Cro. 718, 719.

[g] 1 Lev. 78.

[h] 2 Lev. 86. 1 Salk. 39. Daliſon 77. 1 Roll. Abr. 908, &c.

But by 4 An. ch. 16. *Wages due to Perſons for Work done in the King's Yard or Docks, ſhall not be deemed* Bona Notabilia. In ſome Places [i] *Lords of Manors* have the Probate of all the Wills of their Tenants within the Manor, by Cuſtom Time out of Mind. Therefore it is to be obſerved, that if Probates of Wills or Letters of Adminiſtration are [a] denied in the King's Courts, and thereof an Iſſue joined, it ſhall be tried by a Jury, and not by Certificate of the Ordinary; becauſe not *originally* of Eccleſiaſtical Cognizance. [But the Probate is Evidence uncontrovertible [b] of the Will, and of its Contents, as to perſonal Effects.]

See of Prerogative Court, B. 4. ch. 1. poſt.

[i] 5 Rep 73. 9 Rep 37.

[a] 9 Rep. 31, 40, 41. 2 Inſt. 231. 1 Str. 666.

[b] 1 Ld. Ray. 262. 1 Str. 481. 1 Wms. 389, 526. 2 Wms. 287.

By 31 Ed. 3. ch. 4. *Biſhops ſhall reſtrain their Officers from taking exceſſive* Fees *for Probate of Teſtaments, in pain to have them indicted before the Juſtices for Extortion.*

By 21 H. 8. ch. 5. *The* Fees *for Probate of Teſtaments are limited. And the Ordinary may convene Executors to* prove *the Teſtator's* Will, *and to bring in an* Inventory.

3 Inſt. 149, &c. 4 Inſt. 336.

By 23 H. 8. ch. 9. *A Man is not to be* cited *out of his Dioceſs, or peculiar Juriſdiction, to prove a Will, or to take Letters of Adminiſtration, unleſs there are* Bona Notabilia.

4. It is the Executor's Office and Duty to pay *Debts* and *Legacies*. A [c] Bond or other Security for Payment is to be accounted Payment. All *Debts* muſt be paid before Legacies. In Payment of *Debts* this *Order* muſt be obſerved. After the Charge of the Funeral, Inventory. Oppoſition by a *Caveat* and the Probate, the King is to be preferred for

[c] Hob. 250. 2 Ventr. 358.

his Debts due upon [d] Record and Specialty. Then the Forfeitures for not *Burying* in Woollen are to be allowed out of the Eſtate of the Deceaſed before any Statute, Judgment, or other Debt or Duty whatſoever. [See 30 *Car.* 2. *ch.* 3.] All Money due for *Letters* to the Poſt-Office ſhall be paid before any Debt due to a private Perſon. [See 9 *An. ch.* 10.] Afterwards Debts due upon [e] *Judgments* recovered againſt the Teſtator in any Court of Record, without any Conſideration of firſt or laſt. [But ſee 4 & 5 *W.* & *M. ch.* 20.] Yet then amongſt Judgments, he that firſt ſueth Execution ſhall be preferred. But before Execution it is at the Election of the Executor, to pay which Judgment he will firſt. [A Duty [f] decreed in a Court of Equity ſtands in an equal Degree with a Judgment at Law.] Then [g] *Statutes* or *Recognizances* forfeited, but thoſe that are for Performance of Covenants, or with Conditions, are not to be paid before they are broken or forfeited; and amongſt Statutes and Recognizances forfeited, the Executor may give Precedency, as he pleaſes, before Execution. Then Debts due for [h] Arrearages of *Rent*, whether due upon *Leaſes* in Writing, or upon Parol Leaſes, becauſe it ſavours of the Realty in regard of the Profits received. For the Leſſor may diſtrain and pay himſelf whether the Executor will or no. Then Debts due upon [i] *Specialties*, as Obligations, Bills penal, or ſingle Bills ſeal'd without penalty. Laſtly, Debts due upon Bills or *Notes* unſealed, or verbal *Contracts*; for there is no Difference betwixt theſe which are called ſimple contract Debts.

[d] Of office Executor, ch. 12, p. 179. 1 Roll. Abr. 927. Bacon's Elem. 81.
[e] 4 Rep. 60. 5 Rep. 28.
[f] 3 Lev. 355. 1 Vern. 143. Caſ. Temp. Talb. 217. 3 Wms. 402.
4 Rep. 60. 5 Rep. 28, 29. Office of Executor, ch. 12, 201, &c. Contra, 1 Cro. 734, 822.
[h] Office of Executor, ch 12. p. 209, 210, 211.
2 Ventr. 184. Bacon's Elem. 81. 3 Lev. 267.

Note; That amongſt Debts that are of *equal* Degree, the Executor may always pay [k] himſelf firſt; but an Executor of his own Wrong cannot [l] retain, as before-mention'd. [m] An Executor of an Executor may retain, becauſe he is Executor to the firſt Teſtator: But if the Teſtator being indebted by Bond to *A.* makes *A.* and *B.* his Executors, and dies; and then *A.* makes *C.* his Executor, and dies; *C.* cannot retain, becauſe he is not Executor of the firſt Teſtator; but *B.* is now ſole Executor by Survivorſhip; and the only Reaſon for allowing Retainer, is becauſe the Executor cannot ſue himſelf. And of Creditors in equal Degree, he that commences his [a] Suit is to be paid before thoſe who do not ſue; but of thoſe who commence Suit, he who firſt gets Judgment is to be firſt paid. Thoſe Debts that are due are to be paid before thoſe that are not due, or whoſe Day of Payment is to come.

[i] Office of Executor, 204, &c.
[k] Plowd. 543. Office of Executor, p. 204, &c.
[l] 5 Rep. 30. 2 Ventr. 180.
[m] 3 Wms. 183. Pr. Ch. 79. 2 Wms. 298.
[a] Dr. & Stud. Dial. 2. ch. 10. Noy's Max. 104.

Yet (notwithſtanding what hath been ſaid concerning the Commencement of Suit firſt, and thoſe whoſe Day of Payment is to come) an Executor will ſometimes confeſs Judgment preſently to a Friend for his Debt (for he is not bound to ſtand Suit) and plead that Judgment to a Stranger's Debt, that his Friend may be firſt paid. In Equity, as well as at Law, [b] Executors may prefer any Creditor in equal Degree, or after an Action at Law or Bill in Equity brought by one Creditor, may confeſs Judgment to another. But if on a Judgment for an hundred Pounds the Plaintiff [c] compounds for ſixty, the Judgment for the whole Sum will not be allow'd to keep off other Creditors, as before-mentioned. If no Suit is begun, the Executor may make a voluntary Payment of the whole Debt to any one Debtor in *equal* Degree, tho' he hath no Aſſets left to pay unto another any Part of his Debt. Debts due to the [d] King, otherwiſe than by Matter of Record, as for Sale of Timber, Amerciaments in his Courts-Baron, are like Debts due to a Subject. [But ſee 33 *H.* 8. *ch.* 39.] The ſame Order throughout is to be obſerved by Executors of Executors. If the Executor pays in any other Order, he muſt pay the

1 Roll. Abr. 926, 927. Bacon's Elem. 81.
[b] 1 Wms. 295. Pr. Ch. 188. Caſ. Temp. Talbot 217. 3 Wms. 402.
[c] 8 Rep. 133. 9 Rep. 110.
[d] Office of Executor. ch. 12. p. 179. 1 Roll. Abr. 927.

the Debts of a higher Degree out of his own Eſtate, if he hath not Aſſets to pay all the Creditors. After all the Debts are paid in ſuch Order as directed, the Executor muſt pay [e] *Legacies.* And herein the Executor may prefer [f] himſelf if any Legacy is given to him, tho' there is nothing left to diſcharge the other Legacies. [[g] But this is not Law at this Day, and even tho' the Legacy be given to him for his Care and Trouble, and not generally, it hath been held, that he ſhall abate in Proportion with the other Legatees.] If there is not enough to ſatisfy all the Legatees, he muſt pay to each of the Legatees a Part of their Legacies in Proportion. [h] For it is not here as in the Caſe of Debts due from the Teſtator. The Executor may not know the Number of the Debts; and therefore ſhall be allowed to pay thoſe which come to his Knowledge firſt. But here the Legacies are all known, as ſoon as the Will is opened. But if there is a [i] *ſpecifick* Legacy, or any particular Thing given *in Specie*, as a Leaſe, a Horſe, a Silver Cup; this muſt be delivered accordingly before any other Legacy, if there are Aſſets ſufficient to pay Debts. If there is enough to pay all the Legacies, they muſt be all paid. If one binds himſelf and his Executors in an Obligation, to perform a certain Thing, and in his Will gives divers Legacies and dies, leaving Goods only ſufficient to pay this Obligation when it is forfeited, this Obligation ſhall be no Bar to the Legacies; [k] becauſe it is uncertain whether it may ever be forfeited. But the Executor may make a Delivery or Payment of the Legacy upon Condition, (*viz.*) [l] to return the Legacy if the Obligation is ever forfeited, and the Penalty recovered. If there is not enough to pay Debts, or more above Debts, the Legatees muſt loſe their Legacies. [m] If there be only a Deficiency in Part, ſpecifick Legacies are to be firſt paid, and not to abate in Proportion with the other Legacies; but pecuniary Legacies are to abate in Proportion; and [n] ſo ſhall charity Legacies, which are pecuniary, though preferred by the Civil Law. [a] If an Executor pays one Legatee his whole Legacy, upon a Suppoſition that there are Aſſets to pay all the others, and there happens a Deficiency, a Court of Equity will oblige the Legatee to refund in Proportion; but it is otherwiſe if the Deficiency ariſes by the Waſting of the Executor. See of a *Legacy, infra.*]

By 29 Car. 2. ch. 3. *No Executor or Adminiſtrator ſhall be charged on a ſpecial Promiſe, to anſwer Damages out of his own Eſtate, unleſs ſome Note thereof be in Writing, and ſigned by the Party to be charged, or ſome other by him authorized.*

5. The Executor muſt paſs his [b] *Account* before the Ordinary concerning the Goods and Chattels of the Teſtator. The Inventory ſhews what is his *Charge*, and the Account muſt be his *Diſcharge* for ſo much as he can prove to be laid out in Payments for Funeral Charges, making the Inventory, Probate of the Will, Debts and Legacies. This Account will diſcharge him of all Suits in the Spiritual Court, but will not diſcharge him of Suits at Common Law. For there each Particular muſt again be proved: [And the Executor is accountable for what he has actually received by Sale of the Teſtator's Goods and Chattels, and not according to the Appraiſement.] [See 31 *Ed.* 3. *ch.* 11.]

By 4 Ann. ch. 16. *An* Action *of* Account *lies againſt the Executor, or Adminiſtrator of a Guardian, Bailiff, or Receiver. And the Auditors ſhall examine the Parties upon Oath; and ſhall be allowed, as the Court ſhall judge reaſonable, by the Party on whoſe Side the Balance ſhall be.*

[e] Dr. & Stud. Dial. 2. ch. 11. 8 Rep. 136. 9 Rep. 88. Bacon 83.

[f] Plowd. 545. Office of Executor, ch. 12. p. 204, &c.

[g] 2 Vern. 434. 2 Wms. 25.

[h] 2 Ventr. 358, 360.

[i] Office of Executor, ch. 19. p. 317.

[k] Roll. Abr. 928.

[l] 2 Ventr. 358.

[m] 1 Wms. 422, 539.

[n] 1 Wms. 265, 675. 2 Wms. 25.

[a] 1 Wms. 495. 2 Wms. 447, 296.

[b] 9 Rep. 39, 40.

If one maketh [c] *Overſeers* in his Will, they have no Power to execute the Will, or to intermeddle with the Goods. They may give Counſel and Advice; and if Executors will not be prevailed on to do their Duty, the Overſeers may complain of them in the Spiritual Court, or in a Court of Equity.

Laſtly, [d] If an Executor does *Waſte*, or miſemploys the Eſtate of the Deceaſed, or ſells the Goods of the Teſtator at an Under-value, tho' upon a Submiſſion to Arbitrators, or does not obſerve the Law which directs him in the Management thereof, by paying what ought not to be paid, or by not obſerving the right Order of Payment, or doth any Thing by Negligence or Fraud againſt his Truſt, it is a *Devaſtavit*, or Waſte; and he ſhall be charged for ſo much, upon the *Devaſtavit* returned by the Sheriff, *De Bonis Propriis*, upon his own Goods, as if it were for his own proper Debt. [e] Where there are many Executors, the Fraud or Negligence of one ſhall not be chargeable upon the Reſt: But it is not ſo with Adminiſtrators, for they have but one Authority, which muſt be executed by all joined together. If the waſting Executor dies, [f] his Executors or Adminiſtrators are chargeable. [By 4 & 5 *W.* & *M. ch.* 24.)

4. Of *Legacies.*

[g] A *Legacy* is a particular Bequeſt or Gift of Money, Goods, or Chattels, to one or more by Teſtament. In ſome Caſes a Bequeſt of Lands or Tenements may be called a Legacy. Some are incapable of Taking by Legacy. [See 3 *Ja.* 1. *ch.* 5. 13 *W.* 3. *ch.* 6. 1 *Geo.* 1. *St.* 2. *ch.* 13. 5 *Geo.* 1. *ch.* 27.] He to whom the Legacy is given is called the *Legatee* or *Legatary*. [a] There is a Difference where the *Property* of the Thing is given, and when the Uſe of it only is given. For a Man may give the Uſe of his Plate to one for Life, Remainder to another. But if the *Plate* was given for Life, or for an Hour, a Remainder to another would be void, and the Legatee may diſpoſe of it. But if he does not diſpoſe of it, he in Remainder ſhall have it. [But now a Bequeſt of a Chattel perſonal for Life is conſtrued to mean the ſame Thing as a Bequeſt of the Uſe of it.]

Legacies are not recoverable at Common Law, but in *Chancery* or the Spiritual Court. But if an Executor promiſes, that in Conſideration of Forbearance to ſue for a Legacy, he will pay the Legacy at ſuch a Time, by Virtue of that Promiſe it becomes a Debt, and may be recovered at Common Law. [*Qu.*] The Common Law taketh Notice of the *Aſſent* of the Executor to the Legacy, and doth give him Time to conſider of the Value of the Goods, and State of the Debts; that he may ſafely pay a Legacy without Danger to his own Goods as a Waſter. Therefore the [b] Aſſent or Agreement of the Executor is firſt to be obtain'd, before any Legacy can be taken. Until then the Legatee may not meddle with the Legacy, becauſe (I ſay) the Executor is to pay Debts before Legacies. And this is the Reaſon why no Property can be transferred to the Legatee without the Conſent of the Executor. Nay a *ſpecifick* Legacy, or a particular Thing given in *Specie*, as a Piece of Plate, cannot be taken without his Aſſent. For elſe by ſuch Legacies the Teſtator might give all his Goods away, to defraud his Creditors. [c] Where a Leaſe for Years is deviſed, his Aſſent is neceſſary. And where a Leaſe for Years is bequeathed to one for Life, or ſo many Years as one ſhall live, the Remainder over, the Aſſent to the firſt Eſtate ſhall be effec-

tual

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[c] Office of Executor, ch. 1. p. 13, 14.

[d] 8 Rep. 133. Terms of the Law, v. Devaſtavit. Noy's Max. 104. Office of Executor, ch. 13. p. 226, &c.

[e] Office of Executor, ch. 13. p. 231, &c. 1 Roll. Abr. 929, 930. Bacon's Elem. 81, 82.

[f] Office of Executor, ch. 13. p. 232.

[g] Terms of the Law, v. Legacy, 2 Inſt. 81. 2 Black. Com. 512. 4 Burn. Eccl. law See Title Wills in the Table.

[a] Noy's Max. 31, 99, 100.

1 Ver. 35.

See p. 148. ante.

[b] Perk. 570. 10 Rep. 49. 1 Inſt. 111. a. 1 Roll. Abr. 618. Bacon's Elm. 83.

[c] 8 Rep. 95, 96. 10 Rep. 47. 1 Inſt. 111. a. Bacon's Elem. 83. 3 Wms. 12.

*10 Rep. 47. e Perk. 572. f 5 Rep. 29. 1 Cro. 719.

tual to him in Remainder. If the Legacy is given to the * Executor himſelf, it ſhall come to him as Executor, except he chuſe to take it as Legatee. For the Law gives him his Election. When there are many Executors, the Aſſent of one is ſufficient, to transfer the Property to the Legatee; and [e] one Executor may take his Legacy without the Aſſent of his Co-executors; for *one* may releaſe. And if there is not ſufficient to pay Debts, he only that aſſented ſhall anſwer of his own proper Goods. An Executor may aſſent before and after Probate. An [f] *Infant* Executor before ſeventeen Years of Age, or Feme-Covert, cannot bind themſelves by their Aſſent. But the Huſband's Aſſent is ſufficient, where his Wife is Executrix. An Adminiſtrator *Durante minori ætate* of an Executor cannot aſſent to a Legacy. (*Qu.* If there be Aſſets ſufficient to pay Debts.)

1 Wms. 287. g 2 Str. 847.

If an Executor will not aſſent, he may be compelled in a Court of Equity or the Court Chriſtian, to pay the Legacy; [And may be ſued in the Court [g] where he proves the Will, tho' he does not live in that Dioces, notwithſtanding 23 *H.* 8. *ch.* 9]

h Plowd. 543, 544. 4 Rep. 28. a 1 Inſt. 111. a.

There may be an Aſſent [h] *implied*, as well as *expreſs*. For if a Horſe is bequeathed, and one offers to buy him of the Executor himſelf, and he directs him to go to the Legatee to buy him, or if the Executor himſelf offers the Legatee Money for him. This is an implied Aſſent, and ſufficient. And if the Executor doth once declare his Aſſent to the Legacy, the Legatee may take it tho' the Executor revokes his Aſſent afterwards. For by the Aſſent the Property was veſted in the Legatee. The Aſſent of the Executor is not needful in a Deviſe of [a] Lands by one ſeiſed in Fee-ſimple, if he deviſeth the ſame in Fee, in Tail, for Life, or Years, as hath been ſaid.

b 1 Wms 86. c 10 Rep. 51. 2 Ventr. 342, 366. 2 Vern. 766. 1 Wms. 563. S. C. d 2 Wms. 276, (613) 3 Wms. 138. 2 Vern. 416. e 1 Vern. 204. 321. 3 Wms. 119. 172. Caſ. Temp. Talb. 117. 3 Wms. 414. S. C. 2 Wms. 276, (613.) Embry, v. Marlen, in Chan. 10 May 1754.

If a Legatee dies before the Teſtator, the Legacy is loſt [b]. But if the Teſtator dies, and there is a [c] *Time* limited for Payment of the Legacy, and the Legatee dies before that Day, his Executor ſhall have the Legacy; for the Legatee had a preſent Intereſt, tho' the Time of the Payment was *in futuro*. Otherwiſe, if a Legacy is bequeathed to one *at* ſuch a Time, and he dies before that Time; for then the Legacy is loſt. [But if a Legacy be given out of a *real* Eſtate [d] payable at a future Day, and the Legatee dies before that Time, the Legacy ſhall not be raiſed. Tho' this Rule ſeems to be ſubject to theſe Diſtinctions: [e] That where the Time of Payment reſpects the Legatee or his Capacity to take, if he dies before the Time of his being in ſuch Circumſtances, his Repreſentative ſhall not have the Benefit of the Legacy: But if the Time reſpects the Circumſtances of the Eſtate itſelf, or the Conveniency or Propriety of raiſing the Money, there it ſhall be raiſed at the Time appointed, for the Benefit of the Repreſentative of the Legatee: So if the Time limited be the ultimate Time, *within* which it is to be paid: ſo alſo where it is annexed by Way of Condition to the Enjoyment or Poſſeſſion of the Eſtate, out of which it is to be paid, or where it is given upon ſuch a Contingency ſo remote, as that the Teſtator could not ſuppoſe it would happen in the Life of the Legatee.]

[Where the reſiduary Legatee dies before the Teſtator, the Teſtator is conſidered as having died inteſtate as to ſuch Reſidue, and it ſhall go to the next of Kin; and ſo if the Reſidue is bequeathed to two or more equally between them, or in certain Shares, ſo as to make them *ſeparately* intereſted therein, and any of them die in the Life-time of the Teſtator, his ſhare belongs to the next of Kin, as if the Teſtator had died inteſtate [f], the Executor being in ſuch Caſe only a Truſtee for the next of Kin, and bound to make Diſtribution according to 22 & 23 *Car.* 2. *ch.* 10. [which ſee *infra.*] But if the Reſidue is bequeathed to two or more by ſuch Words as give them [g] a *joint* Intereſt, if one of them dies in the Life of the Teſtator, the Survivors take the whole Reſidue.]

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* *Quando duo jura concurrunt in unâ perſonâ, idem eſt ac ſi eſſent in diverſis.* 7 Rep. 2. 14.

[[h] If a Man bequeath his perſonal Eſtate among his Relations, it ſhall go among ſuch only as are capable of taking within the Statute of Diſtributions of 22 & 23 *Car.* 2. which ſee *infra.*]

When a Wife is made Executrix, with Legacies to the Children, and ſhe marries again; at the Inſtigation of the Huſband, ſhe frequently will endeavour, to diſcount [i] Maintenance and Education. But this was not ſuffered in the Chancery, ſo as to diminiſh the principal Sum. For the Mother ought to maintain her Children. Yet a Sum of Money paid for the Binding out a Child, to be an Apprentice, was allowed to be diſcounted.

5. A *Teſtament* is *void*, 1. Where the Perſon was *incapable* to make a Teſtament for want of *Diſcretion*; for want of *Liberty*, as Woman Covert; for that one is a *Criminal*, as Traitor or Felon; or by Reaſon of ſome legal *Impediments*, as an Alien Enemy, *&c.* 2. By making of a *later* Teſtament though the firſt was made irrevocable; [a] for a Teſtament is of its own Nature revocable. 3. By *Cancelling* that which was made. [See 29 *Car.* 2. *ch.* 3.]

By 9 & 10 W. 3. ch. 41. *No Seaman's Will contained in the ſame Inſtrument with a Letter of Attorney ſhall be good in Law.*

It remains that I ſhew how Goods and Chattels may be acquired by *Adminiſtration.*

VI. [b] *Adminiſtration* is the Management (committed by the Ordinary in Writing under Seal, for it cannot be granted by Word of Mouth) of the Goods and Chattels of one that dieth Inteſtate, by making no Will at all, or by not appointing an Executor in his Will, or where the Executor refuſeth to prove the Will. It relates to the Time of the Inteſtate's Death. He or ſhe to whom the Management is committed, is called the *Adminiſtrator* or *Adminiſtratrix.* They have but an [c] Authority, becauſe they have nothing to their own Uſe. [But ſee 31 *Ed.* 3. *ch.* 11. *infra,*]

Concerning Adminiſtrations it may be inquired, 1. *By whom* Adminiſtration is to be *granted.* 2. *To whom* it ought to be granted. 3. What is the *Intereſt* of an Adminiſtrator. 4. His *Power.* 5 His *Duty.* 6. How an Adminiſtration may be *revoked.*

1. An *Adminiſtration* is to be *granted* by the Biſhop of the Dioceſs, or Archdeacon, or Judge of the peculiar Juriſdiction, where the Goods which are to be adminiſtered, are at the Time of the Death of the Inteſtate. But a Judge of a Peculiar ought to [d] ſhew in his Grant, how he hath Power to grant it. Regularly he that ſhall have the Probate of a Will, ſhall have the Grant of the Adminiſtration, when the Party dieth Inteſtate, or without Will. And if there are *Bona Notabilia*, the Adminiſtration muſt be granted there where the Probate of a Will in ſuch Caſe is to be granted, (*viz.*) By the Archbiſhop of the Province. So that what hath been ſaid before concerning the Right of

[f] 1 Wms. 700. 2 Wms. 489. 2 Str. 820. S. C.

[g] 2 Wms. 529. 347. 3 Wms 115.

[h] 1 Wms. 327. Pr. Ch. 401. Caſ. Temp. Talb. 251.

[i] 2 Ventr. 353.

[a] 8 Rep. 82.

[b] Terms of the Law, v. Adminiſtration. 2 Black. Com. 489, 503, 504. 506. 4 Burn Eccl. law, ſee title Wills in the table. 2 Inſt 397. By Adminiſtration.

[c] 8 Rep. 135.

[d] 1 Cro. 791. 2 Cro. 556.

granting *Probates* of Teſtaments or Wills, the ſame may be ſaid concerning the Right of granting *Adminiſtrations.* The Law is the ſame in both Caſes as to *Bona Notabilia* [e]. In the Time of the Vacation of a Biſhoprick, the Guardian of the Spiritualties may grant the Adminiſtration. [See 43 *El. ch.* 8. An Act againſt fraudulent Adminiſtrations of Inteſtates Goods.]

2. An Adminiſtration muſt be granted *to* ſuch a Perſon as the Law directs; ſo that the Ordinary cannot refuſe to grant Adminiſtration, where a proper Perſon applies to him; nor can he [f] revoke it where it is *legally* granted. But it may be granted upon [g] Condition. It may be granted to an Alien, and he may have Adminiſtration of Leaſes as well as of mere perſonal Things, becauſe he hath them in another's Right, and not to his own Uſe.

By 31. Ed. 3. ch. 11. *Where one dieth Inteſtate, the Ordinaries ſhall depute the next and moſt* lawful *Friends of the Inteſtate, to adminiſter his Goods; which Deputies ſhall have an Action, to demand and recover the Debts due to the Inteſtate in the King's Courts, to enable them to adminiſter, and ſhall anſwer alſo in the King's Courts to others, to whom the ſaid Inteſtate was bounden, in the ſame Manner as Executors ſhall anſwer; and ſhall be accountable to the Ordinaries as Executors are in Caſe of a Teſtament.*

This Act gave Power to Ordinaries to grant Adminiſtrations, which they could not do before. For [a] originally the *King* uſed by his Officers to ſeize the Goods of Inteſtates to pay their Debts, and for Advancement of their Wives and Children, or next of Blood where there was no Wife or Child. And afterwards this Truſt was committed to the Ordinaries. But no Power was given to the Ordinary to ſell or diſpoſe of the Goods either to his own Uſe, or the Uſe of any other, tho' the Goods were in Danger of Periſhing; but only to the Uſe of the Deceaſed, as to pay his Debts, &c. Neither could the Ordinaries bring Actions for Recovery of the Debts of the Inteſtate; tho' an Action lay againſt them at Common Law, or their Committees, by the Name of Executors, if they intermeddled with the Goods, and would not pay the Debts. [b] After Poſſeſſion of the Goods they might have an Action of Treſpaſs, for carrying them away; or before Poſſeſſion ſue for them in the Spiritual Court. [c] But now by this Statute of 31 *Ed.* 3. there are ſix Alterations made; *three* as to the *Ordinary*, and *three* as to the *Adminiſtrators*. As to the *Ordinary*. 1. The *Ordinary* is compelled to grant Adminiſtration. 2. He muſt grant it to the next of Kin, not attainted of Treaſon or Felony, or under other legal Diſability, for they muſt be the next *lawful* Friends. 3. The Ordinary may appoint the Adminiſtrators. Under the Word *Ordinary*, Commiſſaries, Archdeacons, Officials, and other Eccleſiaſtical Judges are comprehended for this Purpoſe within the Meaning of the Act. As to *Adminiſtrators*. 1. The Adminiſtrators have *by this Act* a greater Intereſt in the Goods than the Ordinary ever had, nay, as abſolute Property in the Goods and Chattels as Executors have. 2. Adminiſtrators ſhall recover the Debts, and have all Actions as Executors may have. 3. Adminiſtrators ſhall anſwer to Actions in the ſame Manner as Executors, and be accountable to the Ordinary.

By 21 H. 8. ch. 5. *In caſe any Perſon dies Inteſtate, or the Executor refuſes to prove the Teſtament, the Ordinary ſhall grant Adminiſtration of the Goods of the Perſon deceaſed to his Widow, or to his next of Kin, or to both, as the Ordinary ſhall think fit; taking Surety for the true Adminiſtration thereof. And in Caſe where divers Perſons claim the Adminiſtra-*

[e] See Prerogative Court, B. 4. ch. 1. poſt.

[f] 9 Rep. 40. 1 Lev. 157.

[g] 6 Rep. 19. 1 Cro. 683.

[a] 9 Rep. 38, 39, 40, 41. 2 Inſt. 398.

[b] 8 Rep. 135. 2 Inſt. 398.

[c] 9 Rep. 38, 39, 40, 41. 2 Inſt. 398.

tion as next of Kin, which be in equal Degree of kindred to the Perſon deceaſed, the Ordinary hath Election to accept any one or more making Requeſt; or where but one or more of them, and not all, being in equal Degree, make Requeſt, the Ordinary may admit the Widow, and him or them only making Requeſt, or any one of them, at his Pleaſure.

As to the *Wife* or *Widow*, this Act hath altered 31 *Ed.* 3, *ch.* 11. And as to the next of *Kin*, where an Executor refuſes to prove the Teſtament, the Statute ſuppoſes, that ſuch an Inteſtate's Intent was to prefer the Kin. But if he makes a reſiduary Legatee, that Preſumption is taken away[d]. In that Caſe the reſiduary Legatee, ſhall have the Adminiſtration, who is to have what remains after Debts and Legacies are paid. [e] An Adminiſtration *Durante Minore Ætate* of an Executor is not within the Statute, or of Neceſſity to be granted to the Widow of the Teſtator, nor Adminiſtration *Pendente Lite.* [See *infra.*] So that now the Law is ſettled thus as to Adminiſtration upon the Goods of Inteſtates. It muſt be granted, 1. to the [a] *Huſband* of the Wife's Goods and Chattels, as of a Leaſe for Years. 2. To the *Wife* of the Huſband's Goods and Chattels. [b] But an Adminiſtration may be granted to the Father, or other next of Kin, before the Widow; and a [c] reſiduary Legatee ought to be preferred before the Widow in an Adminiſtration *cum Teſtamento annexo.* If there is no Huſband or Wife living, then, 3. To the *Children*, Sons or Daughters. 4. If Children die firſt, [d] to the *Father*, or *Mother* if the Father is dead. And if no Father or Mother, then 5. To a *Brother* or *Siſter* of the whole Blood. 6. To Brother or Siſter of the [e] *half Blood*; for they are all next of *Kin* in equal Degree. And if none of the half Blood, then 7. To the next of Kin, Uncle, Aunt, or Couſin. [f] A Grandmother is nearer of Kin than an Aunt, and is intitled to Adminiſtration in Preference to her; neither is the latter to come in for a diſtributory Share. If none of theſe deſire the Adminiſtration, then, [g] 8. To a *Creditor*. For want of all theſe, 9. To any other Perſon or Perſons, at the Diſcretion of the Ordinary. Or the Ordinary may *ex Officio* grant to a Stranger Letters [h] *Ad Colligendum Bona Defuncti*, or to gather up the Goods of the Deceaſed. Or the Ordinary may take them into his own Hands, to pay the Debts of the Deceaſed, in ſuch Order as an Executor or Adminiſtrator ought to pay them. But he, or the Stranger who has Letters *ad Colligendum*, cannot ſell them, without making themſelves Executors of their own Wrong. The Ordinary hath only an Authority, and no ſuch Power himſelf; and therefore he cannot give that Power to any other. Adminiſtrators (as hath been ſhewn) derive their Power only from the Statutes.

4 Burn Eccl. law. 197, &c.
[d] 2 Lev. 56.
[e] Hob. 250. 1 Ventr. 219.
[a] 4 Rep. 51.
[b] Raym. 93. Shower's Rep. 351. 1 Sid. 179.
1 Salk. 36.
[c] 1 Ventr. 217, 218, 219.
[d] 3 Rep. 40.
[e] Style 74, 75, 102.
[f] 1 Salk. 38. 1 Wms, 41. Pr. Ch. 527.
[g] Bacon's Elem. 80.
[h] Dyer. 256. 8 Rep. 135. 9 Rep. 39. 1 Roll. Abr. 918. 1 Ventr. 350.

If one hath made a Will, and after the Death of the Teſtator the Executor does prove it, and then [i] dies Inteſtate, the Ordinary muſt grant Adminiſtration of the Goods of the Teſtator (*Not adminiſtered* by by the Executor) to ſome other Perſon. This is called an Adminiſtration *De Bonis non, &c.* (*viz.*) *Non Adminiſtratis.*

[i] 1 Roll. Abr. 907.

By 17 Car. 2. ch. 8. *An Adminiſtrator* De Bonis non *may ſue out a* Scire facias *on a Judgment after a* Verdict *recovered by the Executor or Adminiſtrator.*

Where an Executor *refuſes* to prove a Teſtament, Adminiſtration muſt be granted *cum Teſtamento annexo*, or with the *Will annexed* to the Adminiſtration, to the reſiduary Legatee, or if none, to the next of Kin.

Where an *Infant* is made *Executor*, Adminiſtration muſt be granted *cum Teſtamento annexo* to his Guardian or next Friend, *Durante Minore Ætate*,

Ætate, but the Adminiſtration ceaſes, when the Infant is [k] ſeventeen Years of Age. And if an Infant Executrix before ſeventeen Years of Age taketh Huſband of full Age, the Adminiſtration preſently ceaſeth [l]: [*Qu.*]

If an Infant is intitled to an *Adminiſtration* of the Goods of an *Inteſtate*, Adminiſtration ſhall be granted to another *Durante Minore Ætate*, till he is of full Age [m], *i. e.* one and Twenty. And ſo it is of an Adminiſtration during the Minority of a reſiduary Legatee: Becauſe an Adminiſtrator is in by the Statute, and not by the Act and Judgment of the Party, as an Executor is, and in Judgment of Law, no one is capable to act as Truſtee for another till twenty-one; and a Minor cannot enter into a Bond with Sureties to adminiſter faithfully, as required by 22 & 23 *Car.* 2. *ch.* 10. An Adminiſtrator *Durante Minore Ætate* may bring Actions; but he cannot ſell any of the Goods of the Deceaſed; unleſs it be upon neceſſity, as for the Payment of Debts, or for fear the Goods ſhould periſh. He cannot let a Leaſe, if the Grant of the Adminiſtration is ſpecial, *ad opus, commodum & utilitatem Executoris Durante Minore Ætate, & non aliter, &c.* But if the Grant of the Adminiſtration is general without ſuch Reſtraint, ſuch an Adminiſtrator may let Leaſes: But methinks this is a nice Diſtinction; and ſurely in the firſt Caſe he might let Leaſes [a] during the Time that he is Adminiſtrator. [*Quære.*]

An Adminiſtration may be granted by the Ordinary [b] *Durante Abſentia extra Regnum*, or *Pendente Lite*; and it is as good as an Adminiſtration *Durante Minore Ætate*. And ſuch an Adminiſtrator may maintain Actions for Debts due to the Deceaſed [c].

If Adminiſtration is granted to two, and one of them dies; [d] the Adminiſtration ſurvives.

By 21 H. 8. ch. 5. * *The Fees for Letters of Adminiſtration are ſettled with a Penalty for Extortion.* (But there is no Proviſion in the Act, in caſe the Goods of an Inteſtate amount to more than forty Pounds. *Nothing is to be taken, if the Goods are not above the Value of five Pounds.*

By 9 & 10 W. 3. *ch.* 41. *For Adminiſtration granted to the Wife or Children of any* Seaman *dying in Pay of his Majeſty's Navy, no more ſhall be taken than one Shilling for the Seal, Writing, or ſuing forth of the ſame (unleſs the Seaman's Goods and Chattels amount to twenty Pounds) upon Penalty of ten Pounds to the Party grieved.*

3. An Adminiſtrator by Virtue of his Adminiſtration hath *Intereſt* in all the Chattels, real and perſonal, of the Inteſtate, and in all the Goods and Chattels, either in Poſſeſſion or Action, in like manner as an Executor in the Goods of the Teſtator deceaſed. And all thoſe Goods and Chattels which belonged to the Inteſtate at the Time of his Death, and which come to the Hands of the Adminiſtrator, ſhall be *Aſſets*, or ſufficient Goods and Chattels, to make him chargeable to the Creditors, as Executors are to Creditors and Legatees. [e] Before they come to his Hands he is not chargeable.

But tho' an Executor ſhall have all the Reſidue or Surpluſage of the Goods and Chattles after Debts and Legacies paid, by Virtue of his Executorſhip; it is otherwiſe in caſe of an Adminiſtration. For an Adminiſtrator can take no Advantage by his Adminiſtration, (unleſs [f] by paying his own Debt firſt, if it is equal in degree with others, or by taking the Goods and Chattels, as they are appraiſed) becauſe the Surpluſage muſt be diſtributed amongſt the next of Kin, if there are any Kin, according to 22 & 23 *Car.* 2. *ch.* 10. hereafter to be mentioned. If

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[k] 5 Rep. 29. 6 Rep. 67. 2 Inſt. 398. 1 Ld. Ray. 338. Comy. 159.

[l] 3 Wms. 88. contra.

[m] 1 Salk. 39. 1 Ld. Ray. 338, 667. Comy. 110. 159.

[a] Noy's Max. 106. 1 Roll. Abr. 910. 1 Cro. 718, 719.

[b] 4 Mod. 14. 1 Lut. 342.

[c] 6 Mod. 304. 1 Salk. 42. S. C. 2 Wms. 576. 2 Ld. Ray. 1071. 2 Str. 917.

[d] 2 Vern. 514. Caſ. Temp. Talbot. 127.

* 3 Inſt. 148, &c.

[e] 2 Inſt. 398. 1 Roll. Abr. 919.

[f] 1 Roll. Abr. 922.

a [g] Debtor takes Adminiſtration of the Goods and Chattels of his Creditor, this ſhall not diſcharge the Debtor; but his Debt ſhall be Aſſets; becauſe the Inteſtate did not Act to free him from the Debt. Whereas by making a Debtor Executor, the Teſtator doth thereby releaſe the Debt; tho' the Duty remains, and is Aſſets. [h] When an Adminiſtrator (as well as an Executor) hath paid Funeral Charges, Debts, *&c.* with his own Money, he may retain ſo much of the Goods of the Inteſtate in kind according to the Value, and ſhall have Property in them. For by ſuch Payment the Property is altered from the Inteſtate to the Adminiſtrator.

[a] If an Executor hath not proved the Will of the Teſtator and dies, his Executor is not Executor of the firſt Teſtament. But Adminiſtration muſt be granted with the Will annexed to the reſiduary Legatee, or if none, to the next of Kin of the Teſtator. But where an Executor has proved the Will and dies, making an Executor, the ſecond Executor is Executor to the firſt Teſtator alſo. Yet if an [b] Adminiſtrator dies Inteſtate, or makes an Executor, his Adminiſtrator or Executor ſhall not be Adminiſtrator or Executor to the firſt Inteſtate; neither ſhall the Adminiſtrator of an Executor be Adminiſtrator to the Teſtator; but the Ordinary is to grant a new Adminiſtration or an Adminiſtration *De Bonis non*, of the Goods of the firſt Inteſtate, or Teſtator, to his reſiduary Legatee, or next of Kin. Therefore where an Adminiſtrator hath Judgment and dieth, his Executor cannot ſue Execution of that Judgment. For none ſhall have Execution of the Judgment, but he who ſhall be ſubject to the Payment of the Debts of the firſt Inteſtate, to which the Executors of the Adminiſtrator are not ſubject.

4. As to the *Power* of an Adminiſtrator.

An Adminiſtrator can do nothing till an Adminiſtration is granted to him; whereas an Executor hath his Power from the Will, and may act in many Caſes before Probate. After the Adminiſtration is granted, the [c] *Power* of an Adminiſtrator is almoſt equal with that of an Executor. Yet if there are *many* Adminiſtrators, one of them cannot ſell Goods, or releaſe Debts, without the other, but they muſt all join, becauſe they have but one Authority. [See 30 *Car.* 2. *ch.* 7. 4 *&* 5 *W. & M. ch.* 24.]

5. The *Office* and *Duty* of an Adminiſtrator is the ſame with that of an Executor, as to the *Burial* of the Deceaſed and Payment of *Funeral* Charges, the making of an *Inventory* of his Goods and Chattels, the Payment of *Debts* and the paſſing of an *Account*. And as an Executor is to take a Probate of the Will, ſo the Adminiſtrator muſt apply to the Ordinary for Letters of Adminiſtration, and muſt take them out from the Ordinary, as an Executor ought to do for the Probate of the Will, and with regard to *Bona Notabilia*. But there is ſomething more to be done by an Adminiſtrator. For,

By 22 & 23 Car. 2. ch. 10. *All Ordinaries and Eccleſiaſtical Judges, (upon granting Adminiſtrations) muſt take Bond of the Adminiſtrator with two or more able Sureties,* [Q. Of an Adminiſtrator *Cum Teſtamento Annexo*, and ſee 21 *H.* 8. *ch.* 5.] *with Condition, that the Adminiſtrator ſhall make a true and perfect* Inventory *of all the Goods and Chattels of the Deceaſed, and exhibit it into the Regiſtry of the Ordinary's Court by ſuch a Day; and to adminiſter according to Law, and to make a true and juſt* Account *thereof, and to deliver and pay the ſame to ſuch Perſon as the Court ſhall decree the ſame to, purſuant to the Act; and the Court ſhall order*

[g] 8 Rep. 136. 1 Roll. Abr. 920.

[h] 1. Inſt. 264. b.

[a] 1 Roll. Abr. 907.

[b] 5 Rep. 9.

[c] Noy's Max. 106. Bacon's Elem. 82.

Diſtribution of the Surplus after Payment of Debts, Funerals and juſt Expences, as follows, viz. *One* third *to the Wife of the Inteſtate; the Reſidue amongſt his Children, and ſuch as legally repreſent them, if any of them are dead; except ſuch Children (not Heirs at Law) who had any Eſtate by Settlement or Advancement by Portion from the Inteſtate in his Life-time, equal to the other Shares. If their Shares by ſuch Advancement are not equal to the other Shares, thoſe Children ſhall have ſo much of the Surplus, as ſhall make the Shares of all to be equal. But the Heir at Law ſhall have an equal Share in the Diſtribution with the other Children, without any Conſideration of the Value of the Land which he hath by Deſcent, or otherwiſe, from the Inteſtate.*

[a] A Deſcent of Lands in the Nature of *Borough Engliſh* to the youngeſt Son will not prevent his having a full diſtributive Share of his Father's perſonal Eſtate.

[a] Caſ. Temp. Talbot 276.

Note; [b] The Right to the diſtributive Share veſts immediately on the Inteſtate's Death: But not ſo as to exclude a poſthumous Child.

[b] 2 Wms. 442, 446. 3 Wms. 50.

If there are no Children, nor legal Repreſentatives of them, one half *of the Inteſtate's Goods and Chattels ſhall go to the Wife; the Reſidue equally to the next of Kindred to the Inteſtate in equal Degree, and thoſe that repreſent them. If there is no Wife, all ſhall be diſtributed amongſt the Children; if no Child, all ſhall be diſtributed amongſt the next of Kin to the Inteſtate in equal Degree and their Repreſentatives.* [But ſee 1 *Ja.* 2. *ch.* 17. *poſt.*]

No Repreſentation *ſhall be admitted amongſt Collaterals after Brothers and Siſters Children.* [That is after the Children of the Inteſtate's [c] Brothers and Siſters.]

[c] 1 Wms. 25. 1 Ld. Ray. 571.

Such Diſtribution is not to be made till one Year after the Death of the Inteſtate; and Bond with ſufficient Sureties muſt be given by thoſe, to whom ſuch Diſtribution ſhall be made, to refund to the Adminiſtrator, in caſe Debts afterwards appear.

Where the Inteſtate's Brothers and Siſters all die before him, leaving Children, theſe take *per Capita* [d]; but if there is one or more Brothers or Siſters, and the Children of deceaſed Brothers and Siſters, they then take *per Stirpes*.

[d] Pr. Ch. 54. 3 Wms. 50.

Note, That it is agreed for Law, that the [e] *half* Blood ſhall have a Share upon a Diſtribution equally with the whole Blood.

And the next of Kin on the Mother's Side take equally with thoſe of the ſame Degree of Kindred on the Father's Side [f].

Where the next of Kin are an Uncle, and the Son of a deceaſed Aunt, the latter can have no Share under the Statute [g]. But Uncles and Nephews are in equal Degree of Kindred, and the Uncles ſhall take under the Statute with the Nephews, if the Inteſtate left no Brothers [h] or Siſters.

[e] 1 Ventr. 307. 2 Ventr. 317. Shower's P. Caſes 108. Show. Rep. 1. 2 Lev. 173. 1 Wms. 53.

[f] 1 Wms. 53.

[g] 1 Wms. 594. Pr. Ch. 28.

[h] Morgue v. Buiſſiere, in Chan. 12. March 1756.

By 29 Car. 2. ch. 3. *The Act of* 22 & 23 Car. 2. ch. 10. *ſhall not extend to the Eſtates of Feme Coverts that die Inteſtate, but their Huſbands ſhall have Adminiſtration of their perſonal Eſtates, as before the making of that Act.*

And the Huſbands are not compellable to make Diſtribution of their perſonal Eſtates. But a [i] Huſband ſhall be liable, as Adminiſtrator to his Wife, to her Creditors, by Reaſon of ſuch Part only of her Eſtate as he did not reduce into Poſſeſſion during the Coverture; unleſs he made a Jointure upon her, in which Caſe he is deemed a Purchaſer of all her Fortune [k].

[i] Caſ. Temp. Talbot 173. See p. 64. ante.

[k] 3 Wms. 199.

By 1 Ja. 2. ch. 17. *No Adminiſtrator ſhall be cited to render an* Account *of the perſonal Eſtate of the Inteſtate (otherwiſe than by Inventory) unleſs it be at the Inſtance of ſome Perſon in Behalf of a Minor, or of one having a Demand out of ſuch Perſonal Eſtate as Creditor or next of Kin.*

If, after the Death of a Father, any of his Children ſhall die Inteſtate without Wife or Children in the Life of the Mother, every Brother and Siſter, and the Repreſentatives of them, ſhall have an equal Share with the Mother.

[a] But if a Child dies Inteſtate and unmarried, the Father ſurviving has the Child's whole Eſtate at this Day. And this without taking Adminiſtration to him.

[b] If after the Death of the Father the Son dieth Inteſtate, without Iſſue, but leaving a *Wife*, a Mother, and Brothers, and Siſters, the Inteſtate's Wife ſhall have one Moiety, and as to the other Moiety, the Inteſtate's Brothers and Siſters ſhall come in for an equal Share thereof with the Mother, being a Caſe within the Statute.

Such Part of any Inteſtate's Eſtate within the City of London *or Province of* York, *as any Adminiſtrator hath by Virtue only of being Adminiſtrator, ſhall be ſubject to Diſtribution as in other Caſes, and the Cuſtom ſhall not extend to ſuch Part.*

[If a Freeman of *London* leaves a Wife and no Children: *By the Cuſtom of London* [c], the Half of his perſonal Eſtate belongs to his Wife, and the other Half is ſubject to his Diſpoſition by Will: So if he leaves a Child or Children, and no Wife, the Half belongs to ſuch Child or Children. But if he leaves a Wife and a Child, or Children, one Third belongs to the Wife, another Third to the Child or Children, and the other Third he may diſpoſe of by Will: But if a Freeman dies without making any Will, his *Teſtamentary* Share (or ſuch Part as he might have diſpoſed of by Will) is ſubject to the Statute of Diſtributions. [But ſee 11 *G.* 1. *ch.* 18. To *empower* Freemen to diſpoſe of their *whole* Eſtate by Will. *Ante.*]

[[d] Such Child of a Freeman, as hath been advanced in his Life-time, muſt (if there are *other* Children) bring ſuch Advancement into Hotch Pott, *i. e.* into the Orphanage or Children's Part of the perſonal Eſtate.]

6. An Adminiſtration may be *revoked* by the Ordinary upon good Cauſe; and then if the Adminiſtrator afterwards intermeddles with the Eſtate, he may be charged as Executor of his own Wrong. But the Ordinary cannot revoke an Adminiſtration legally granted, at his Pleaſure. If a [e] *Citation* is granted to the next of Kin againſt an Adminiſtrator (a Stranger) to ſhew Cauſe, why his Adminiſtration ſhould not be revoked, and it is revoked accordingly by Sentence, yet all Acts of the Adminiſtrator done lawfully and *Bona Fide*, as Adminiſtrator, during his Adminiſtration, (as Selling Goods, Paying Debts, Receiving Debts, and Giving Releaſes, even depending the Suit for Revocation of his Adminiſtration) are good till the Adminiſtration is revoked; and ſhall bind the ſucceeding Adminiſtrator. For the Adminiſtration was only voidable, not void. But if there is any Fraud, a Creditor may have Relief upon the Statute of 13 *El. ch.* 5. tho' it remains good againſt the ſecond Adminiſtrator. Otherwiſe it is when there is an *Appeal* from the *Grant* of the Adminiſtration to one: For the Appeal doth ſuſpend the former Decree;

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[a] 1 Wms. 48. Pr. Ch. 260.

[b] 2 Wms. 344. 1 Str. 710.

Danv Ab. 311, &c.

[c] 2 Salk. 426. 1 Wms. 341.

[d] Ibid. 2 Wms. 527.

2 Str. 911. 4 Burn Eccl. Law, title Will. p. 207.

[e] 6 Rep. 18, 19. 8 Rep. 135, 143. 1 Cro. 459, 460. 1 Ventr. 219. 1 Ld. Ray. 685. 1 Wms. 41.

[f] 5 Rep. 30. 8 Rep. 135.

[a] 1 Wms. 767.

Decree; which is different from the Caſe of a *Citation* to ſhew Cauſe why the Adminiſtration ſhould not be revoked. [f] So it is when the firſt Adminiſtration is merely void; as when an Adminiſtration is granted by the Biſhop of the Dioceſs, &c. where there is an Adminiſtration already granted by the Prerogative Court, whether by right or wrong. For tho' the prerogative Adminiſtration is afterwards revoked, it ſhall not make the other Adminiſtration of more Effect, than it was at the Time it was granted. So that after it is revoked, a new Adminiſtration muſt be granted by the inferior Ordinary. But if the Inferior Ordinary had firſt of all granted Adminiſtration, and the Metropolitan in his Prerogative Court afterwards grants Adminiſtration where he ought not, and it is revoked; all Acts by the firſt Adminiſtrator are valid from the Beginning. [A Prerogative Adminiſtration, where there are not *Bona Notabilia*, is only voidable; [a] but a Dioceſan Adminiſtration, in caſe there are *Bona Notabilia*, is merely void.]

[b] 1 Roll. Abr. 907.

[c] 3 Rep. 78.

If an Adminiſtration is granted, and afterwards a Will is produced and proved, the Adminiſtration is to be revoked, and all the Acts, which the Adminiſtrator hath done, are void. [b] But if the Executor was cited to prove the Will, and he did not appear, or if he conceals the Will, and thereupon the Ordinary grants Adminiſtration to another; and then the Executor comes in afterwards and proves the Will; all Acts done by the Adminiſtrator are good, and ſhall bind the Executor. Letters of Adminiſtration obtained by [c] Fraud are void; and ſhall not repeal a former Adminiſtration. [See 43 *El. ch.* 8. and of the *Prerogative Court*, *B.* 4. *ch.* 1. *poſt.*]

[See 29 *Car.* 2. *ch.* 3. 30 *Car.* 2. *ch.* 7. 4 & 5 *W.* & *M. ch.* 24. which are mentioned under *Executor.*]

CHAP. VII.

How *Eſtates* in *Goods* and *Chattels* perſonal may be *forfeited* or *loſt*.

How Eſtates in Goods and Chattels perſonal may be forfeited or loſt.

[d] Bacon's Elem. 77, 78.

[d] GOODS and Chattels perſonal may be *forfeited* or *loſt* by *Treaſon*, *Felony*, *Flight* for Felony, tho' one is not Guilty; By being put in the *Exigent*, tho' he is not Guilty; By *Sale* in Market Overt; By *Deodand*, *Treaſure-Trove*, *Waif*, *Stray* and *Wreck*. Of theſe I have ſpoken particularly in another Place. [See of *Forfeiture*, *B.* 4. *ch.* 5. *poſt*; and of *Franchiſes*, *B.* 2. *ch.* 2. *ante.*] By *Bankruptcy*, [See *ch.* 4. *ante.*] By *Aſſaulting* or *Challenging* another to fight for Money won at *Play*, &c. [See 9 *An. ch.* 14.]

Thus far of *Eſtates* in *Lands*, *Tenements*, and *Hereditaments*; and of *Eſtates* in *Goods* and *Chattels* perſonal; being the ſecond *Object*, and the moſt difficult Part, of the Laws of *England*.

The End of the Second Book.

BOOK III.

Of *Crimes* and *Miſdemeanors*; or of the *Pleas* of the *Crown*.

CHAP. I.

Of *Capital* Crimes or Offences, *(viz.) High Treaſon*, *Petit Treaſon*, and *Felony*. And therein of *Private* Felonies, which are committed againſt the *Life*, *Body*, *Goods*, or *Habitation*, of the Subject, *&c.*

THE *third* Object of the Laws of *England* are *Crimes* and *Miſdemeanors*, or the Pleas of the *Crown*.

4 Black. Com. ch. 1.

Some Offences are by the *Common Law*; but moſt of them are made ſo by *Acts* of Parliament. Theſe are neceſſary to be known, becauſe they concern the Safety of the King; the Quiet of the Commonwealth; the Life, Liberty, and Eſtate of the Subject.

The Order that I ſhall obſerve in treating of *Crimes* and *Miſdemeanors* ſhall be this. I ſhall ſpeak 1. Of *capital* Crimes. 2. Of *Principals* and *Acceſſories*, and of the *Benefit* of the *Clergy*. 3. Of Crimes *not capital*. Theſe ſhall be the Subjects of the enſuing Chapters concerning the *third* Object of our Laws.

[a] A *Crime* or *Offence* is an Act *committed* againſt a Law, or *omitted* where the Law requires it, and puniſhable by it. This general Definition comprehends capital Offences, and Miſdemeanors or Offences not capital.

[a] West's Symb. Of Indictm. and Offences, §. 2.

But thoſe that are to be eſteemed Guilty of any Offences muſt have the Uſe of their *Reaſon*, and be at their own Diſpoſal or *Liberty*. For 1. [b] Thoſe that want *Reaſon*, to diſtinguiſh betwixt Good and Evil (as *Infants* under the Age of Diſcretion, *viz.* under the Age of fourteen Years, *Idiots* and *Lunaticks*) ought not to be proſecuted for any Crime; no, not for Treaſon for killing the King; tho' the Law was anciently otherwiſe. But as to *Infants* under fourteen, their Underſtanding and Diſcretion ought to be examin'd. For if they appear to have Knowledge equal to thoſe that are of Years of Diſcretion, they may be proſecuted. But it is proper to reſpite Execution in order to obtain a Pardon. And as one *Non Compos Mentis* ſhall not be arraigned for a capital Offence; ſo if he become *Non Compos* after Conviction, he ſhall not be executed. Yet if an Infant or *Non Compos* commits a *Treſpaſs* againſt the Perſon or Poſſeſſion of another, he muſt anſwer for the Damage in

4 Black. Com. ch. 2.
[b] 1 Inſt. 247. b.
4 Black. Com. 22, 24.
3 Inſt. 4, 6, 108.
2 Rep. 27.
4 Rep. 124.
H. P. C. 43, 44.
Dalt. ch. 147. p. 350.

[a] Hob. 134.
2 Roll. Abr. 547.
Dalt. ch. 147.
[b] 1 Inſt. 247 a.
4 Black. Com. 25, 26, 27, to 33.
[c] 3 Inſt. 108.
H. P. C. 65, 66.
Kelynge 31.
Dalt. ch. 157. p. 734.
[d] 9 Rep. 71.
11 Rep. 61, 62.
Hob. 97.

a[a] civil Action. Men[b] *Drunk* or in a *Paſſion* are not to be excuſed, if they commit Offences; for their Acts are voluntary and owing to their own Folly. 2. One that is at *Liberty*, but under the Power of another, may be ſometimes excuſed. [c] As a *Feme Covert* ſhall not ſuffer for a bare Theft in Company with her Huſband; for it ſhall be preſumed to be done by Coercion. The bare Command of her Huſband will not ſave her. But if ſhe commits Treaſon, Murder, or Robbery in Company with her Huſband, ſhe is puniſhable in like Manner as the Huſband. [d] And in all Offences not Capital a Wife may be put to anſwer with her Huſband, or alone without him, tho' they both join'd in the Commiſſion of the Offence. [e] A Servant is not to be excuſed the Commiſſion of any Crime, tho' he acts by the Command or Coercion of his Maſter. For a Maſter hath no ſuch Power over him.

[e] H. P. C. 66.
Dalt. ch. 161. p. 399.
Kelynge 13.

In all Crimes there muſt be an evil *Intention*; a mere *Miſtake* is not puniſhable. [f] Nor is an evil Intention puniſhable equally with the Fact; except in Treaſon.

4 Rep. 16.
11 Rep 98.
[g] 3 Inſt. 5, 69, 161.
Weſt's Symb. 86. § 3.

Where one hath the Uſe of his Reaſon, and is at Liberty, his [g] *Endeavour* to commit a Felony is puniſhable; tho' not to that Degree, as if the Felony had been actually committed. For in ſuch Caſes the Will ſhall not be taken for the Deed.

4 Rep. 16.
11 Rep. 98.
4 Black. Com. ch. 3.
[h] Dr. & Stud. Dial. 2. ch. 42.

Not only they which actually commit the Offence are puniſhable, [h] but thoſe that *command*, *perſuade*, *adviſe*, *procure*, *hire*, *abet*, or *conſent* to the Commiſſion of an Offence, or *conceal* it after it is done, are eſteemed to offend.

Weſt's Symb. 86. § 7. 14.
See ch. 2. poſt.
[i] H. P. C. 2. 126, 134.

[i] All Crimes or Offences are *Capital* or *not Capital*. *Capital* are thoſe for which the Offender ſhall loſe his Life. *Not Capital*, for which the Offender may forfeit his Lands or Goods, or both, or for which he may be fined; or ſuffer corporal Puniſhment; or ſuffer both Fine and corporal Puniſhment; but not Loſs of Life.

Of capital Crimes or Offences.

Capital Offences are of *three* Sorts, *High Treaſon*, *Petit Treaſon*, *Felony*.

Treaſon (from *Trahiſon*, *Proditio*, *Betraying*) is either, 1. *High Treaſon*, or, 2. *Petit Treaſon*.

Of High Treaſon.
[k] Weſt's Symb. § 63.
3 Inſt. 8.
4 Black. Com. ch. 6.
4 Burn. Juſt. title Treaſon.
Foſter 183, &c. on High Treaſon.

I. [k] *High Treaſon* is an Offence committed againſt the Security of the King or Kingdom, and is deſcribed in the Statutes hereafter mentioned. Concerning High Treaſon there were different Opinions before 25 *Ed.* 3. *ch.* 2. But all Treaſons were ſettled by that Statute, and confirmed by 1 *Mar. Seſſ.* 1. *ch.* 1. which takes away the Power to *adjudge* any Thing elſe to be Treaſon than what is declared and expreſſed to be ſuch by 25 *Ed.* 3. taking no Notice of the Clauſe in that Statute relating to the Parliament's Power of *declaring* any Thing elſe to be High Treaſon. So that no Crime is at this Day High Treaſon, Petit Treaſon, or Miſpriſion of Treaſon, unleſs it be declared by 25 *Ed.* 3. or is *made* ſuch by ſome Statute ſince 1 *Mar. Seſſ.* 1. *ch.* 1. And no Indictment for Treaſon can be without the Word [b] *Proditorie.*

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[a] *Privilegium non valet contra Rempublicam. Neceſſitas publica major eſt quam privata.* Bacon 32.

[e] *Mandata licita ſtrictam interpretationem recipiunt, ſed illicita latam et extenſivam.* Bacon 66. 3 Inſt. 51.

Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud. 5 Rep. 115.

Crimen non contrahitur niſi nocendi voluntas intercedit. Bracton, Lib. 1. ch. 4.

[g] *Voluntas non reputabitur pro facto.* 3 Inſt. 69. 11 Rep. 98.

Non officit conatus, niſi ſequatur effectus. 6 Rep. 42.

[i] *Pœnæ potius molliendæ ſunt, quam exaſperandæ.* 3 Inſt. 220.

Qui non habet in ære, luat in corpore. 2 Inſt. 173.

Quælibet pœna corporalis, quamvis minima, major eſt qualibet pœna pecuniaria. 3 Inſt. 220.

Nobiles magis plectuntur pecunia, plebeii vero in corpore. 3 Inſt. 220.

Dignitas perſonæ auget pœnam. 2 Inſt. 218.

Intereſt Reipublicæ ne maleficia remaneant impunita. 4 Rep. 45. 5 Rep. 109.

Impunitas ſemper ad deteriora invitat, et continuum affectum tribuit delinquendi. Ibid.

Minatur innocentes qui parcit nocentibus. 4 Rep. 45.

[b] 3 Inſt. 4, 15.

[c] Natural-born Subjects (except Infants under the Age of Diſcretion, Idiots; and Lunaticks totally deprived of their Reaſon) tho' they live in the Dominions of a foreign Prince, and have ſworn Allegiance to him, and all Subjects of foreign Princes living in the Dominions of our King, by Reaſon of their local Allegiance, may be guilty of High Treaſon. The Queen, Wife of a King regnant, may be alſo guilty. But an Alien, who in an hoſtile Manner invades the Kingdom, ought not to be puniſhed as a Traitor; but is to be dealt with as an Enemy. [d] An Ambaſſador, that is guilty of Treaſon againſt the King's Life may be condemned and executed; but for other Treaſons he ſhall be ſent Home with a Demand to puniſh him, or to ſend him back to be puniſhed. (*Qu.*)

[c] 3 Inſt. 4, 5, 6, 8, 11. 7 Rep 6, &c. H. P. C. 10, 15. 1 Inſt. 129. a. 1 H. H. P. C. 92, &c. 2 Salk. 633. 1 Ld. Ray. 1.

[d] 4 Inſt. 152, &c. 2 Danv. 327. Grot. de jure belli, Lib. 2. ch. 18. Zouch de Legat. del. Ind. Comp. 4 Black. Com. 76.

By 25 *Ed.* 3. *St.* 5. *ch.* 2. High Treaſon may be committed in the *ſeven* Inſtances following, (*viz.*)

1. *By compaſſing and imagining the Death of the King or Queen, or of their eldeſt Son and Heir.*

A King [e] *De facto* and in Poſſeſſion is here to be underſtood; and High Treaſon againſt him may be puniſhed by the right Heir, when he gets the Crown afterwards. He that hath only a Right, is not within this Act. [See 11 *H.* 7. *ch.* 1.] The Heir of the laſt King, before his Coronation, is a King within the Act, when the Crown deſcends upon him. [f] The Huſband of a Queen, that reigns in her own Right, is not a King within its Meaning. But a Queen reigning is a King within the Intention of it, as ſhe is inveſted with Royal Power. [See 1 *Mar. Seſſ.* 3. *ch.* 1.] Her Huſband may commit Treaſon againſt her, for ſhe is a diſtinct Perſon from him to this and many other Purpoſes. [g] A Queen Dowager is not within the Act. Nor a *Pro-Rex* or Guardian of the Kingdom; nor a collateral Heir apparent, till he is declared Heir apparent by Act of Parliament, with a ſpecial Proviſion for that Purpoſe.

[e] 3 Inſt. 7. H. P. C. 12.

[f] 3 Inſt. 6, 7, 8. H. P. C. 12.

[g] 3 Inſt. 8, 9. H. P. C. 12. 1 H. H. P. C. 125.

By eldeſt Son and Heir, The ſecond Son after the Death of the firſt may be underſtood.

[See 1 *W. & M. Seſſ. ch.* 2. § 9. Whereby one that is a Papiſt, or marries a Papiſt, is incapable to enjoy the Crown; *and in every ſuch Caſe the People are abſolved from their Allegiance.*]

Some [e] *Overt-Act* or open Deed muſt be alledged in every Indictment for High Treaſon; for tho' the Words *and be provably thereof attaint of Overt-Deed* come after the Clauſe of levying War; [*ſee infra.*] yet they relate to all the ſeveral Treaſons therein before expreſſed. And the Compaſſing and Imagining the Death of the King muſt be mani-

[a] 3 Inſt. 6, 12, 14. H. P. C. 12, 13. Kely. 20, 21. 2 Salk. 634.

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[e] *Protectio trahit ſubjectionem, et ſubjectio protectionem.* 7 Rep. 5. *Salus populi eſt ſuprema lex.* 10 Rep. 139.

feſted by an Overt-Act to make it High Treaſon; as by providing Arms to effect it; by conſulting to levy a War againſt him (for my Lord *Coke*'s Opinion to the contrary is denied to be Law), if it be with Deſign to kill, depoſe, or impriſon him, or to put any Force upon him; by writing Letters, to excite others to join with them; by aſſembling Men, in order to impriſon or depoſe the King; by writing Letters to a foreign Prince, to perſuade him to invade the Realm; theſe Overt-Acts may be alledged to *prove* that one imagined the Death of the King, that he may be *provably* (not probably) attainted. [b] Bare Words are not ſuch an Overt-Act; nor Words ſet down in Writing, and kept privately in one's Study; but Words ſet down in Writing, and publiſhed by the Delinquent himſelf, are a ſufficient open Deed within the Statute. Words without an Overt-Act are to be puniſhed in another Manner, as an High Miſpriſion, or a Great Miſdemeanor. If a Man is indicted only for Words, that cannot amount to High Treaſon [*ſed Quære.* [c]] Tho' if one doth any Thing, by which he ſheweth his Liking or Approbation to a traiterous Deſign by Words or Actions, he is guilty of High Treaſon.

[b] 3 Inſt. 14, 140. 1 H. H. P. C. 111, &c. 3 Cro. 125, 332. Kely. 12, 13. contra.

[c] Hawk. P. C. B. 1. p. 39, &c.

4 Black. Com. 81.

2. *By Violating the King's Companion, or the King's eldeſt Daughter unmarried, or the Wife of the King's eldeſt Son and Heir.*

[d] 3 Inſt. 8, 9. H. P. C. 16.

[d] To *violate* is to know carnally. The King's *Companion* is the King's Wife, which implies, that the Violation muſt be during the Marriage with the King; for after the Death of the King ſhe is not his Companion. And therefore it extendeth not to a Queen Dowager. If the Wife of the King doth yield and conſent to him that committed this Treaſon, it is Treaſon in her. The *eldeſt Daughter*, *i. e.* the eldeſt Daughter, not married, at the Time of the Violation, tho' there was an elder Daughter than her who is then dead. For ſhe, as the eldeſt alive, is inheritable to the Crown upon Failure of Iſſue Male.

Or *the Wife of the King's eldeſt Son and Heir*, implies alſo that the Violation muſt be during the Coverture. If ſhe yields and conſents to the Adulterer, it is likewiſe Treaſon in her.

4 Black. Com. 81.

3. *Or if a Man doth levy War againſt the King in his Realm.*

Not only by rebelling and taking up Arms to dethrone the King, [e] but to reform Religion or the Laws; to remove Perſons from the Miniſtry; to reſiſt the King's Forces by defending a Caſtle; to pull down *all* Incloſures, *all* Bawdy-Houſes, or to do any Thing elſe for publick Reformation, is an Invaſion on the King's Authority, and a Levying of War. Thoſe that join with them alſo are guilty, tho' they know not their Intent: [But it ſhould ſeem that the *bare* being in Company in ſuch Caſe cannot amount to Treaſon [f]] To raiſe a Force to pull down a *particular* Incloſure or Bawdy-Houſe, is only a Riot.

[e] 3 Inſt. 9, 10. H. P. C. 14. Kely. 75, 76.

[f] 2 Ld. Ray. 1586.

[g] A bare Conſpiracy to levy War cannot amount to Treaſon within *this* Branch. It muſt be an actual Levying of War, . [h] But a Conſpiracy to levy War againſt the King may be alledged as an Overt-Act of Compaſſing his *Death*, as hath been ſaid. [a] If a War is levied, the Conſpirators are all Traitors, tho' all are not actually in Arms.

[g] 3 Inſt. 9. H. P. C. 13, 14.

[h] Kely. 19, 20, 21.

[a] 3 Inſt. 9.

[b] Thoſe that join themſelves to Rebels for fear of Death, and return, at the firſt Opportunity, are not guilty of Treaſon.

[b] 3 Inſt. 10.

4 Black. Com. 82.

4. *Or be adherent to the King's Enemies in his Realm, giving to them Aid or Comfort in the Realm or elſewhere, and thereof be provably attainted of open Deed.*

An *Adhering* may be [c] proved, by giving the King's Enemies Aid and Comfort *within* the Realm, or *without*, but for Neceſſity-ſake the Adherency without the Realm muſt be alledged in ſome Place within *England*; and if the Jury finds upon Evidence any Adherency without the Realm, they muſt find the Delinquent guilty. So an Adherency may be proved by ſurrendering the King's Caſtle for Reward, or ſelling Arms. To ſuccour a Rebel fled into another Realm, is not within this Clauſe; becauſe a Rebel is not properly an Enemy; and becauſe the Statute is to be taken ſtrictly. [d] *Enemies* are thoſe that are out of the Allegiance of the King.

[c] 1 Inſt. 261. b. 3 Inſt. 10, 11. H. P. C. 14. See of the court by Commiſſion, B. 4. c. 1. poſt.

[d] 3 Inſt 11.

5. *Or if a Man counterfeit the King's* Great Seal, *or* Privy Seal, *or his* Money.

7 Rep. 24, 25. Calvin's Caſe. 4 Black. Com. 83.

This Branch of 25 *Ed.* 3. does not extend to a Fixing of the *Great Seal* by the Chancellor to a Patent without any Warrant for it; nor to the Taking the [e] Wax impreſſed by the Great Seal, from one Patent, and fixing it to another; for this is not Counterfeiting the Great Seal but a Miſuſing of it. There muſt be an actual Counterfeiting, not an Intent or going about to counterfeit. Alſo it muſt have a Likeneſs of the King's Great Seal. Thoſe who aid and conſent to the Counterfeiting, are equally guilty within the Act. [See 7 *W.* 3. *ch.* 3.] This Statute mentions only the *Great* and *Privy* Seal; ſo that the Counterfeiting of the *Sign Manual* or *Privy Signet* is not Treaſon within this Act. But it is made High Treaſon in both Caſes by 1 *M. Seſſ.* 2. *ch.* 6.

[e] 3 Inſt. 15, 16. 12 Rep. 13, 16, 17. H. P. C. 18. Kely 80. Contra. St. Pl. Cr. 3. a. See of the Privy Council B. 4. ch. 1. poſt,

[f] Thoſe who coin *Money* in this Realm without the King's Authority (whether they utter it or not) are Guilty of High Treaſon; and thoſe that have Authority to coin Money, are guilty of High Treaſon, if they make it of greater Alloy or leſs Weight than they ought. Clippers are not within this Statute. The King's money here is ſuch only as is coin'd by the King's Authority in Gold and Silver (not in Braſs or Copper) within this Realm. But concerning the King's Coin, and the Counterfeiting of foreign Money current in this Realm, it is further provided for by ſubſequent Statutes ſince 1 *Mar. Seſſ.* 1. *ch.* 1. which ſee *infra.* Forging or Counterfeiting of foreign Money not current within this Realm is Miſpriſion of Treaſon.

[f] 2 Inſt. 577, 578 3 Inſt. 16, 17. H. P. C. 20. Dalt. ch. 140. p. 329. 1 H H. P. C. 211, 112 4 Black. Com. 84.

6. *Or if a Man bring falſe Money into this Realm, Counterfeit to the Money of* England, *knowing the Money to be falſe, to merchandize or make Payment in Deceit of the King and his People.*

[g] It muſt be brought over actually counterfeited according to the Likeneſs of *Engliſh* Money. [But ſee 1 & 2 *P.* & *M. ch.* 11. *infra*] It muſt be brought by one that knows it to be falſe; it muſt be brought from a foreign Nation, and not from any Place ſubject to the Crown of *England*; and he that brought it over muſt utter it in Payment, otherwiſe it is not High Treaſon within the Statute. (*Qu.*)

[g] 3 Inſt. 18. H. P. C. 21.

1 H. H. P. C. 229. contra.

[See the *Statutes* concerning the *Coin*, *infra*.]

7 *Or if a Man ſlay the Chancellor, Treaſurer, or the King's Juſtices of the one Bench or the other, Juſtices in Eyre or Juſtices of Aſſize, or other Juſtices aſſigned to hear and determine, being in their Places, doing their Offices.*

4 Black. Com. 84.

[a] This Branch extends to no other Officers beſides thoſe expreſſly named; and to them only while they are in actual Execution of their Offices, repreſenting the Perſon of the King. It alſo extends only to a Killing, not to a Wounding without Death. [See 3 *H.* 7. *ch.* 14. in *Felony*, *poſt*.]

[a] 3 Inſt. 18. H. P. C. 17.

All theſe Acts are High Treaſon by the Common Law, and are *declared* to be ſo by the forementioned Statute of 25 *Ed.* 3. *ch.* 2. and 1 *Mar. Seſſ.* 1. *ch.* 1. And all other Statutes (as hath been ſaid) made

3 Inſt 23, 24.

between thoſe two Statutes concerning High Treaſon are abrogated. And there wanted nothing to the Perfection of the Statute of *Ed.* 3. but a Limitation of ſome certain Time wherein the Offender ſhould be accuſed. [As to which ſee 7 *W.* 3. *ch.* 3.]

But ſince 1 *Mar.* many Offences are made High Treaſon by Statutes which were not ſo before. As concerning the *Coin*, the *Pope*, Popiſh *Prieſts*, and *Papiſts*, the *Proteſtant Succeſſion*, and concerning *Soldiers*.

4 Black. Com. 88.

1. Of High Treaſon concerning the *Coin*.

By 1 Mar. Seſſ. 2. ch. 6. *Forging or Counterfeiting any* foreign *Coin of Gold or Silver, current by the King's Proclamation, is High Treaſon.* [See 14 El. ch. 3.]

By 1 & 2. Ph. & M. ch. 11. *To bring into the Realm Money counterfeited according to the* Similitude *of* foreign *Coin current here, to the Intent to utter, or make Payment with the ſame within this Realm, by Merchandizing or otherwiſe, is High Treaſon.*

By 5 El. ch. 11. *Whoſoever ſhall, for Lucre or Gain waſh, clip, round, or file*; Or,

By 18 El. ch. 1. *Impair, diminiſh, falſify, ſcale, or lighten the proper Money of this Realm, or that of other Realms made current here by Proclamation, ſhall be deemed as an Offender in Treaſon, and forfeit all his Chattels abſolutely, and his Hereditaments for Life, but without Corruption of Blood or Loſs of Dower.*

By 8 & 9 W. 3. ch. 26. *Whoſoever (except ſuch as are employed in the Mint) ſhall knowingly make or mend, or aſſiſt therein, or buy, or ſell, or hide or conceal, or knowingly have in his Houſe or Poſſeſſion, any Mould, Preſs, or Tool, for Coining, or convey any Tool or Inſtrument for Coining out of the King's Mint, or mark upon the Edges any current Coin, or any diminiſhed, or counterfeited Coin, or colour, gild, or caſe over any Coin reſembling the Current Coin of this Kingdom, ſhall be guilty of High Treaſon, but without Corruption of Blood, or Loſs of Dower.* [See 6 & 7 *W.* 3. *ch.* 17. 7 *An. ch.* 24 and 15 G. 2. ch. 28. As to the *Reward* for Apprehending and Convicting a Counterfeiter or Clipper of the Coin, and *Pardon* for Diſcovery and Conviction of Accomplices or like Criminals.]

By 15 Geo. 2. ch. 28. *To waſh, gild, or colour a lawful Shilling or Sixpence, or a falſe one, or to add to, or alter the Impreſſion to make it look like a Guinea, or half a Guinea; or a Half-penny, or Farthing, to make it look like a Shilling, or Six-pence, is High Treaſon; but without Corruption of Blood or Loſs of Dower.*

See Hawk. P. C. B. 1. p. 44. 4 Black. Com. 87.

2. Of High Treaſon concerning the *Pope*, popiſh *Prieſts*, and *Papiſts*.

By 5 El. ch. 1. *If any one ſhall by Writing, Cyphering, Printing, Preaching, or Teaching, or by any Speech, or open Deed, or Act, adviſedly maintain the* Juriſdiction *of the Biſhop of* Rome *heretofore claimed in this Realm, he is guilty of a* Præmunire *for the firſt Offence, and of High Treaſon for the ſecond Offence; but without Corruption of Blood or Loſs of Dower. And if any Perſon, who ſhall have a Charge, Cure, or Office in the Church, or an Office or Miniſtry in an Eccleſiaſtical Court, or ſhall willfully refuſe to obſerve the Orders, and Rules for Divine Service in the Church of* England, *after he ſhall be admoniſhed by the Ordinary; or ſuch as ſhall openly deprave any the Rights and Ceremonies of the Church of* England, *or that ſhall ſay or hear private Maſs, ſhall refuſe a ſecond Tender of the Oath of Supremacy,* [*See* 1 W. & M. Seſſ. 1. ch. 8. *which hath al-*

tered the Form of the Oath] he ſhall be guilty of High Treaſon; but without Corruption of Blood or Loſs of Dower.

By 13 El. ch. 2. *If any ſhall put in Ure any Bull or Inſtrument for Abſolving the Subjects from their Allegiance, obtained from the See of* Rome, *or willingly receive any ſuch Abſolution; or ſhall obtain from the See of* Rome *any Bull or Writing whatſoever, and put it in Ure, he is guilty of High Treaſon.*

By 23 El. ch. 1, *and* 3 Ja. 1. ch. 4. *To abſolve Subjects from Obedience, and reconcile them to the Obedience of* Rome, *is Treaſon in the Reconciler and Reconciled.* But,

By 3 Ja. 1. ch. 4. *A Perſon reconciled beyond the Seas, returning into this Realm, and taking the Oaths within ſix Days after ſuch return, ſhall not (as for and touching the Point of being reconciled only) be deemed within that Act.*

By 27 El. ch. 2. *If any Eccleſiaſtick born in the Queen's Dominions, that is ordained or profeſſed by popiſh Authority, ſhall remain in the Queen's Dominions, or come from beyond Sea, and not ſubmit to ſome Biſhop, or ſome Juſtice of Peace within three Days, and take the Oaths, he ſhall be guilty of High Treaſon.*

And if any Subject, not being an Eccleſiaſtick, ſhall not return from a popiſh Seminary *within ſix Months after a Proclamation in* London, *and ſubmit, and take the Oaths within two Days, he ſhall be guilty of High Treaſon, whenever he ſhall otherwiſe return.*

3. Of High Treaſon concerning *the Proteſtant Succeſſion.* 4 Black. Com. 90.

By 1 An. St. 2. ch. 17. *If any ſhall attempt maliciouſly, adviſedly, and directly, by any Overt-Act, to deprive or hinder any Perſon, who ſhall be next in Succeſſion to the Crown for the Time being (according to the Limitation by* 1 W. and M. Seſſ. 2. ch. 2. *and* 12 W. 3. ch. 2. *From ſucceeding after the Deceaſe of her Majeſty; he is guilty of High Treaſon.* [*Qu.* If this Act related to any but the Queen's immediate Succeſſor, and therefore if now of any Force.]

By 13. W. 3. ch. 3. *To have Correſpondence, or keep Intelligence, with the pretended Prince of* Wales, *or knowingly with any Perſon employed by him, or knowingly by Bill of Exchange, or otherwiſe, to remit or pay any Money for his Uſe or Service, is High Treaſon.* And,

By 4 An. ch. 8. *and* 6 An. ch. 7. *Whoever ſhall maliciouſly, adviſedly, and directly, by Writing or Printing, maintain, that the pretended Prince of* Wales, *or any other, hath any Right to the Crown, otherwiſe than according to the Acts of* 1 W. and M. ch. 2. *or* 12 W. 3. ch. 2. *Or that the Kings within this Realm, with and by the Authority of Parliament, cannot make Laws to Limit and bind the Crown and the Deſcent, Limitation, Inheritance, and Goverment thereof, ſhall be guilty of High Treaſon.*

By 17 Geo. 2. ch. 39. *If any Subject of the Crown of* Great Britain, *within the Realm or without, hold any Intelligence or Correſpondence in Perſon, or by Letters, or otherwiſe, with any Son of the Pretender, or any Perſon employed by him, knowing him to be ſo employed, or remit or pay any Money for his Uſe or Service, knowingly, 'tis High Treaſon.*

If any Son of the Pretender lands, or attempts to land, or be found in Great Britain, Ireland, *or any of the Territories, or Dominions belonging to the Crown of* Great Britain, *'tis High Treaſon.*

Offences out of the Realm may be tried in England *or* Scotland.

4. Of High Treaſon by *Soldiers.*

By 2 & 3 An. ch. 20. *Officer or Soldier in the King's Army, either upon Land out of* Great Britain *or at Sea, holding Correſpondence with, or giving Advice or Intelligence, to any Rebel or Enemy, is guilty of High Treaſon.*

By 7 An. ch. 21. *Crimes and Offences which are High Treaſon, and Miſpriſion of Treaſon by the Laws of* England, *ſhall be adjudged ſo in* Scotland, *and no other.*

[See 7 *W.* 3. *ch.* 3. For regulating Trials in Caſes of High Treaſon, and 7 *An. ch.* 21. & 17 *G.* 2. *ch.* 39. For mitigating the Rigour of the Laws relating to High Treaſon, after the Deceaſe of the Pretender and all his Sons, *B.* 4. *ch.* 5. *poſt.*]

Of Petit Treaſon. [a] 3 Inſt. 20. 4 Black. Com. 75, 203. Dalt. ch. 142. p. 336. 4 Burn Juſt. 293.

II. [a] *Petit Treaſon* is a Crime, where one out of Malice taketh away the Life of a Subject, to whom he oweth a ſpecial Obedience. It is called *Petit* Treaſon comparatively in reſpect to High Treaſon, which is againſt the *King.* It may be committed in *three* Caſes. For,

By 25 Ed. 3. ch. 2 *It is Petit Treaſon, when a* Servant *killeth his Maſter, when a Wife kills her Huſband, or when a* Secular *or* Religious *ſlayeth his Prelate, to whom he oweth Faith and Obedience.* [*See* 1 Mar. Seſſ. 1. ch. 1.]

[b] 11 Rep. 34. 3 Inſt. 20. H. P. C. 24.

If a *Servant* kills his [b] Miſtreſs, or the Wife of his Maſter, it is Petit Treaſon; for ſhe is his Maſter within the Letter of the Statute. A Servant intended to kill his Maſter, and did lye in Wait to do it, while he was his Servant, but did not do it till he had been a Year out of his Service, it was adjudged Petit Treaſon within the Act. A Servant [c] procured another to kill his Maſter, who killed him in the Servant's Preſence, this was Petit Treaſon in the Servant, and Murder in the other. If the Servant had been abſent, he would have been only acceſſary to the Murder.

[c] 3 Inſt. 20. H. P. C. 24. Dalt. ch. 142, p. 337.

If a *Wife* and a Stranger kill the Huſband, it is Petit Treaſon in the Wife, and Murder in the Stranger.

And ſo it is in the Caſe of an Eccleſiaſtick Perſon, ſecular or regular, if he kills his Prelate or Superior, to whom he oweth Faith and Obedience.

[a] 3 Inſt. 20, H. P. C. 24.

If a [a] *Child* kills his Father or Mother, he is out of the Statute; unleſs the Child ſerved the Mother for Wages, or for Meat, Drink, or Apparel, in which Caſe he ſhall be indicted by the Name of a Servant.

[b] Crompt. 19, 20. H. P. C. 24.

Aiders, Abettors, and Procurers, are within the Act; [b] but in all theſe Caſes, if the Killing is upon a ſudden Falling out, or *Se Defendendo*, or not ſuch a Killing as would be Murder in another, it is not Petit Treaſon in a Wife, Servant, or Eccleſiaſtick. [See of *Principal* and *Acceſſory*, *ch.* 2. and of *Judgments* in High Treaſon and Petit Treaſon, *B.* 4. *ch.* 5. *poſt.*]

Of Felony. Fran. Junius Etyomo. Anglican. verb. Fellonie. [c] Spelm. Gloſſ. verb. Felon. 1 Inſt. 391. a. 3 Inſt 15, 38. 4 Black. Com. 94, 95.

III. [c] *Felony* (*Felonia*, from *Feah* Fee, and *Lon* Price) formerly was every capital Crime committed with an evil Intention. But a bare Intention to commit Felony is not puniſhable as Felony, tho' finable. [But ſee 3 *H.* 7. *ch.* 14. 9 *An. ch.* 16.] It is a Word ſo appropriated by Law, that Felony cannot be expreſſed by any other. So that *Felonice* muſt of Neceſſity be laid in the Indictment for Felony. At this Day Felony includes Petit Treaſon, Murder, Homicide, burning of

Houſes, Burglary, Robbery, Rape, Chance-medley, Death occaſioned by Self-Defence, Petit Larceny, Breach of Priſon, Reſcous and Eſcape after one is impriſon'd or arreſted for Felony, *&c.*

When an Offence amounts to a Felony, it drowns the Miſpriſion, unleſs the Crown chuſes to proſecute for the leſſer Offence only; as was done in the caſe of *Hampden* for Miſpriſion of Treaſon. 2 Ld. Ray. 981. 1 Haw. P. C. B. 1. p. 125. St. Tri. temp. J. 2.

Note, [d] That where a Statute makes a ſecond Offence Felony, or lays a heavier Puniſhment than for the firſt Offence, it is always implied, that ſuch ſecond Offence ought to be committed after Judgment given for the firſt. For the Indictment for the ſecond Offence muſt recite the former Attainder. [d] 2 Inſt. 468. 3 Inſt. 46, 172. H. P. C. 8.

But it is not neceſſary that the ſecond Offence ſhould be of the very ſame Nature with the firſt.

Felony is either by *Common Law* or by *Statute.* Felonies by *Common Law* are Murder, Manſlaughter, *Felo de ſe*, *Se Defendendo*, Chance-medley, Larceny, Robbery, Burglary, Arſon or Houſe-Burning, Breach of Priſon. Felonies by *Statute* are very many, which will appear in their Order. There are alſo Felonies puniſhable by the *Civil Law*, as Piracy, Robbery, or Murder upon the Sea.

Felonies likewiſe are either of a *publick* or *private* Nature.

I. [e] *Publick* Felonies are thoſe that are directly hurtful to the Commonwealth and the King's Government. Theſe are Felonies relating, 1. To the *Coin*, 2 Felonies againſt the *King*, and the King's *Counſellors*, *&c.* 3. Felonies of *Soldiers* and *Mariners*. 4. Felony by *embezzling* the King's *Armour*. 5. Felonies relating to Popiſh *Prieſts*. 6. Felonies by *Rioters*. 7. Felonies relating to *Turnpikes* and *Floodgates*. 8. Felony in not performing *Quarantine*. 9. Felonies by *Breach* of *Priſon*, *Eſcape*, and *Reſcous*; and 10. Felonies relating to the *Revenue* and *Trade*. [e] Weſt's Sym. p. 86. §. 4, 5. 6, 65. 4 Black. Com. 98.

1. Of Felonies relating to the *Coin*.

By 8 & 9 W. 3. ch. 26. *It is Felony to blanch Copper for Sale, or to mix blanch'd Copper with Silver, or knowingly and fraudulently to buy, or ſell, or offer to ſale, blanch'd Copper alone, or mixt with Silver, or any Mixture that ſhall be heavier than Silver, and look, and touch, and wear like ſtandard Gold, but be manifeſtly worſe; or to receive, pay, or put off, any counterfeit mill'd Money, or mill'd Money unlawfully diminiſhed, and not cut in pieces, at a lower Rate than the ſame by its Denomination ſhall import, or was coined or counterfeited for.* Hawk. P. C. B. 1. p. 46. 4 Black. Com. 98. 1 Burn. Juſt. tit. Coin.

By 15 G. 2. ch. 28. *Uttering falſe Money knowingly, is ſix Months Impriſonment, and Security for Behaviour for ſix Months more, on Conviction for the firſt Offence; and on Conviction for the ſecond Offence, two Years Impriſonment, and Security for Behaviour for two Years more; and on Conviction for the third Offence, it is Felony without Clergy.*

He that utters falſe Money, knowing it to be ſo, and on the ſame Day, or within ten Days after, utters other falſe Money, knowing it to be ſo, or at the Time of uttering hath more in his Cuſtody, ſhall be deemed a common Utterer of falſe Money, and ſhall ſuffer a Year's Impriſonment, and find Sureties for two Years more; and if after being convicted as a common Utterer of falſe Money, he ſhall again utter falſe Money, ſuch ſecond Offence is Felony without Clergy.

[See 6 & 7 *W.* 3. *ch.* 17. 15 *G.* 2. *ch.* 28. As to the *Reward* for Diſcovery of Coiners, and Clippers, and of *Pardon*, *B.* 4. *ch.* 5. *poſt.*]

By 11 Geo. 3. ch. 40. *If any Perſon after* June 24, 1671. *make, coin, or counterfeit the Copper Monies of the Realm called a Halfpenny, or a Farthing, ſuch Perſon ſhall be adjudged guilty of Felony. Or if any Perſon ſhall buy, ſell, take, receive, pay or put off any Copper Money not melted down, or cut in Pieces, at, or for a lower Rate than the ſame, by its Denomination, doth import, or was counterfeited for, every ſuch Perſon ſhall be adjudged guilty of Felony.*

4 Black. Com. 100. Hawk. P. C. B. 1. p. 38.

2. Of Felony againſt the *King*, and the King's *Counſellors, &c.*

By 3 H. 7. ch. 14. *It is Felony for any ſworn Servant in the Cheque-Roll of the King's Houſhold, under the State of a Lord, to make any Confederacy, Compaſſing, Conſpiracy, or* Imagination *with any Perſon, to deſtroy or murder the King, or any Lord of this Realm,* or any other *Perſon, ſworn to the King's Council, or Steward, Treaſurer, or Comptroller of the King's Houſe, being thereof Convict by twelve of the ſaid Houſhold before the Steward, Treaſurer, and Comptroller, or any two of them.*

[a] 3 Inſt. 38, 39.

[a] A Conſpiracy or Imagination by *Words* only, within the King's Houſhold, makes it Felony by this Statute without any Overt-act.

See of Ld. Steward's Court B. 4. ch. 2. poſt.

The Perſon againſt whom the Conſpiracy is form'd muſt be the King, or of the King's *Privy Council,* except ſuch great Officers as the Steward, Treaſurer, and Comptroller of the King's Houſhold, who need not be of the Privy Council.

By 9 An. ch. 16. *Unlawfully to attempt to kill, or unlawfully to aſſault and ſtrike, or wound a Privy Counſellor in the Execution of his Office, is Felony without Benefit of Clergy.*

3. Concerning Felony of *Soldiers* and *Mariners.*

See p. 46. ante. 4 Black. Com. 101. 4 Burn. Juſt. 196.

By 7 H. 7. ch. 1. *and* 2 & 3 Ed. 6. ch. 2. *It is Felony without Benefit of Clergy, for any Soldier, not being a Captain, to leave the King's Service without Licence.*

By 3 Ja. 1. ch. 4. *It is Felony to go out of the Realm to ſerve any foreign Prince or State, without taking the Oaths of Allegiance before Departure.* [See for the new Oaths, 1 G. 1. *St.* 2. *ch.* 13.]

See Ibid.

And if any Gentleman, or Perſon of higher Degree, or any Perſon who hath borne any Office in Camp or Army, ſhall go out of the Realm to ſerve ſuch foreign Prince or State, without being bound with two Sureties in a Bond, not to be reconciled to the See of Rome, *and not to enter into any Conſpiracy againſt the King, he ſhall be adjudged a Felon.*

By 9 Geo. 2. ch. 30. *If any Perſon enliſts or enters himſelf, or procures any Subject to enliſt or enter himſelf, or hires or retains any Perſon being a Subject of his Majeſty, with an Intent to cauſe ſuch Perſon to enliſt or enter himſelf, or procures any ſuch Perſon to go beyond Sea, or embark, with an Intent and in order to be enliſted to ſerve any foreign Prince, State, or Potentate, as a Soldier, without Licence firſt obtained under his Majeſty's Sign Manual, ſuch Offender ſhall ſuffer as a Felon without Benefit of Clergy. But if the Perſon ſo enliſted, enticed, or inveigled, ſhall, within fourteen Days, diſcover the Perſon who ſo enliſted or enticed him, ſo as that he may be apprehended and convicted, the Party enliſted or enticed ſhall be indemnified from the Penalties in this Act. And,*

[*By* 29 Geo. 2. ch. 17. *If any Subject ſhall agree to go beyond Sea, or embark with an Intent to enliſt in any foreign Service, tho' no enliſting Money be paid, or if any Perſon hire or procure any Subject, tho' no enliſting Money be actually paid, to agree to go beyond Sea, or embark without*

Licence; and if any Subject ſhall accept of any military Commiſſion, or otherwiſe enter into the military Service of the French *King, as a Commiſſion or non Commiſſioned Officer, without Licence, or being an Officer, or private Soldier,* then *in ſuch Service, without Licence, and not returning and taking the Oaths within the Time limited by this Act, ſhall ſuffer Death as a Felon, without Benefit of Clergy.*]

Offences againſt theſe Acts committed out of the Kingdom may be laid to be committed, and may be tried in any County in England.

By 39 El. ch. 17. *Soldiers and Mariners wandering without a Teſtimonial, or idle Perſons which wander as Soldier and Mariners with a forged Teſtimonial, ſhall ſuffer as in caſe of Felony without Clergy.*

[*By* 22 & 23 Car. 2. ch. 11. *Mariners laying violent Hands on their Commander, to hinder him from defending his Ship and Goods againſt Pirates, ſhall ſuffer Death as Felons without Clergy.* See of *Piracy*; and alſo of Felonies concerning Ships, *poſt.*]

[See the Offences which are made capital in Soldiers, and the Puniſhments they are liable to in the Act for preventing Mutiny and Deſertion, which is annually paſſed; and 22 *G.* 2. *ch.* 33. for explaining, amending, and reducing into one Act, the Laws relating to the Government of the King's Ships and Forces by Sea.]

See 1 *Geo.* 1 *St.* 2. *ch.* 47. For the Puniſhment of Soldiers that are of the *popiſh* Religion; and the Puniſhment for *ſeducing* Soldiers to deſert.

4. Of Felony by *embezzling* the King's *Armour, &c.*

By 31 El. ch. 4. *If any Perſon having the Charge or Cuſtody of the King's Armour, Ordnance, Munition, Shot, Powder, or Habiliments of War, or of any Victuals provided for Soldiers or Mariners, ſhall for Lucre wilfully embezzle the ſame to the Value of twenty Shillings (tho' at ſeveral Times) he ſhall be adjudged guilty of Felony.* And by 22 *Car.* 2. *ch.* 5. *without Benefit of Clergy, as to naval Stores.* [See 9 & 10 *W.* 3. *ch.* 41. and 1 *Geo.* 1. *St.* 2. *ch.* 25. To preſerve the Stores belonging to the Navy. See alſo of *Forfeiture, B.* 4. *ch.* 5. *poſt.*]

5. Of Felony relating to popiſh *Prieſts.*

By 27 El. ch. 2. *Whoſoever ſhall willingly receive, relieve, aid, or maintain any Jeſuit, Seminary, or other popiſh Prieſt, being at Liberty or out of Hold, knowing him to be ſuch, is guilty of Felony without the Benefit of Clergy.*

4 Black. Com. 56, 87, 115.
4 Burn. Juſt. tit. Popery.

By 35 El. ch. 2. *If ſuch popiſh Recuſant,* as is mentioned in the Statute, *departs not the Realm within the Time limited, if he does not conform himſelf within three Months,* as the Statute requires, *or if he returns without the King's Licence, he ſhall be adjudged a Felon without Clergy.*

6. Of Felony by *Rioters.*

By 1 Geo. 1. ch. 5. *If any Perſons to the Number of* twelve, *or more, being unlawfully, riotouſly, and tumultuouſly aſſembled together, to the Diſturbance of the publick Peace, (being required by any Juſtice of Peace, Sheriff of the County, Under-Sheriff, Head Officer of any City or Town corporate, where ſuch Aſſembly ſhall be, by Proclamation made in the King's Name, in the Form by the Act directed, immediately to diſperſe themſelves), ſhall afterwards unlawfully riotouſly, and tumultuouſly continue together by the*

4 Black. Com. 142, 143, 146, 433, 125.
4 Burn. Juſt. tit. Riot, Rout, &c.

the Space of an Hour after ſuch Proclamation, they ſhall be adjudged Felons without Clergy. And if any Perſons with Force and Arms ſhall wilfully and knowingly oppoſe, obſtruct, or let, hinder, or hurt any Perſon beginning or going to make ſuch Proclamation, whereby the ſame ſhall not be made, or ſhall continue together, to the Number of twelve, and not diſperſe themſelves within one Hour after ſuch Let or Hindrance ſo made, having Knowledge thereof, they ſhall be adjudged Felons without Clergy. So if any Perſons unlawfully, riotouſly, and tumultuouſly aſſembled, to the Diſturbance of the publick Peace (altho' under the Number of twelve, and whether any Proclamation be made or not) *ſhall unlawfully and with Force demoliſh or pull down, or begin to demoliſh or pull down any Church or Chapel, or Building for Religious Worſhip, certified and regiſtred according to* 1 W. & M. Seſſ. 1. ch. 18. *or any Dwelling-Houſe, Barn, Stable, or other Outhouſe, they ſhall be adjudged Felons without Benefit of Clergy.*

4 Black. Com. 144. 2 Burn. Juſt. 395.

7. Of Felony in Deſtroying of *Turnpikes,* and *Flood-Gates.*

By 8 Geo. 2. ch. 20. *If any Perſon ſhall either by Day or Night wilfully or maliciouſly pull down, pluck up, throw down, level, or otherwiſe deſtroy, any Turnpike-Gate, or any Poſt, Rail, Wall, Chain, Bar, or other Fence, ſet up or erected, or hereafter ſo to be, to prevent Paſſengers from paſſing by without paying any Toll, laid and directed to be paid by any Act of Parliament already made, or hereafter to be made for that Purpoſe, or any Houſe erected or to be erected for the Uſe of any ſuch Turnpike-Gate, or other Fence; or any Lock, Sluice, Floodgate, or other Works on any Navigable River erected or to be erected by Authority of Parliament, or forcibly reſcue any Perſon, being lawfully in Cuſtody of any Officer or other Perſon for any of the ſaid Offences; in any of the ſaid Caſes every Perſon ſo offending, being thereof lawfully convicted, ſhall be adjudged guilty of Felony* ſans *Clergy; not to work Corruption of Blood, Loſs of Dower, or Forfeiture of Lands or Goods.* [See 1 *G.* 2. *St.* 2. *ch.* 19. and 5 *G.* 2. *ch.* 33. for leſs Puniſhments for theſe Offences.]

4 Black. Com. 161. 3 Burn. Juſt. 258.

8. Of Felony in not performing *Quarantine.*

By 26 G. 2. ch. 6. *If any Perſon obliged to perform Quarantine ſhall refuſe or neglect to repair, within convenient Time after Notice, to the Lazaret, or other Place appointed, or ſhall eſcape from thence before Quarantine performed, or if any Perſon ſhall conceal from the Officers of Quarantine, or convey any Letters or Goods from any Ship under Quarantine, or from any Lazaret, he ſhall be deemed guilty of Felony without Clergy.*]

[a] H. P. C. 87. 4 Black. Com. 130.

9. Of Felonies by *Breach* of *Priſon, Eſcape* and *Reſcous.*

Breach of *Priſon* and *Eſcape* may be committed by the [a] *Party* himſelf; alſo an *Eſcape* by an *Officer* and a *private* Perſon; a *Reſcue* by a *Stranger.*

[b] H. P. C. 87. 2 Inſt. 589. S. P. C. 30.

1. Of *Breach* of Priſon and *Eſcape* by the [b] *Party* himſelf.

Breach of *Priſon,* for any Cauſe, as Treſpaſs, was Felony at the Common Law. But now Breaches of Priſon for Offences not Capital are not Felonies. For,

2 Inſt. 589, &c.

By 1 Ed. 2. St. 2. *None that breaketh Priſon ſhall have Judgment of* Life *and* Member *for breaking of Priſon only, except the Cauſe, for which he was taken and impriſon'd, did require ſuch Judgment, if he had been convicted.*

A *Priſon*

[c] A *Priſon* within this Statute is the Stocks; the Priſon of a Lord of a Franchiſe; the Cuſtody of any, that lawfully arreſts; or the Houſe of the Conſtable, that lawfully arreſts, or other Perſon, where detained, as well as the Common Gaol. [d] But if the Priſon is fired without the Privity of the Priſoner, he may lawfully break it, to ſave himſelf. If a Gaoler does *voluntarily* permit a Felon to eſcape, it is Felony in the Gaoler, not in the Priſoner: If the Gaoler is *Negligent*, it is Felony in the Priſoner, and a Miſdemeanor in the Gaoler. If the Priſon is broke by *Strangers* without the Priſoner's Procurement, no Felony in the Priſoner. [e] To go out of the Priſon, when the Doors are open, is not Felony, no more than when the Gaoler ſuffers the Priſoner to go at large. For the Statute requires an *actual* Breaking with Force and Violence, by the Priſoner himſelf, or others through his Procurement, or at leaſt with his Privity. If he was no way concerned in the breaking, and yet eſcapes through the Breach, he can be indicted only for the Eſcape. Though he breaks the Priſon by opening a Paſſage to eſcape, yet if he does not eſcape, the mere breaking does not amount to Felony. If one is committed only for [f] Suſpicion of Felony, yet if the Felony is done, it is Felony to break the Priſon; otherwiſe if no Felony was done. But if the Offence, for which the Party was committed, appears by Matter of *Record*, as when a Perſon preſent in Court is committed, or the Party is taken by a *Capias*, it is Felony to break the Priſon, tho' the Party was innocent, or no Felony done. Whereas if the Sheriff, *&c.* by the Authority which the Law gives him, arreſts an innocent Man, he may reſcue himſelf. So *Note* a Difference betwixt a Warrant of *Record* and a Warrant in *Law*. One muſt be committed by lawful *Mittimus*, elſe the Breach of Priſon is no Felony. [a] Breach of Priſon turns into Felony only, though the Priſoner was committed for High Treaſon. For it is not made Treaſon by 25 *Ed.* 3. *ch.* 2. or by any ſubſequent Statute. [b] But if a Priſoner breaks a Priſon to let out Traitors, this is Treaſon; becauſe there are no Acceſſaries in High Treaſon. If one is impriſoned for [c] Petit Larceny, or for killing a Man *ſe Defendendo*, or by Miſfortune, and breaks the Priſon, it is not Felony.

Thus of *Breach* of *Priſon* by the *Party* himſelf.

By *Eſcape* after an Arreſt, Felony alſo may be committed by the *Party*. If a Perſon Eſcapes [d] before an Arreſt, he cannot be puniſhed as a Felon. But if Flight is found he ſhall forfeit his Goods. [e] Perſons preſent at the committing of a Felony muſt uſe their endeavour to apprehend the Offender; otherwiſe they are to be fined and impriſoned. [See 3 *Ed.* 1. *ch.* 9. 13 *Ed.* 1. *St.* 2. *ch.* 1. Of Hue and Cry. And 3 *H.* 7. *ch.* 1. in caſe a Murderer eſcapes, *infra.*]

[*By* 6 G. 1. ch. 23. § 6. *Felons ordered for Tranſportation, being afterwards at Large within any Part of* Great Britain, *without lawful Cauſe, before the Expiration of the Term for which they were ordered to be tranſported, ſhall ſuffer Death as Felons without Benefit of Clergy.*]

2. By an [f] *Officer*, there may be a Felony by a *voluntary* Eſcape. The Puniſhment for a negligent Eſcape is a Fine. But for a voluntary Eſcape the Officer is eſteemed to be guilty of the ſame Crime, that the Perſon permitted to eſcape ſtood committed for, whether for Treaſon or Felony. Eſcapes ſuffered by [g] *private* Perſons, who have Felons in their Cuſtody, are puniſhed (generally ſpeaking) as Eſcapes ſuffered by Officers.

[c] S. P. C. 30. b. 31. a. 2 Inſt. 589. H. P. C. 107.

[d] 2 Inſt. 590. H. P. C. 108.

[e] 2 Inſt. 589, 590. S.P.C. 30, 31. H. P. C. 108.

[f] 2 Inſt. 592. H. P. C 109. 3 Inſt 69, 70, 221.

[a] H.P.C. 109.

[b] 2 Inſt. 590. 3 Cro. 583. H. P. C. 109. Kely. 77. 1 Ld. Ray. 67.

[c] 2 Inſt. 590.

[d] H P.C. 111, 271.

[e] 3 Inſt. 53, 117, 158. H. P. C. 89.

[f] S. P. C. 32. H. P. C. 113, 114, 115. See p. 77, 78. ante.

[g] H.P.C. 112.

[See concerning the Eſcapes of Felons. *Weſt.* 1. *ch.* 3. 31 *Ed.* 3. *ch.* 14. 1 *R.* 3. *ch.* 3. 19 *H.* 7. *ch.* 10.]

4 Black.Com. 131.
[h] S. P.C. 31. 2 Inſt. 589, 590. H. P C. 116. Kely. 45, 77.
[i] S. P. C. 31. b. 32. a. 2 Inſt. 590. Kelly. 77. 3 Wms. 439, &c.
[k] 2 Inſt. 592. H. P. C. 116.

3. Felony may be committed by a *Stranger*, when publick Juſtice is hindred by a [h] *Reſcue*, or when a Stranger takes one away by Violence, that is arreſted for Felony by lawful Authority. A Hindrance to arreſt one that hath committed a Felony, is a Miſdemeanor only. [i] But if the Party is arreſted, and then reſcued, if the Arreſt was for Felony, the Reſcuer is a Felon; if for Treaſon, a Traitor, becauſe they are all Principals. If for Treſpaſs, *&c.* the Reſcuer is fineable.

[k] There muſt be a Felony really done, and a lawful Commitment.

By 9 Geo. 1. ch. 28. *It is Felony knowingly and wilfully to oppoſe ſerving or executing any Proceſs, or Rule, or Order of Court, or any Warrant of a Juſtice in the Mint, or to abuſe any Perſon ſerving or for having ſerved the ſame, whereby ſuch Perſon ſhall receive any Damage or bodily Hurt; or to make reſcue, or conceal a Priſoner there: And to join in any Riot or Tumult there, or oppoſe the Execution of Proceſs there in a Diſguiſe is Felony without Clergy.*

By 11 Geo. 1. ch. 22. *It is Felony for three or more in any Place within the Bills of Mortality, which hath been preſented by the Grand Jury at the County Seſſions, as a Place where Perſons unlawfully aſſemble and aſſociate for the ſheltering themſelves from their Debts, to oppoſe ſerving any Writ, Rule, or Order of Court, or legal Proceſs, and aſſault the Perſon ſerving, whereby he ſhall receive bodily Hurt; or for any Perſon to oppoſe an Officer of Juſtice, or his Aſſiſtants, in the Execution of any Writ or legal Proceſs, or to reſcue or conceal a Priſoner taken there.*

[*By* 6 G. 1. ch. 23. § 5. *It is Felony without Benefit of Clergy to reſcue an Offender, condemned to be tranſported, out of the Hands of thoſe who have contracted to tranſport him.*]

By 16 Geo. 2. ch. 31. *If any Perſon be aſſiſting to any Priſoner to attempt to make his Eſcape from any Gaol, or convey, or cauſe to be conveyed, into any Gaol, any Vizor or other Diſguiſe, or any Inſtrument or Arms, to facilitate the Eſcape of Priſoners, and deliver, or cauſe the ſame to be delivered, to any Priſoner in ſuch Gaol, or to any other Perſon for the Uſe of ſuch Priſoner, without the Privity of the Gaoler, although no Eſcape be actually made, ſuch Priſoner being then attainted or convicted of Treaſon or Felony (except Petty Larceny) or lawfully committed or detained for Treaſon or Felony (except Petty Larceny) expreſſed in the Warrant; he is guilty of Felony, and to be tranſported for ſeven Years. But if the Priſoner's Offence was Petty Larceny, or a leſſer Crime, or he was in Gaol for Debt, amounting to* 100 l. *it is a Miſdemeanor. and liable to a Fine and Impriſonment.*

To aſſiſt any Priſoner to attempt to make his Eſcape from the Cuſtody of any Conſtable, or other Perſon who has the lawful Charge of ſuch Priſoner, in order to carry him to Gaol, by Virtue of a Warrant of Commitment for Treaſon or Felony (except Petty Larceny) expreſſed in ſuch Warrant; and to aid any Felon to attempt to make his Eſcape from on Board any Boat or Veſſel, carrying Felons for Tranſportation, or from the Contractor for their Tranſportation, or any other Perſon to whom ſuch Felons ſhall be lawfully delivered for Tranſportation, is Felony, and Tranſportation for ſeven Years.

Proſecution to be within a Year after the Offence.

Returning from Tranſportation puniſhable as in caſe of other Felons tranſported.

[By 25 Geo. 2. ch, 37. § 9. *Any Perſon who ſhall reſcue, or attempt to reſcue, or ſet at Liberty out of Priſon, any Perſon committed for, or found guilty of Murder, or reſcue, or attempt to reſcue, any Perſon convicted of Murder, going to, or during Execution, ſhall ſuffer Death as a Felon, without Benefit of Clergy. And any Perſon by Force reſcuing, or attempting to reſcue, the Body of ſuch Murderer, after Execution, out of the Cuſtody of the Sheriff or his Officers, or from the Surgeons Company, or from the Houſe of any Surgeon, where the ſame ſhall be depoſited purſuant to this Act, ſhall be deemed guilty of Felony, and tranſported for ſeven Years.*

By 11 G. 2. ch. 26. § 2. 24 G. 2. ch. 40. § 28. *Tumultuouſly aſſembling to the Number of five or more, to reſcue any Offender againſt any Acts relating to ſpirituous Liquors, or to aſſault any Perſon informing againſt ſuch Offender, is Felony, and Tranſportation for ſeven Years.*]

10. [Of Felony relating to the *Revenue* and *Trade*.

By 8 Geo. 1. ch. 18. § 6. *Perſons knowingly and willingly paſſing with foreign Goods, landed without Entry, within twenty Miles of the Coaſt, being more than five in Number, or being armed or diſguiſed, or who ſhall forcibly reſiſt the Officers of the Cuſtoms or Exciſe in ſeizing, run Goods, ſhall be guilty of Felony, and tranſported for ſeven Years.* And, 4 Black. Com. 154.

By 9 Geo. 2. ch. 35. § 13. *Perſons, being two or more in Company, paſſing within five Miles from the Coaſt, or from any navigable River, with one or more Horſes, or with any Carriage, whereon there ſhall be laden more than ſix Pounds of Tea, or more than five Gallons of ſpirituous Liquors, not having paid the Duties, and not having a Permit, or any other foreign Goods of above thirty Pounds Value, landed without Entry and Payment of Duties, and being armed or diſguiſed, or forcibly reſiſting any Officer of the Cuſtoms or Exciſe in the Execution of his Office; ſhall be deemed Runners of foreign Goods within the Meaning of* 8 G. 1. *and ſhall be guilty of Felony, and tranſported for ſeven Years. The Proof of the Entry and Payment of Duties to lie on the Perſons found with the Goods*

By 18 G. 2. ch. 28. *All Perſons who, before the firſt of* May, 1745, *have incurred any Penalty for running Goods are indemnified. But if any Perſon, having been guilty of any ſuch Offence for which he is liable to be tranſported, ſhall take the Benefit of this Act, and afterwards commit any the like Offence, he ſhall ſuffer as a Felon, without Benefit of Clergy.*

And by 19 G. 2. ch. 34. *If any Perſons, to the Number of three or more, armed with Fire Arms or other offenſive Weapons, ſhall be aſſembled, in order to aſſiſt in the illegal Exportation of Wool or other Goods prohibited to be exported, or in the carrying of Wool or other ſuch Goods in order to ſuch Exportation, or in running any prohibited or uncuſtomed Goods, or Goods liable to pay Duties which have not been paid, or ſecured, or in re-landing Goods ſhipped upon Debenture or Certificate, or in reſcuing the ſame after Seizure, or in reſcuing any Perſon apprehended for any Offence made Felony by any Act relating to the Cuſtoms or Exciſe, or in preventing his being apprehended; or if any Perſon ſhall have his Face blacked, or wear any Diſguiſe when paſſing with ſuch Goods, or ſhall forcibly hinder or aſſault any Officer in the ſeizing ſuch Goods, or maim, or dangerouſly*

gerouſly wound any Officer attempting to go on board any Veſſel, or ſhoot at, maim, or dangerouſly wound him when on Board, and in the due Execution of his Office; he ſhall be guilty of Felony without Benefit of Clergy.

And Perſons charged with ſuch Offences, by Information on Oath before one Juſtice, certified to a Secretary of State, who ſhall not ſurrender within forty Days after a Publication, in two ſucceſſive Gazettes, of his Majeſty's Order in Council, and Proclamation thereof purſuant to the Act, or who ſhall eſcape after ſuch Surrender, ſhall be attainted of Felony without Benefit of Clergy.

And if any Perſon, after the Time appointed for Surrender, ſhall knowingly harbour ſuch Offender, he ſhall, if convicted within one Year, be adjudged guilty of Felony, and tranſported for ſeven Years.

And Offences relating to the Cuſtoms or Exciſe, made Felony by any Act, may be tried in any County; but the Attainder on this Act ſhall work no Corruption of Blood, Loſs of Dower, or Forfeiture of Lands.]

[*See* 6 G. 1. ch. 21. *and* 9 G. 2. ch. 35. *Whereby it is made Tranſportation for ſeven Years to forcibly hinder, wound, or beat, in the Execution of his Office, any Officer of the Cuſtoms, by any Perſons armed, and tumultuouſly aſſembled, to the Number of eight, or any Officer of Cuſtoms or Exciſe being on Board any Ship.*]

By 4 Geo. 1. ch. 11. *Perſons impriſoned for exporting Wool, or Woolfells* [*or by* 12 G. 2. ch. 21. *for aiding and abetting therein*]. *refuſing to plead, Judgment ſhall be entered againſt them by Default; and if they do not pay the Sum recovered againſt them within three Months after Judgment, they ſhall be tranſported as Felons for ſeven Years.*

[*By* 12 G. 2. ch. 21. § 26. *It is Felony and Tranſportation for ſeven Years, to oppoſe Officers ſeizing Wool,* &c.

By 12 G. 1. ch. 34. § 7. *Willfully and maliciouſly to deſtroy any Serges or Woollen Goods in the Loom, or on the Rack, or any Rack on which the ſame are hanged in order to dry, or break or deſtroy any Tools uſed in the making ſuch Serges or Goods, without the Conſent of the Owner, is Felony without Clergy.*

And this Act is declared to extend to Combers of Jerſey and Wool, and to Framework-knitters, and Weavers, or Makers of Stockings.]

[See more of this Act at the End of Title *Felonies againſt the Body*; and alſo of Title *Burglary, poſt.*]

See 9 Geo. 3. ch. 30. *Whereby for the Puniſhment of Perſons guilty of ſtealing or embezzling his Majeſty's naval Stores; or of Forgery or Perjury in relation to Seamens Wages, it is made Felony without the Benefit of Clergy, for any one to utter or publiſh as true any falſe, forged, or counterfeited Letter of Attorney, Bill, Ticket, Certificate, Aſſignment, laſt Will, or any other Power or Authority whatſoever, in order to receive any Wages, Pay, or other Allowances of Money, or Prize-Money, due or ſuppoſed to be due to any Officer or Seaman or other Perſon, who has really ſerved or was ſuppoſed to have ſerved on Board of any Ship or Veſſel of his Majeſty, his Heirs or Succeſſors, with intent to defraud any Perſon, knowing the ſame to be falſe, forged or counterfeited.*

2. [a] *Private* Felonies are thoſe that are immediately hurtful to particular Perſons; tho' theſe too are againſt the King, his Crown and Dignity. Theſe private Felonies, more immediately againſt the inferior Members of the Commonwealth, are ſuch as are committed, 1. Againſt the *Life* of a Subject. 2. Againſt his *Body*, without taking away his Life.

[a] Weſt's Symb. p. 86. § 6, 65.

Life. 3. Againſt his *Goods*. 4. Againſt his *Habitation*, and, 5. There are ſome private Felonies made Capital by *Statutes*, which more immediately do concern the Subject.

1. Of private Felonies which are againſt the *Life* of the Subject.

The *Life* of a Subject may be deſtroyed ſeveral Ways; as, 1. By *Murder*. 2. By *Manſlaughter*. 3. By *Chancemedley*. 4. By *Neceſſity*.

Murder and Manſlaughter are *properly* Felonies; but in all the Inſtances before mentioned one may be *arraigned* for *Felony* and *Murder*.

1. [b] *Murder* (*Murdrum*, Sax. *Mordrue*) may be committed upon *one's ſelf*, or upon *another*.

1. Murder of *one's ſelf* may be committed, when one kills himſelf by hanging, poiſoning, drowning, ſtabbing, *&c.* with Deliberation and a direct Purpoſe. In this Caſe one is termed *Felo de ſe*. But the Perſon that commits this Felony, muſt be of the Age of Diſcretion and *Compos Mentis*. Therefore, if an Infant under the Age of fourteen Years, or a Lunatick during his Lunacy, or one diſtracted by Force of a Diſeaſe, or an Idiot, kills himſelf, it is not Felony. If one, during the Time that he is *Non Compos Mentis*, giveth himſelf a mortal Wound, whereof, when he recovereth his Memory, he dieth, he is not *Felo de ſe*; for at the Time of the Stroke, he was not *Compos Mentis* [a] In ſome Caſes he who maliciouſly attempts to kill another, and in Purſuance of ſuch an Attempt unwillingly kills himſelf, is a *Felo de ſe*. As when one haſtening to kill another, falleth upon his Weapon, which he held up in his own Defence[b]. [*Qu.*] But as in other Felonies, Death muſt enſue within a *Year* and a *Day* after the Stroke.

4 Black. Com. 194. Foſter Diſc. 2. ch. 8. per tot.
2 Burn Juſt. 418, &c.
[b] 1 Inſt. 287. b.
3 Inſt. 54.
H. P. C. 28, 29.
Dalt. ch. 145. p. 342.
Kely. 121, 122.
[a] 3 Inſt. 54.
Dalt. ch. 145. p. 344.
[b] 1 H. H. P C. 413. contra.

2. Murder committed upon [c] *another* is when a Man of ſound Mind and Memory, and of the Age of Diſcretion unlawfully killeth any reaſonable Creature in Being, under the King's Peace within any County, with Malice forethought, either expreſs or implied, ſo as the Party wounded or hurt dies of the Wound or Hurt within a *Year* and a *Day*. [d] The Killing may be by a Weapon, Poiſon, Cruſhing, Bruiſing, Smothering, Suffocating, Strangling, Drowning, Burning, Burying, Famiſhing, Throwing down, Inciting a Dog, Bear, *&c.* to bite or hurt, whereby Death enſueth, and by laying a ſick Man in the Cold in the open Air, againſt his Will, by Reaſon whereof he dieth.

[c] 3 Inſt. 47.
H. P. C. 43.
Dalt. ch. 145. p. 344.
3 Inſt. 48.
H. P. C. 53.
Cromp. 24.
2 Ld. Ray. 1583.

But to explain this Definition of the Murder of *another*.

[e] One under the *Age* of *Diſcretion*, or one *Non Compos Mentis*, cannot be guilty of the Murder of another. But if it appears by Circumſtances, as the Infant's hiding the Body, or the like, that he could diſtinguiſh the Nature of the Act, it is Felony. If one that is *drunk* kills a Man, it is Murder.

[e] 3 Inſt. 4, 6, 54.
H. P. C 43, 44.
4 Black. Com. 195.

It muſt be a Killing ſome [f] *reaſonable* Creature, Man or Woman, Subject or Alien; whether attainted of Treaſon or Felony, *Præmunire*, or not, Chriſtian or Heathen. And the reaſonable Creature muſt be born alive.

[f] 3 Inſt. 50, 51.
H. P. C. 53.
See p. 11. ante.
Exod. 21. v. 22, 23.

It muſt be within ſome [g] *County*. For if it is done out of the Realm, it cannot be determined *by the Common Law* but muſt be heard and determined before the Lord High Conſtable and Marſhal.

[g] 3 Inſt. 48.
H. P. C. 54.
See B 4. ch. 1. § 8, 9, 10. poſt.

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[b] *Majus eſt delictum ſeipſum occidere, quam alium.* 3 Inſt. 54.

[c] *Malitia ſupplet ætatem.* S. P. C. 16. b.

[*But by* 2 Geo. 2. ch. 21. *If a Stroke or Poiſon is given at Sea, or any where out of* England, *and the Party die thereof within* England; *or if the Stroke or Poiſon be given in* England, *and the Party die thereof at Sea, or in any Place out of* England, *the Principal or Acceſſary in ſuch Murder may be indicted and tried in the County where the Death, Stroke, or Poiſoning happened, as if both the Death, and the Stroke, or the Poiſoning, had been in that County.*]

[h] 2 Inſt. 42. 3 Inſt. 62. Kely. 127. 3 Cro. 131. 2 Ld. Ray. 1487. 2 Str. 766. S. C.

[i] 3 Inſt. 51. H. P. C. 47, 49.

[a] H. P. C. 49, 50. Kely. 64, 65, 127, 133, 134.

[b] 3 Inſt. 56. Crompt. 25. Dalt ch. 145. p. 347. H. P. C. 31, 44, 51. Kely. 87, 116, 117, 127.

[c] H. P. C. 48.

[d] Kely. 55, 56, 61, 65, 130, 131.

[e] 3 Inſt. 51. 9 Rep 81. H. P. C. 50.

It muſt be with *Malice forethought*. [h] *Malice* is a formed Deſign of doing Miſchief to another; ſo that Hatred and Malice differ. He that doth a *cruel* and voluntary Act, whereby Death enſueth, doth it of Malice prepens'd and forethought in the Eſteem of the Law, though he doth it of a ſudden. Therefore Malice is *expreſſed* by the Party, or *implied* by the Law, 1. [i] *Expreſs* Malice is when the Killing is with Malice prepens'd or forethought; with a ſedate Mind and formed Deſign to wound, poiſon, or to do ſome perſonal Injury to him that is kill'd, the Malice continuing until the mortal Wound or Hurt is given. This Malice may be in the Principal that doth the Act, or in the Principal aiding and abetting; and in the Acceſſory before the Fact. When a Perſon in cold Blood, maliciouſly, unlawfully, and deliberately [a] *beats* another, or doth other corporal Damage, in ſuch a Manner that he afterwards dieth thereof, he is guilty of Murder by expreſs Malice, tho' he did not deſign to kill him; but where a Maſter beats his Servant, or Schoolmaſter his Scholar, or Parent his Child, with ſuch Things as are uſual and fit for Correction, in ſuch a Manner as that it appears he only meant to chaſtiſe him, it is Manſlaughter only. If one executes his Revenge upon a ſudden Provocation in ſuch a cruel Manner, with a *dangerous Weapon*, as ſhews a malicious and deliberate Intent to do Miſchief, and Death enſues, it is expreſs Malice from the Nature of the Fact, and Murder. [b] If two or more come together to do an *unlawful* Act, as to beat a Man, to commit a Riot, to rob a Park, *&c.* and one of them kills a Man, this is Murder in all of that Party that are preſent, aiding or aſſiſting, or that were ready to aid and aſſiſt, tho' but Lookers on. Otherwiſe of them that come by chance. It is certain, that where the principal Intent was to commit another *Felony*, and a Killing happens in purſuance of that unlawful Purpoſe, all are guilty of Murder; for all will be ſaid to intend the Murder. And ſuch Perſons are ſaid to be preſent that are in the ſame Houſe, tho' in another Room, or in the ſame Park, tho' at Half a Mile Diſtance, or out of View. And ſo it is when Death happens, where ſeveral Perſons intend only a Breach of the Peace, and to reſiſt all Oppoſers. [c] If *A.* upon a Quarrel with *B.* tells him that he will not ſtrike him, but that he will give him a Pot of Ale to ſtrike him, and thereupon *B.* ſtrikes, and *A.* kills him, he is guilty of Murder; for this was only to cover his miſchievous Intention. [d] If upon a ſudden Quarrel one being provoked by bare Words or Geſtures makes a Puſh at another with a Sword, before the other's Sword is drawn, and thereupon a Fight enſues, and he who made the Aſſault kills the other, he is guilty of Murder; becauſe he ſhew'd at firſt, that he intended to kill him. But if he had made no Paſs at him, till his Sword was drawn, and till he was upon his Guard, and then fights with him and kills him, he is guilty of Manſlaughter only. [e] Sometimes the Malice, intended to one, makes the accidental

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[e] *In criminalibus ſufficit generalis malitia intentionis cum Facto paris gradus.* Bacon 65.

Death of another to be Murder. As *A.* having Malice to *B.* ſtrikes at him, and miſſeth him, and kills *C.* this is Murder in *A.* If one lays Poiſon to kill *B.* and *C.* takes it and dies, this is Murder in him that laid the Poiſon. If one reſolves to kill the next Man he meets, and does kill him, it is Murder, tho' he knew him not; for it is Malice againſt all Mankind. In the Caſe of [f] *Duelling*, it is agreed, that where two Perſons meet and fight in cold Blood upon a precedent Quarrel, or at ſuch a Day after the Quarrel, in which it may be preſumed the Blood was cool'd, and one killeth the other, he is guilty of Murder; tho' he had often declin'd to meet him. [g] For where a Man is killed, the Law will not preſume that it was upon a ſudden Quarrel, unleſs it is proved ſo to be; therefore if *A.* kills *B.* and no ſudden Quarrel appears, it is Murder; for, it lies upon the Party indicted to prove the ſudden Quarrel. If *A.* challenges *B.* and *B.* refuſes to meet him, but tells *A.* that he ſhall go the next Day to ſuch a Town about Buſineſs, and then *A.* meets *B.* on the Road the next Day, and aſſaults him, whereupon they fight, and *B.* kills *A.* he is guilty of Manſlaughter only. If *A.* challenges *B.* and *B.* refuſes to meet him, but tells him that he always wears a Sword, and ſhall be always ready to defend himſelf, and then *A.* meets him and attacks him, and *A.* is kill'd, *B.* is not guilty of Murder, nor of Manſlaughter, if the Killing was neceſſary in his own Defence. In Duelling, not only the Principal who actually kills the other, but alſo the *Seconds* are guilty of Murder, whether they fought or not. And the Seconds of the Perſon kill'd [a] are equally guilty, by Reaſon of the Encouragement which they gave their Principals, by joining with them. [*Qu*] [See 9 *An. ch.* 14. where any Perſon aſſaults and challenges another to fight for Money won at Play.] Theſe are Inſtances of *expreſs* Malice, [b] becauſe the Acts are *cruel*, and *unlawful*, and *deliberate*, or in Purſuance of an unlawful Act, tending immediately, or by neceſſary Conſequence, to the Hurt of another. 2. But there is alſo a Malice *implied* by the Law, where it is not expreſſed in the Nature of the Act. This may be in *three* Caſes. *In reſpect of the* [c] *Manner of Killing*; as by Poiſoning. [See 1 *Ed.* 6. *ch.* 12.] or when one killeth another without any Provocation, or upon a ſlight Provocation. No Affront by bare Words or Geſtures is ſufficient Provocation. [d] *In reſpect of the Perſon killed*; as if a Conſtable or Watchman is kill'd doing his Duty, or any other that comes in aid of the King's Officer, while he is executing his Office, tho' the Killer knew them not to be ſuch Perſons, yet it is Murder. Others contend, that he ought to have Notice from them, that they come to keep the Peace, *&c.* If a Bailiff is executing a lawful Warrant, and is kill'd, here Malice will be implied, tho' the Bailiff arreſts on a Sunday [*Qu.* Since 29 *Car.* 2. *ch.* 7.] or tho' he ſhews not his Warrant, where it may be demanded, and tho' the Proceſs is erroneous. [e] But if the Bailiff do that which is unwarrantable, (as if he breaks open an Houſe to arreſt in civil Caſes, either by Night or Day) and is ſlain, Malice ſhall not be implied to make it Murder. So it is where the Bailiff hath no Authority at all. [f] *In reſpect of the Perſon killing*; as if one aſſaults another to rob him, and in Reſiſtance kills him; if a Priſoner by Dureſs of the Gaoler comes to an untimely End; if one is executed by Command of a Judge who hath no Juriſdiction in the Cauſe; if Execution is not by a lawful Officer; or if the Sheriff, when he ought to hang the Party attainted, does burn or behead him;

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[f] H. P. C. 47, 48, 49. Kely. 56.

[g] Kely. 27. 2 Ld. Ray. 1493.

[a] H. P. C. 51. 1 H. H P. C. 443. contra.

[b] H. P. C. 57. Kely. 111, 113, 115, 116.

[c] 3 Inſt. 51, 52. 9 Rep. 67. Kely. 60, 128, 130, 135, 137. Comy. 13. See of Manſlaughter, poſt.

[d] 3 Inſt. 52. 9 Rep. 40, 41. 9 Rep 66, 68. Kely. 66. Contr. 115, 116. H. P. C. 45, 46. 2 Cro. 279, 280. 3 Cro. 183, 537. 2 Ld. Ray. 1302. 1 H. H. P. C. 438, 446, 460.

[e] 1 H. H. P. C. 457, &c.

[f] 3 Inſt. 52. 9 Rep. 67, 68. Dalt. ch. 145. p. 344. H. P. C. 46. 2 Ld. Ray. 1574. 2 Str. 882. S. C.

or if an Officer authorized to whip, does it with ſuch Rigour, that by Means thereof the Offender dieth; in all theſe Caſes the Law doth imply Malice. [See the Statute of *Stabbing*, 1 *Ja.* 1. *ch.* 8. *poſt.*]

g 3 Inſt. 53. 5 Rep. 1. H. P. C. 55. a Kely. 26.

Laſtly, It is ſaid in the Definition of Murder, that the Dying muſt be within a [g] *Year* and a *Day* after the Stroke, Wound, or Poiſon given. For if one that is wounded or poiſoned dies after that Time, the Law preſumes he died a natural Death. So it is in caſe of a *Felo de ſe.* The whole Day on which the Hurt was done, ſhall be reckoned the firſt. [a] It is no Excuſe where another is wounded, if the Party dies thro' his own Negligence or diſorderly Living; for the Wounds were the principal Cauſe of the Death which enſued.

By 3 H. 7. ch. 1. *When one is ſlain in the Day-time, and the Murderer eſcapes untaken, the Townſhip that ſuffers it, ſhall be amerced, and the Coroner ſhall inquire thereof upon the View of the dead Body.*

b 2 Inſt. 315.

The Town ſhall be amerced, if any Man kills another in his own [b] Defence, and *eſcapes.*

c 3 Inſt 53. 7 Rep. 6, 7. H P. C. 89.

[c] If a Murder is committed in the Day-time (not in the Night) in a Town not incloſed, and the Murderer eſcapes, the Townſhip ſhall be amerced. But if it is incloſed, whether the Murder is committed by Night or Day, the Townſhip ſhall be amerced, if the Offender eſcapes. For the Gates ought to be ſhut from Sun-ſet till Sunriſing. See 13 *Ed.* 1. *ch.* 1. and of *Hue* and *Cry* under *Robbery, poſt.*]

Hawk. P. C. B. 2. p. 438. 1 Inſt. 217. b.

By 21 Ja. 1. ch. 27. *If any Woman be delivered of any Iſſue of her Body, Male or Female, which being born alive, ſhould by Law be a Baſtard, and ſhe endeavour privately, either by Drowning, or ſecret Burying thereof, or any otherways, either by herſelf, or the Procuring of others, ſo to conceal the Death thereof, as that it may not come to light whether it were born alive or not, but be concealed, ſhe ſhall ſuffer Death, as in Caſe of Murder, except ſhe can prove by one Witneſs, at leaſt, that the Child was born dead.*

4 Black. Com. 191.

2. Of *Manſlaughter.*

d 1 Inſt. 217. b. 3 Inſt. 55. 1 Str. 499. Foſter Diſc. 2. ch. 5, 6, 7. per tot. 2 Burn Juſt. tit. Homicide.

[d] Manſlaughter is the Killing of another without Malice, in a preſent Heat on a *ſudden Quarel*, upon a *juſt Provocation*, or in the Commiſſion of a *voluntary* and *unlawful Act*, without any deliberate Intention of doing Miſchief. There is no Difference betwixt Murder and Manſlaughter, but that Murder is upon Malice forethought, expreſs, or implied; and Manſlaughter upon a ſudden Occaſion, or without an ill Intent. Therefore in Manſlaughter there can be no Acceſſories before the Fact.

e Crompt. 25, Kely 56. 1 Lev. 180. 2 Cro. 296.

It muſt be upon a [e] *ſudden Quarrel*, where the Party guilty did not appear to be Maſter of his Temper, by talking calmly upon the Quarrel, or afterwards upon other Diſcourſe, whereby the Heat of the Blood might be preſum'd to be cool'd. Therefore where two meet together, and ſtriving for the Wall, one kills the other, this is Manſlaughter.

f 3 Inſt. 51, 55. H P. C. 56, 57. Dalt. ch. 146. p. 349.

[f] And ſo it is if they had upon a ſudden Occaſion gone into the Field and fought, and the one had kill'd the other. For all is one continued Act of Paſſion upon the firſt ſudden Occaſion. If two fall out

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Delinquens, per iram provocatus, puniri debet mitius. 2 Inſt. 55.

on a ſudden and fight, and one breaks his Sword, and a Stranger ſtanding by, lends him another, and he kills therewith, Manſlaughter in both.

Or it muſt be upon a *juſt Provocation*. But when it appears that one hath kill'd another, it ſhall be intended at firſt that he did it [g] maliciouſly, unleſs he can prove that he did it upon a juſt Provocation. [h] No Breach of a Man's Word, or Treſpaſs either on Lands or Goods, no Affront by Words or Geſtures will excuſe the Killing of another, from the Guilt of Murder, or be thought a juſt Provocation. [a] But if upon ill Words (as giving the Lie, or calling another Son of a Whore) both the Parties ſuddenly fight, and one kills the other, this is but Manſlaughter. For it is a Combat betwixt two upon a ſudden Heat. Juſt Provocations may be in the following Manner. [b] As if one upon angry Words ſhall aſſault another, as by pulling him by the Noſe, or filliping upon his Forehead, and he that is ſo aſſaulted ſhall draw his Sword, and immediately kill the other, this is only Manſlaughter. For the Peace was broke by the Perſon kill'd, and an Indignity was offered to the Slayer, ſo that he might reaſonably apprehend that there might be ſome further Deſign upon him. [c] If a Man's Friend is aſſaulted by another or engaged in a Quarrel that comes to Blows, and one in the Vindication of his Friend ſhall on a ſudden take up a miſchievous Inſtrument, and kill the Enemy of his Friend, that is but Manſlaughter. So it is if a Man ſees another injuriouſly reſtrained of his Liberty, and out of Compaſſion comes to his Reſcue, and kills any of thoſe that ſo injuriouſly reſtrained him, that is Manſlaughter. Again, when a Man is taken in [d] Adultery with another's Wife, and the Huſband preſently kills the Adulterer, this is a juſt Provocation, and makes it Manſlaughter. For here was the higheſt Invaſion of Property.

[e] The *unlawful Act* muſt be without Deliberation, and without Intention of doing a *perſonal Hurt*, to make it Manſlaughter. For if the unlawful Act is deliberate, and tends to the perſonal Hurt of any immediately, or by way of neceſſary Conſequence, and Death enſues, it is Murder as before obſerved. [f] So that any unlawful Act without an ill Intent, is Manſlaughter; with an ill Intent, Murder. [g] As when two play at Foils, and one kills the other, it is Manſlaughter only. For tho' the Act was unlawful, yet there was no deliberate Intention of doing a perſonal Hurt. [h] If two Maſters of Defence, without the King's Command, play at Hand-Sword, and one hurts the other ſo that he dies within a Year and a Day, it is only Manſlaughter. (It is not Felony, if it is by the King's Command.) For that in a friendly Manner they play by Conſent, and for Sport to try their Manhood, or that they may be able to do the King a Service in that Kind, as Occaſion ſhall be offered. So if Death happens by playing at Foot-ball, by Wreſtling, and ſuch like Sports, which are attended with no apparent Danger of Life, and are uſed only for Sport and Exerciſe, it is not Felony, but Chancemedley, or Homicide *per Infortunium*. [i] If one killeth another by throwing a Stone over a Wall, in a Place where Men often reſort, or by throwing a Stone wantonly at another in Play, or by doing ſuch idle Action as cannot but endanger the bodily Hurt of ſome one or other, it is Murder, if done with an evil Intention to hurt; if without ſuch Intention, it is Manſlaughter. The Intention of Evil, tho' not againſt a particular Perſon, makes Malice implied. [k] Certainly, if a Man knoweth that People are paſſing by in the Streets (as in *London*, where there is a continual Concourſe of People paſſing up and down) and throws Rubbiſh, a Piece of Timber, or great Stones, from a Houſe,

[g] Kely. 27. 2 Ld. Ray. 1493.

[h] Kely. 130, 131, 132. 134.

[a] Kely. 55, 60.

[b] Kely. 135.

[c] Plowd. 101. 12 Rep. 87. Kely. 46, 60, 61, 62, 136, 137. 2 Ld. Ray. 1300.

[d] 1 Ventr. 158. Raym. 212, 213. Kely. 137.

[e] 3 Inſt. 56. H.P.C. 51, 57. Kely. 112, 113, 115. 4 Black. Com. 191.

[f] H. P. C. 32, 44.

[g] H. P. C. 32, 57.

[h] 3 Inſt. 56, 160. Hob. 134. Dalt. ch. 148. p. 352.

[i] 3 Inſt. 57. H.P.C. 44, 45.

[k] 3 Inſt. 57. H. P. C. 44. Kely. 40, 41.

1 See Hawk. P. C. B. 1. p. 73. 1 H. H. P. C. 472, 475. a 3 Inſt. 56. b 1 H H P.C. 475, contra. c 3 Inſt 56. Contra, H. P C. 31, Kely 117. 1 H. H. P. C. 475.

and killeth another, it is Murder, tho' he calls out to the People to ſtand aſide [1], [*Qu.*] becauſe in common Preſumption his Intention was to do Miſchief, when he caſts a Thing down amongſt a Multitude of People. Otherwiſe if he had call'd out in a Country-Town, where there is no ſuch Frequency of Paſſengers. [a] If one by ſhooting at wild Fowl, or Hare, kills a Man by Accident, if he is not qualified to keep a Gun, it is Manſlaughter [b]. [*Qu.*] But if he was qualified to keep a Gun and the Act was lawful, it is Chancemedly only. But, tho' qualified, if he ſhoots at a Cock or Hen, or any tame Fowl of another Man's and he kills a Stander-by, it is Murder, for the Act is unlawful. [c] So if one meaning to ſteal a Deer in the Park of another, accidentally killeth a Boy that is hid in a Buſh, this is Murder. But *Quære*, becauſe the unlawful Act doth not tend immediately or by neceſſary Conſequence to the Hurt of another.

d 4 Inſt. 251. S. P. C 16, b. Haw. P. C. B. 1. p 87.

[d] If a Phyſician gives one ſuch Phyſick, that the Patient dies of it in the Operation, it is not Homicide, if there was no felonious Intent. But if one who is not of the Faculty of Phyſicians takes upon him the Cure of a Man, and he dieth of the Potion, it is ſaid to be Homicide and Felony.

But there is a Manſlaughter, which is puniſhable as Murder. For,

1 Ld. Ray. 138, &c. Foſter Diſc. 2. ch. 6. per totum. 4 Black. Com. 193.

By 1 Ja. 1. ch. 8. *When one thruſts or ſtabs another, not having then a Weapon drawn, or then ſtriking firſt, ſo that he dies thereof within ſix Months after; although it were not of Malice or Forethought, he ſhall not enjoy the Benefit of his Clergy.*

This Act ſhall not extend to charge any with Thruſting or Stabbing, when it is done only Se Defendendo, *by Misfortune, or in keeping the Peace, or in chaſtiſing a Child or Servant, with no Intent or Purpoſe to commit Manſlaughter.*

e 3 Lev. 255, 266. 1 Ld. Ray. 142.

Obſerve upon this Statute, that where a Perſon who kills another, was at any Time ſtruck by the other in the Quarrel, or where he had a Weapon drawn at any Time in the Quarrel, before the Thruſt, or Stab, or mortal Wound was given, the Slayer is out of the Statute, though he gave the firſt Blow. For the Words *That hath not THEN firſt ſtricken*, or *That hath not* [e] *THEN any Weapon drawn*, ſhall be conſtrued to be the *Stroke* given by the Party ſlain at any Time of the Quarrel, and not to any Stroke juſt before the Thruſt or Stab; and ſo *then* ſhall be conſtrued to a *Weapon* drawn at any Time during the Quarrel.

f H. P. C. 58.

The Statute extends to him only that [f] *actually* gave the Stroke, or that ſtabb'd the other; and not to thoſe that were aiding and abetting in the Fact. For they ſhall be allowed Clergy. So that if it cannot be proved, by whom the Stroke was given, the Caſe is out of the Statute.

g 1 Jones 432. h 3 Lev. 266.

[g] A Killing with a Hammer cannot come under the Words *Thruſt* or *Stab.* [h] But if the Party ſlain had diſcharged a Piſtol, or threw a Pot or Bottle, at the Party that ſtabb'd, it is within the Equity of the Words, *Having then a Weapon drawn.* For penal Statutes ſhall be conſtrued favourably for the Subject. For this Reaſon, if one had drawn out a Piſtol only, and level'd it at the Party without Diſcharging it; or held up a Pot or Bottle, threatening only to throw it; this ſeems to be a *Weapon drawn.* [But *Quære.*]

a H. P. C. 58, 266. b Kely. 55.

[a] He that is ouſted of Clergy by this Statute, muſt be ſpecially indicted purſuant to it; and yet the Jury may find Manſlaughter generally. For the Statute makes no new Offence, but only takes away the Benefit of the Clergy, which was allowed at Common Law. [b] For the Statute is but a Declaration of the Common Law, and made to prevent the Compaſſion

who reduced him to ſuch a *Neceſſity*: It is ſaid *that* it muſt be a Killing paſſion of Juries, who oftentimes were apt to believe that to be a Provocation to extenuate a Murder which in Law was not.

Thus of Murder and Manſlaughter, which are *voluntary* Homicides.

Involuntary Homicide is either by *Chancemedley*, or thro' *Neceſſity*. [c] But theſe are not *properly* Felonies, becauſe not accompanied with a felonious Intent.

3. [d] *Chancemedley (Chance-Meſle)* is where a Man is doing a lawful Act without Intent of Hurt to another, and the Death of ſome Perſon doth by Chance enſue. Manſlaughter is call'd Chancemedly; but then it ſignifies the Killing of a Man upon a ſudden Brawl or Contention by Chance. For *Meſle*, *Medle*, or *Melle* is Brawling. But Chancemedley in common Speech is where Death happens, when one is doing a lawful Act, and without an ill Intent. So then while one is uſing a lawful Diverſion, as by ſhooting at Rovers or at wild Fowl, or when one is hewing a Tree, and the Head of the Hatchet flies off, and a Stander-by is accidentally kill'd, this is Chancemedley. Alſo if one is doing a lawful Thing that may breed Danger, and gives Warning (as where a Workman flings down Timber or Rubbiſh from a Houſe, and gives Warning to all Perſons to take care and ſtand aſide) and yet kills one that happens to be underneath, it is Chancemedley. [e] Otherwiſe in populous Cities, where People are continually paſſing up and down. [f] If a Man whips his Horſe in the Street to make him gallop, and the Horſe runs over a Child and kills it, it is Manſlaughter: But if another had whipp'd the Horſe, it would be Manſlaughter in him and Chancemedley in the Rider.

[g] If a Schoolmaſter in correcting a Scholar, or a Father his Son, or a Maſter his Servant, or an Officer in whipping a Criminal, in a reaſonable Manner, happens to occaſion his Death, it is Chancemedley and Miſadventure. But if they exceed the Bounds of Moderation, they are guilty of Manſlaughter. [h] And if they correct with an improper Inſtrument for Correction, as with a Sword, an Iron Bar, or kick the Scholar to the Ground, and then ſtamp on him, and kill, it is Murder; becauſe of the Cruelty and Barbarity of the Action.

In Chancemedly the Offender forfeits his Goods, but hath a Pardon of Courſe.

Note, That there is a Death *Per Infortunium*, without the Fault or Procurement of another, [i] occaſioned by ſome Animal, or elſe by a Thing without Life; as where one is kill'd by a Fall from a Horſe, Mow, or Rick of Corn, Hay, Cart, which tho' it is not properly Homicide, or the killing of a Man by a Man, nor puniſhable as a Crime, yet the Law takes Notice of it, and makes that Thing that occaſion'd the Death, to be forfeited to the King as a *Deodand*[k]. [l] But if a Man is ſlain in ſuch Manner by the wilful Default of another, it is Felony. And,

[*By* 10 G 2. *ch.* 31. § 8. *In caſe any greater Number of Paſſengers than thirty-ſeven at one Time, and three by the Way, are taken or received into any Tilt-Boat or Row-Barge, or more than eight, and two by the Way, into any other Boat, working for Hire or gain on the* Thames, *between* Graveſend *and* Windſor, *and any Paſſenger ſhall then be drowned, every Perſon who ſhall for Hire or Gain work or navigate ſuch Boat, ſhall be deemed guilty of Felony, and tranſported as Felons.*]

4. The Life of a Man may be taken away upon a *Neceſſity*.

This *Neceſſity* makes it *excuſable* or *juſtifiable* Homicide.

1. *Excuſable* Homicide is *Se Defendendo*, or where one has no other poſſible Means of preſerving his own Life, than by killing the Perſon, who

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[c] 2 Inſt. 149, 3 Inſt. 54, 56, 57.

[d] 3 Inſt. 56, 57. 4 Black. Com. 184. Foſter 277. H. P. C. 31. Dalt. ch. 148. p. 351, 352. Deut. xix. v. 5, 6. Joſh. xx. v. 3.

[e] 3 Inſt. 57, H. P. C. 32. See p. 349. ante. Kely. 40.

[f] H. P. C. 58. 59.

[g] H. P. C. 31. Dalt. ch. 148. p. 351.

[h] H. P. C. 26. Kely. 65. 133. Exod. xxi. v. 20, 21. Num. xxxv. v. 15.

[i] 3 Inſt. 57, 58. H. P. C. 32, 34.

[k] See p. 207. ante,

[l] Dalt. ch. 149. p. 353.

4 Black. Com. 177.

Foſter diſc. 2. ch. 1, 2. & fol. 273, 275, 278.

upon an *inevitable* Neceſſity; but Neceſſity always implies the Act to be inevitable, or that it could not be otherwiſe.

*3 Inſt 55, 56. H. P. C. 41, 42. Dalt. ch. 150. p. 357, 358. Kely. 128.

* The Party aſſaulted is not to be excuſed, unleſs he gives back to the Wall, Hedge, or River, beyond which he cannot go, before he kills the other. But if the Aſſault is ſo fierce, and in ſuch a Place, that giving back would endanger his Life; he need not go back. Certainly this muſt be a Killing *Se Defendendo*, or in his own *Defence*. And tho' one retreats from an Aſſault to the Wall, and gives the other divers Wounds in his Retreat, yet if he gives him no mortal Wound 'till he gets thither, he is guilty of excuſable Homicide and *Se Defendendo* only. But if the mortal Wound was firſt given, then Manſlaughter. If one aſſaults another to kill him upon Malice prepenſed, and then flies to the Wall, and there in his own Defence kills him, it is Murder. For he was the original Cauſe of the Killing. But if there is Malice betwixt *A.* and *B.* and *A.* ſtrikes firſt, and *B.* retreats to the Wall, and there in his own Defence kills *A.* this is *Se Defendendo* notwitſtanding there was Malice between them.

b 3 Inſt. 56. 5 Rep. 91. 9 Rep. 68. Dalt. ch. 150. p. 358. H. P. C. 41. 1 Str. 499.

[b] If a Priſoner aſſaults a Gaoler, or one aſſaults an Officer of Juſtice, that hath a lawful Warrant, in the Execution of his Office, they are not bound to give back before they kill in their own Defence. So it is, where a Thief offers to rob or murder another either abroad or in his Houſe. And ſo it is declared by 24 *H.* 8. *ch.* 5.

A Man in Fight falleth to the Ground, there his flying to the Wall is not neceſſary.

c 3 Inſt. 140. 2 Cro. 367.

[c] A Man cannot draw a Weapon in his own Defence in a Church or Churchyard, [See 5 & 6 *Ed.* 6. *ch.* 4.] or in View of the King's Courts of Juſtice, or in any of the King's Palaces.

d 2 Inſt. 316, 317. H. P. C. 38.

d Upon an Indictment for Murder, one cannot ſet forth his Caſe in a ſpecial Plea; but muſt plead Not guilty, and give the ſpecial Matter in Evidence. And tho' the Verdict is Chancemedley or *Se Defendendo*, he ſhall *forfeit* all his Goods and Chattels. But he ſhall have a Writ of Reſtitution, and a Pardon of Courſe. This Forfeiture is made, that Men may be wary and careful, how they take away the Life of any Man. The Pardon was obtained formerly by *Certiorari* out of *Chancery* to remove the Record, which being certified, the Lord Chancellor iſſued forth a Pardon: But now it is done by Certificate of the Judge or Juſtices.

a 2 Inſt. 316. 3 Inſt. 56.

There can be no [a] Acceſſories before or after the Fact in excuſable Homicide.

b See B. 4. ch. 5. § 12. poſt. See of Bail, B 4. ch. 5. § 2. poſt.

By 24 H. 8. ch. 5. *If one is indicted or appealed for the Death of another attempting to murder him, or rob him on the Highway, or in his Houſe, (and ſo found by Verdict) he ſhall forfeit* [b] *no Lands or Goods for the ſame; but ſhall be acquitted and diſcharged thereof.* [See 6 Ed. 1. *ch.* 9.]

So then *Se Defendendo* is an *excuſable* Homicide. And thus it may be ſaid of *Chancemedley*.

c 1 Inſt. 128. b. Foſter 273, 275. 3 Inſt. 211, 212, 217, 221. 4 Black. Com. 177. 10 Rep. 76. H. P. C. 35, 36, 37, 272. Dalt ch. 150, p. 354, 355. 1 H. H. P. C. 497.

2. c *Juſtifiable* Homicide muſt be alſo upon a *Neceſſity*. This is either of a *publick* or *private* Nature. 1. *Publick*, occaſioned either by the due *Execution* of publick Juſtice, or the *Advancement* of it. By the due *Execution* of Juſtice, when Judgment of Death is given by one that hath Juriſdiction in the Cauſe, and when Judgment is executed by

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* *Quod quis ob tutelam corporis ſui fecerit, jure id feciſſe videtur.* 1 Inſt. 162. a. 2 Inſt. 384, 590. 3 Inſt. 56.
Vim vi repellere licet, modo fiat cum moderamine inculpatæ tutelæ. 1 Inſt. 162. a.

a lawful Officer, and the Execution is purſuant to the Judgment. But if the Judgment is only erroneous (as Death in Treſpaſs by Juſtices of the Peace) the Officer is not guilty of Felony, tho' the Judge is guilty. In *Advancement* of Juſtice, either in Relation to *criminal* or *civil* Cauſes. *Criminal*, as when a Sheriff or Bailiff, having a lawful Warrant, arreſts a Perſon that hath actually committed a Felony, or that is indicted of Felony, tho' no Felony done, or the Party is innocent, and he will not obey; or when he will not ſuffer himſelf to be arreſted, but defends himſelf; or when one either with or without Warrant [d], purſues a Felon upon Hue and Cry, that flies for it, or one that is indicted of Felony; or if a Priſoner aſſaults thoſe that conduct him to Gaol, or his Gaoler while he is endeavouring to eſcape; if thoſe who are engaged in a Riot, [See 1 *Geo.* 1. *ch.* 5. § 3.] or forcible Entry or Detainer, ſtand in Oppoſition to a Juſtice's Command or lawful Warrant; if any are doing Treſpaſs in a Foreſt, Chace, Park, or in any incloſed Ground where Deer are kept, and will not render themſelves to the Keepers, but fly or defend themſelves; [See 3 *W.* & *M. ch.* 10. Againſt Deer-ſtealers; and 4 & 5 *W.* & *M. ch.* 23. For Preſervation of the Game.] In *all* theſe Caſes a Killing may be juſtified. *Civil*, [e] as a Sheriff may kill a Man that reſiſts an Arreſt. But he cannot kill one that barely flies from the Execution of a civil Proceſs. So it is, if the Sheriff endeavours to retake one that hath been arreſted, and hath made his Eſcape, and doth reſiſt him. But no *private* Perſon hath this Authority upon an Arreſt in a civil Matter, as he hath upon an Arreſt for Felony. Neither hath the Sheriff this Authority either in criminal or civil Caſes but upon a [f] *Neceſſity* as aforeſaid; as when an Offender cannot be taken without Killing him. If he might be taken without Killing him, it will be eſteem'd Murder. 2. *Private*, occaſion'd in Defence of one's *Perſon*, *Houſe*, or *Goods*. [g] As when a Woman kills one that attempts to raviſh her, or when one kills another that attempts to murder him, rob him, abroad, or in his Houſe. [See 24 *H.* 8. *ch.* 5. *ante.*] When one in Danger of Drowning, thruſts another from the ſame Plank, which is not able to ſupport both, whereby he is drowned; when the Owner of a Houſe, his Servants, or Lodgers, kill one that endeavours to rob or burn the Houſe, or to commit any other Felony. [h] But if the Aſſault in the Houſe were in the Day-time, not to rob me, but to beat me, it would be a Killing *Se Defendendo*. If one comes into my Houſe, claiming a Title, or breaks open my Windows to arreſt me, or doth any private *Treſpaſs* to my Goods, and I kill him, it is Manſlaughter at leaſt. In Defence of the Poſſeſſion of my Goods I may juſtify to beat him that will wrongfully take them from me; but I cannot juſtify the Killing of him, except he is a Thief. If one enters wrongfully and forcibly into the Houſe of another, and the Owner endeavours to fire the Houſe, and the Wrong-doer kills him, it is alſo Manſlaughter. [See 1 *Ja.* 1. *ch.* 1.]

[d] 1 H. H. P. C. 490, 494. See B 4. ch. 5. § 1. poſt.

[e] 3 Inſt. 56, 221. H. P. C. 37. Dalt. ch. 150. p. 355.

[f] H. P. C. 38. Dalt. ch. 150, p. 355. Kely. 28.

[g] H. P. C. 39. Dalt. ch. 150. p. 356, 357. 1 H H. P. C. 485, &c.

[h] H. P. C. 40, 57. Dalt. ch, 150. p. 357, 358.

[a] Upon the ſpecial Matter found, the Party is to be diſmiſs'd without any Forfeiture or Pardon purchaſed; or the Jury may find him Not guilty generally.

[a] 3 Inſt 283. a. 2 Inſt. 316. 3 Inſt 220. H. P. C. 38.

Theſe are the *Felonies* (at leaſt ſuppoſed Felonies at firſt) committed againſt the *Life* of the Subject.

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[a] *Agentes et conſentientes pari pœna plectentur.* 3 Rep. 59. 5 Rep. 80.

2. Private Felonies may be againſt the *Body* of the Subject, without taking away his Life; and may be committed by 1. *Buggery*, 2. *Rape*, 3. *Forcible Marriage or Defilement of Women*, 4. *Polygamy*, 5. *Mayhem*.

4 Black. Com. 215. 1 Burn Juſt. 256. [b] 3 Inſt. 58, 59. 12 Rep. 36, 37. H. P. C. 177. 1 H. H. P. C. 628. Dalt. 160. p. 382. cont. Exod. xxii. v. 19. Levit. xviii. v. 22, 23.

1. [b] *Buggery* or *Sodomy* is the carnal Knowledge of the Body of Man or Woman, or of Beaſts againſt the Order of Nature. It may be committed by Man with Man or Woman, or by Man or Woman with a Beaſt. Some kind of Penetration, and alſo of Emiſſion [*Qu.*], muſt be proved. If a Boy or Girl thus abuſed is within the Age of Diſcretion, it is no Felony in them, but in the Agent only. Otherwiſe it is Felony in both Agent and Patient. Not only he that doth the Act is a Principal, but they that are preſent, aiding and abetting the Miſdoer, are alſo Principals. This is Felony by the ancient Common Law.

By 25 H. 8. ch. 6. *and* 5 El. ch. 17. *Buggery is made Felony without Clergy.*

The Word *Perſons* in the Statute extends to a Woman as well as a Man.

4 Black. Com. 210. 4 Burn. Juſt. 56 to 59. [c] 1 Inſt. 123. b. 124. a. 2 Inſt. 180, 433. 3 Inſt. 59, 60. 12 Rep. 37. H. P. C. 177, 118, 186. Dalt. ch. 160. p. 392. 1 H. H. P. C. 628. contr. Deut. xxii. v. 25. [d] S. P. C. 24. Finch 204. 1 H. H. P. C. 731.

2. [c] *Rape (Raptus)* is the carnal Knowledge of the Body of a Woman by Force, and againſt her Will. There muſt be Penetration, and Emiſſion [*Qu.*], otherwiſe an aſſault only. Emiſſion may be Evidence of Penetration, tho' not full Evidence. This is alſo Felony by the Common Law. It is no *Excuſe* that the Woman conſented after the Fact, or before the Fact, if it was for fear of Death or Impriſonment; or that ſhe was a common Strumpet; or that ſhe conceived[d]. But it is a ſtrong Preſumption againſt the Woman, that ſhe made no Complaint in a reaſonable Time after the Injury.

Aiders and Abetters may be indicted as principal Felons, whether Men or Women.

The Word *Rapuit* ſignifies as much as *Carnaliter Cognovit*, and is neceſſary in the Indictment.

By 18 El. ch. 7. *It is Felony without Clergy to commit a Rape; and whoſoever ſhall carnally know and abuſe any Woman-Child under the Age of* ten *Years, ſhall ſuffer as a Felon without Clergy.* [See *Weſt.* 1. or 3 *Ed.* 1. *ch.* 13. *Weſt.* 2. or 13 *Ed.* 1. *ch.* 34.]

[a] 3 Cro 332. Dalt. ch. 160. p. 393.

It is not material whether ſuch Child conſented, or was forced. Yet it muſt be proved that the Offender [a] entered her Body.

4 Black. Com. 208.

3. *Forcible Marriage* or *Defilement* of a Woman of Eſtate is Felony. For,

By 3 H. 7. ch. 2. *If any Perſon ſhall take away any Woman, being a Maid, Wife, or Widow, having Lands or Goods, or that is Heir Apparent to her Anceſtor, againſt her Will, and marry or defile her; the Takers, Procurers, Abetters, and alſo the Receivers of the ſame* Woman *ſo taken againſt her Will, and knowing the ſame, ſhall be deemed principal Felons. Provided that this Act extend not to any Perſon taking any Woman, claiming her only as his Ward or Bond-Woman.* [See 39 *El. ch.* 9. *infra.*]

[b] 3 Inſt. 61. H. P. C. 118, 119. 12 Rep. 20, 100. Hob. 182. 3 Cro. 482, 484, 488, 492. [e] Hawk. P. C. B. 1. p. 110.

[b] The Woman muſt have Lands or Goods, or be *Heir Apparent*. She muſt be taken away [or at leaſt detained[c]] againſt her Will, and ſhe muſt be married to the Miſdoer, or to ſome other by his Conſent, or

defiled, as appears by the Preamble of the Statute, to which the enacting Clauſe does refer by the Words, *ſo* againſt her Will. If theſe do not concur, it is no Felony within this Statute; but the Miſdoer muſt be otherwiſe puniſhed.

If the Taking is unlawful, and againſt the Will of the Woman, altho' the Marriage was with her Will, it is Felony within the Statute.

Thoſe that after the Fact receive the Offender, and not the Woman, are not Principals within this Statute, but Acceſſories according to the Rules of Law.

Privies to the Marriage, and not Parties to the Force, are not within the Statute.

The Indictment ought to alledge, that the taking was for Lucre.

By 39 El. ch. 9. *All Perſons, who ſhall be Principals, Procurers, or Acceſſories before the Offence committed, in the taking away of Women againſt their Will, contrary to* 3 H. 7. ch. 2. *ſhall be excluded the Benefit of Clergy.*

4. [d] *Polygamy* is where a Man marries two or more Wives together, or where a Woman marries two or more Huſbands together. Here the *Body* of the Huſband and Wife may be ſaid to be injured by a ſecond Marriage while either are living. Therefore,

[d] 3 Inſt. 88.
See p. 56, 57. ante.
4 Black. Com. 163.
3 Burn. Juſt. 265.

By 1 Ja. 1. ch. 11. *If any Perſon within* England *and* Wales *being married, do marry any Perſon or Perſons, the former Huſband and Wife being alive, every ſuch Offence ſhall be Felony. Provided that this Act ſhall not extend to any Perſon or Perſons, whoſe Huſband or Wife ſhall be continually beyond Sea for ſeven Years; or whoſe Huſband and Wife ſhall be abſent for ſeven Years together in any of the King's Dominions, the one not knowing the other to be living within that Time. Provided alſo, that this Act ſhall not extend to Perſons divorced by Sentence in the Eccleſiaſtical Court, or whoſe former Marriage is declared void by Sentence there, or whoſe former Marriage was had within Age of Conſent.*

And the Offender may be proceeded againſt, tried, and executed in the County where apprehended, as if the Offence had been committed in that County.

[a] So that if either is abſent ſeven Years beyond Sea, Notice of being alive is not material; but if abſent ſeven Years in the King's Dominions, they can marry only where there has been no Notice at all that either Party is living.

[b] Not only a Divorce *à Vinculo Matrimonii*, but a Divorce *à Menſâ & Thoro* is within the *Proviſo* of this Statute; because a penal Statute muſt be conſtrued favourably. (*Qu.*)

* Where either of the Parties are within the *Age* of *Conſent* at the Time of the firſt Marriage, and doth diſagree to the firſt Marriage at the Age of Conſent, the Huſband or Wife may marry a ſecond Time.

[a] 3 Inſt. 88.
H. P. C. 121, 122.
[b] 3 Inſt. 89.
H. P. C. 121, 122.
3 Cro. 461, 462.
Kely. 27.
1 H. H. P C. 694.
* See p. 56. ante.
4 Black. Com. 205.
3 Burn Juſt. 112.

[c] 5. *Mayhem* (*Mayhaigne, Mayhemium*) is a Hurt of any Part of Man's Body, whereby he is rendered leſs able in Fighting, either to defend himſelf or annoy his Enemy. As if a Bone, Joint, or Finger is broken, or diſabled by ſhrinking up, or an Eye put out, or the Fore-teeth broken, or the Skull broke, or where one is caſtrated. But it is not Mayhem to cut off an Ear or Noſe, becauſe this is not weakening, but disfiguring a Man.

[c] Terms of the Law, v. Mayhem.
1 Inſt. 126. b. 127 a. 288. a.
3 Inſt. 63, 118.
H. P. C. 133, 180.
2 Roll. Abr. 578.
1 Inſt. 127. a.
1 Ld. Ray. 176.

All Mayhem is Felony, but no Mayhem at Common Law is puniſhed with Death, or otherwiſe than by Fine and Impriſonment. But when a Fine is ſet for this Offence, the Court of *K. B.* may increaſe it upon View of the Party maimed. The Words *Felonicè Mayhemavit* are neceſſary in the Indictment. *Mutilavit* or *Obtruncavit*, is not ſufficient.

By 5 H. 4. ch. 5. *If any Man do cut out the Tongue, or put out the Eyes, of any of the King's Subjects, of Malice prepenſed, it is Felony.*

4 Black. Com. 207.

By 22 & 23 Car. 2. ch. 1. *If any on Purpoſe, and of Malice forethought, and by lying in Wait, ſhall cut out or diſable the Tongue, put out an Eye, ſlit the Noſe, cut off the Noſe or Lip, or cut off or diſable any Limb or Member of any Subject, with Intention to* maim *or* disfigure *him; ſuch Perſons, their Counſellors, Aiders, and Abettors, are Felons without Clergy. Provided that there ſhall be no Corruption of Blood, Loſs of Dower, or of Lands, Goods, or Chattels of the Offender.*

Theſe are Felonies againſt the *Body* of the Subject, without taking away his Life. [Beſides which there are alſo new Felonies by Statute, which do not properly come under any of the above Heads. As,

4 Black. Com. 208.

By 9 G. 1. ch. 22. *Whereby wilfully and maliciouſly to ſhoot at any Perſon in any Dwelling-houſe or other Place; knowingly to ſend any Letter without a Name ſubſcribed thereto, or ſigned with a fictitious Name, demanding Money, Veniſon, or other valuable Thing,* (*and by* 27 G. 2. ch. 15. *to ſend ſuch anonymous or fictitious Letter threatening to kill any one, or to burn his Houſe, Out-houſe, Barn, or Stack of Corn, or Grain, Hay, or Straw, tho' no Money,* &c. *be thereby demanded*) *is made Felony without Benefit of Clergy.* [See more of this Act under Title *Felony* concerning the *Game, poſt.*] And,

By 12 G. 1. ch. 34. § 6. *To aſſault or abuſe any Maſter Wool-comber or Weaver, or other Perſon concerned in any Woollen Manufacture, whereby he ſhall receive any bodily Hurt, for not complying with the illegal By-Laws, made by Combinations of Workmen in thoſe Manufactures; or to write, or knowingly ſend, or cauſe to be written or ſent, any Letter, or Writing, or Meſſage, threatening Harm to ſuch Maſter,* &c. *or to burn or deſtroy his Houſe, Out-houſe, or Trees, or to maim or kill his Cattle, for not complying with the Demands of his Workmen, or ſuch illegal By-Laws; is Felony, and Tranſportation for ſeven Years.*

4 Black. Com. 229.
3 Burn. Juſt. tit. Larceny per tot.
[a] 2 Inſt. 189.
3 Inſt. 107.
H. P. C. 60.
Dalt. ch. 154. p. 365, 366.
Kely. 68.
[b] 3 Inſt. 107, 108.
Pult. 126.
Dalt. ch. 155. p. 367.
H. P. C. 61, 62.
Kely. 81, 82, 83, 84, 85.
5 Rep. 13.

3. Private Felonies againſt the *Goods* of the Subject are *Larcenies*, from *Latrocinium*. Theſe are of two Sorts. 1. *Simple* Larceny, or, 2. *Mixt* Larceny. To which may be added, 3. *Piracy*.

[a] *Simple* Larceny alſo is of two Sorts. 1. *Grand* Larceny, and 2. *Petit* Larceny.

1. *Grand* Larceny is a felonious and fraudulent Taking and Carrying away, by Man or Woman, the mere perſonal Goods of another, above the Value of twelve Pence; not from the Perſon, or in the Houſe of the Owner.

To explain the Definition of ſimple Grand Larceny.

It muſt be a [b] *felonious* and *fraudulent Taking*, or with an Intention to ſteal, when it firſt cometh to his Hands and Poſſeſſion. The Intent of Stealing muſt be at the Time of the Receiving. For if one hath the Poſſeſſion of Goods once lawfully, tho' he carrieth them away with an ill Intention afterwards, it is no Larceny. It muſt not be by *Bail-*

ment or Delivery; for that is a Receipt, and not a Taking. Thus if a Carrier receives Goods, to carry them to a certain Place, or a Tailor receives Cloth delivered to him, to make a Suit of Clothes. Theſe cannot commit Felony by embezzling them. The Remedy muſt be by Action. But if the Privity or Poſſeſſion by the firſt Delivery is determined, that is, if by Agreement the Goods were to be carried to a certain Place, and after the Carrier hath brought them to the Place, he takes them with an Intention of ſtealing them, then it is Larceny. And if the Carrier, before he hath brought them to the appointed Place, opens the Pack, and takes away *Part* of the Goods delivered to him, with an Intent to ſteal them, it is alſo Felony. So if a Miller, who receives Corn to grind, takes away Part of it with an Intention to ſteal it. For ſuch Poſſeſſion of a Part, diſtinct from the Whole, was not delivered by the Owner. [See 7 *Ja.* 1. *ch.* 7. For puniſhing Frauds committed by Workers of Wool that embezzle any Part of it.] But if I lend a Friend a Horſe, or if he hires him to go to *York*, or any other certain Place, and goes to *York* accordingly, and there rides away with him, it is not Larceny, tho' the Privity was determined. [*Qu.* the particular Reaſon of this Caſe.] But I may have my Action for the Damage. So if I lend one a Horſe, and he kills him, I may have an Action on the Caſe. [c] If a Shopkeeper delivers Goods to a Perſon that pretends to buy them, and he runneth away with them, it is Felony; for the Goods were not out of the Poſſeſſion of the Owner. If one comes on Pretence to buy a Horſe, and the Owner gives him leave to ride him, to try his Paces, and he rideth away with him, it is Felony.

[c] Raym. 275. Kely. 82.

One that hath the bare [a] *Charge* of Goods, and not the Poſſeſſion (as a Butler that hath the Charge of Plate, a Shepherd of Sheep, a Servant that hath the Charge of my Chamber by Delivery of the Key to him), may be guilty of Larceny. So where one hath a ſpecial *Uſe* only; for if a Gueſt, that hath a Piece of Plate ſet before him in a Tavern or Inn, takes it away, he is guilty of Felony; for this is no Bailment or Delivery, but a Grant of a ſpecial Uſe to a ſpecial Purpoſe. [See 3 & 4 *W.* & *M.* *ch.* 9. Concerning the taking away of Furniture let to uſe with Lodgings, *poſt.*] But if my Shepherd, whom I truſt with my Sheep, ſuffers them by his Negligence to be loſt, or drowned, Action upon the Caſe lieth: tho' the Defendant cometh to the Poſſeſſion of them by the Act of the Plaintiff; and ſo it is in the other Caſes of a Butler or Servant before mentioned.

[a] 3 Inſt. 108. H. P. C 61. 5 Rep. 13, 14.

If one, *intending to ſteal my Goods*, gets Poſſeſſion of them by Replevin; or by Judgment in Ejectment, obtained by falſe Oath, gets Poſſeſſion of my Houſe without any Colour of Title, and then takes away my Goods; the *legal Proceſs*, in Abuſe of the Law, ſhall not excuſe him from a felonious and fraudulent taking away of my Goods.

[b] 3 Inſt. 64, 108. H. P. C. 63. 1 Sid. 2 5 4. Kely. 43, 44.

[c] If one feloniouſly takes away my Horſe, and another feloniouſly takes away the Horſe from him, the laſt Man may be indicted for a felonious taking from me; becauſe in Judgment of Law, the Poſſeſſion and Property always continued in me.

[c] S. P. C. 61. H. P. C. 64, 184.

If one loſeth his Goods, and another [d] *finds* them, and converts them to his own Uſe with an Intention to ſteal them, it is no Larceny; for the firſt Taking was lawful. So if one finds Treaſure-Trove, Waife, or Stray.

[d] 3 Inſt. 108. H. P. C. 61.

Note, That there muſt be an *actual* Taking; for the Indictment muſt be *Felonicè Cepit*; *Felonicè Abduxit* or *Aſportavit* only, is not good.

3 Inſt. 107. H. P. C 61. Kely. 24.

By 21 H. 8. ch. 7. *and* 5 El. ch. 10. *If a Servant (being of the Age of eighteen Years, and not an Apprentice) goes away with Money or Goods of his Maſter or Miſtreſs delivered to him to keep, or being in the Service of his Maſter or Miſreſs, embezzles them, or converts them to his Uſe, with an Intention to ſteal them, contrary to his Truſt, if the Goods are of the Value of forty Shillings, or above, it is Felony. Apprentices and Servants under Eighteen ſhall ſtand in like Caſe as before this Statute.* [See 12 *Ann ch.* 7. *poſt.*]

[f] Dalt ch. 155. p. 388. H.P.C.62,63.

[f] He muſt be a Servant at the Time of the Delivery of the Goods, and at the Time of his going away. Therefore for embezzling Goods after his Maſter's Death, ſee 33 *H.* 6. *ch.* 1.

Dyer 5.

If one Servant delivers the Goods to another Servant, this is a Delivery by the Maſter.

[g] Dyer 5. 3 Inſt. 105. H P. C. 63. Hawk. P C. B. 1. p. 92.

[h] Dalt. ch. 155. p. 369.

[g] If the Maſter or another Servant, delivers a Bond or Obligation, or delivers Cattle to ſell, and the Servant goes away with the Bond or other Thing in Action, or receives the Money due on the Bond, or for the Cattle, and goes away with the Money, this is not Felony within the Statute. So if a Servant receives his Maſter's Rents. For the Maſter did not deliver the Money to the Servant. It muſt be of ſuch Things as are delivered to keep. [h] If Goods *delivered* to the Servant to keep, are under the Value of 40 *s.* and he goes away with them, this is only a Breach of Truſt, becauſe of the Delivery. But if the Servant ſhall embezzle or convert to his own Uſe, or go away with any Goods of his Maſter's which were not delivered to him, this is Felony, tho' the Goods were under the Value of forty Shillings. [See 12 *An. ch.* 7. *infra.*]

By 15 G. 2. ch. 13. § 12. *If any Officer or Servant of the Bank of* England (*and by* 24 G. 2. ch. 11. *Of the* South Sea *Company*) *being entruſted with any Note, Bill, Bond, Dividend Warrant, Deed, or other Security, Money, or Effects belonging to the Company, or having any Note,* &c. *of any other Perſon lodged or depoſited with the Company, or with him as an Officer or Servant of the Company, ſhall ſecrete, embezzle, or run away with the ſame, or any Part thereof, he ſhall ſuffer Death as a Felon without Clergy.*

[a] 3 Inſt. 108, 109. H. P. C. 64. Dalt. ch. 155. p. 369. [b] Kely. 31. [c] H. P. C. 64.

[d] 3 Inſt. 108. Dalt. ch. 155. p. 367.

And carrying away. This is alſo neceſſary. The leaſt Removing of the Thing from the Place where it was, is ſufficient, tho' it is not quite carried off. As if one is apprehended, [a] before he gets the Goods ſtolen out of the Houſe, or before he has led a Horſe out of the Paſture, [b] or when one takes Goods out of a Trunk, and lays them on the Floor, and is apprehended before he can carry them off. For by thus taking them and carrying them ſo far, he hath the Poſſeſſion of them. [c] If one kills my Sheep and ſtrips them, and then carries away their Skins, or pulls off the Wool from their Backs, and carries it away, it is Larceny and Felony. [d] All Indictments in Larceny muſt ſay *Felonicè Cepit & Aſportavit*, or *Cepit & Abduxit.*

[e] 3 Inſt. 108. H. P. C. 65. Dalt. ch. 157. p. 374, 375.

[f] 1 H.H.P.C. 515.

[h] Dalt. ch. 151. p. 363. Prov.vi. v.30. 1 H. H. P. C. 54. contra.

By Man or Woman. [e] An *Infant* under fourteen Years of Age may commit Larceny, but Judgment is uſually reſpited, though there are Precedents, that Infants under fourteen Years of Age have been burnt in the Hand. [But this muſt be underſtood, when it appears by Circumſtances that he hath more Diſcretion than the Law preſumes [f] at that Age.] A *Feme Covert* [g] alone may commit Larceny. [h] If one ready to ſtarve takes Victuals from another, to ſatisfy his preſent Hunger, it ought not to be adjudged Larceny. [*Qu.*]

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[h] *Neceſſitas inducit privilegium quoad jura privata.* Bacon 29.

The *mere perſonal Goods.* [i] *Mere,* for if the perſonal Goods ſavour any Thing of the *Realty,* it cannot be Larceny. Here then we muſt not underſtand Things annexed to the *Freehold,* as Corn, Graſs, Wood, or Fruit growing, or Lead on a Church or Houſe: [*But by* 9 G. 1. ch. 22. *It is Felony without Clergy, unlawfully and maliciouſly to cut down or deſtroy any Trees planted in any Avenue, or growing in any Orchard, Garden, or Plantation, for Ornament, Shelter, or Profit.* [See more of this Act under Title *Felony* relating to *Game, poſt.*] But it is Larceny, if they are ſevered from the Freehold, or if the Thief ſevers them at one Time, and then comes again at another Time and takes them. [*By* 4 G. 2. ch. 32. *It is Felony to ſteal Lead or Iron Bars from a Houſe, or other Building, or any Garden, Court-Yard, Fence, or Outlet belonging to any Building. Alſo by* 25 G. 2. ch. 10. *To ſteal black Lead out of Mines, or enter therein with Intent to ſteal, or to aſſiſt or hire any Perſon ſo to do, the Offender may be committed for a Year and publickly whipt, or tranſported for ſeven Years.*] Thus no Larceny can be committed by taking and carrying away an Infant in *Ward,* becauſe in the Realty. If the Realty is the principal Thing, it is not Larceny; as ſtealing of a Cheſt with Writings relating to a Freehold, tho' the Cheſt is of Value. [*Qu.*] Therefore of Paper and Parchment, on which Conveyances are written concerning Lands, or of Bonds and Obligations, relating to ſome other Thing which cannot be ſtolen, Larceny cannot be committed. Beſides, the Law does not preſume, that any one would ſteal ſuch Things that are of no Value or Uſe to any one but the Owner. *But by* 2 Geo. 2. ch. 25. *Stealing perſonal Securities is made Felony of the ſame Nature, as ſtealing Goods of a like Value.* The perſonal Goods alſo muſt not be of a [a] *baſe Nature,* as Dogs or Cats, if they may be ſaid to be one's perſonal Goods. Some Things that are *wild* by Nature, and made tame, cannot be taken away feloniouſly as perſonal Goods; as (for Example) Bears, Apes, Monkies, Pole-cats, Ferrets, Squirrels, Parrots, ſinging Birds. And where no Felony can be committed of the Thing that is wild and reclaimed at *Age,* Felony cannot be committed of the *Young* in the Neſt, Kennel, or Den.

[b] By the Goods of *another,* we muſt underſtand Goods that are the Property and in the Poſſeſſion of another.

Therefore to take away [c] *wild Beaſts* out of the Poſſeſſion of another, is not Larceny; neither to take Deer, Hare, Conies, in a Foreſt, Chaſe, or Warren; becauſe no one has any Property in them. [See 3 *W. & M. ch.* 10. and 5 *G.* 1. *ch.* 15. and 28, and 9 *G.* 1. *ch.* 22. For the more effectual Diſcovery and puniſhment of Deer-ſtealers; and 4 *&* 5 *W. & M. ch.* 23. Againſt deſtroying the Game[d].]

But if the wild Beaſts are fit for *Food,* and are reduced to Tameneſs [as Deer, wild Boar, Hares, Conies,] he that ſtealeth them, knowing them to be tame, committeth Felony.

Obſerve then the Difference between wild Beaſts tam'd ſerving for *Food,* and wild Beaſts tam'd ſerving for Pleaſure only. But tho' Deer Boars, *&c.* are wild, yet when they are kill'd, Larceny may be committed of the *Fleſh.*

To take [e] *Fiſh* in a River is no Felony. But it is Felony to take away Fiſh out of a Net, Trunk, or Pond; becauſe then they are not at their natural Liberty.

See Stat. 5 Geo. 3. ch. 14. for preſervation of Fiſh in Ponds, &c.

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[i] 3 Inſt. 109. 8 Rep. 33. H. P. C. 66. Dyer 5. Dalt. ch. 156. p. 372.

[a] 3 Inſt. 109. 7 Rep. 18. H. P. C. 66.

[b] 2 Inſt. 110.

[c] 7 Rep. 18. 2 Inſt. 201. 3 Inſt. 109, 110. H. P. C. 66, 67, 68. Dalt ch. 156. p. 370.

[d] See of the Game, ch. 3. poſt.

[e] 3 Inſt. 109. H. P. C. 67.

As to *wild Fowls*, the Law is the ſame as of *wild Beaſts*, obſerving the Difference betwixt ſuch as are for Food, or Pleaſure only.

Of Swans mark'd or pinion'd, or tam'd, which are kept in a Pond or private River; as alſo of Young Pigeons in a Dove-houſe, or young Hawks out of their Neſts in another's Ground, Larceny may be committed. But to take old Pigeons out of a Dove-houſe is not Larceny, unleſs they were ſhut up there; becauſe there is no certain Property in any one. Felony may be committed, by taking away Cocks, Hens, Peacoks, Turkeys, Geeſe, Ducks and their young ones. Alſo to take away the *Eggs* of tame Fowl is Felony; except the Eggs of Swans and Hawks tam'd, which is puniſhable by Fine and Impriſonment by 11 *H.* 7. *ch.* 17.

By 37 Ed. 3. ch. 19. *To ſteal Hawks reclaim'd is Felony.* [See 34. *Ed.* 3. *ch.* 22. and ſee of *abſolute* and *qualified* Property, *p.* 318. *ante.*]

Generally Larceny may be committed of all Creatures that are of a *tame Nature*, whether domeſtick Beaſts or Fowls; eſpecially if they are fit for Food.

By 2 & 3 Ed. 6. ch. 33. *Stealing of a Horſe, Mare, or Gelding, is Felony without Clergy.* [See 31 El. ch. 12.]

And by 14 G. 2. ch. 6. *and* 15 G. 2. ch. 34. *Stealing any Sheep, Bull, Cow, Ox, Steer, Bullock, Heifer, Calf, or Lamb, (and no other Cattle whatſoever) or wilfully killing the ſame, with a felonious Intent to ſteal the whole, or any Part of the Carcaſe; or to aſſiſt any Perſon in the committing any ſuch Offence, is Felony without Clergy.*

[a] Alſo of all *moveable* Goods, the Property of which is in any Perſon, Larceny may be committed; as Money, Houſhold-Stuff, Hay, Corn, Trees, and Fruit ſevered from the Ground. To take away Goods whereof the Owner is *unknown*, ſometimes is no Felony; as [b] Treaſure-Trove, Wrecks, Waifs, Strays, before Seizure by the Perſon who hath a Right thereto. This Fact ſhall be puniſhed only by Fine, *&c.* but in other Caſes a Man may be guilty of Felony in taking away Goods, the Owner whereof is [c] *unknown.* In which Caſe the King ſhall have them, and the Indictment ſhall be for taking *Bona cujuſdam Hominis ignoti.* One alſo may be guilty of Felony, for taking away the Goods of a *Church* or *Chapel*, or the Goods of *Pariſhioners*, as Plate, Bells, Books, Veſtments. And he who takes off a [d] Shroud from a dead *Corpſe*, may be indicted, as having ſtolen it from the Executors or Adminiſtrators, or other Owner thereof when it was put on. For a dead Man is not capable of having any Property. And there is a ſpecial Caſe wherein a Man may commit Felony by taking away his [e] *own* Goods in the Poſſeſſion of another. (For a felonious Taking may be of the Poſſeſſion; or of the Property with Poſſeſſion; not of the Property removed from the Poſſeſſion.) Thus when the Owner delivers Goods to a Tailor or Carrier, and afterwards ſteals them from him, with an Intent to charge him for them it is Felony; for tho' the Owner had the general Property in himſelf, yet the Tailor or Carrier had a ſpecial Property and the Poſſeſſion for a Time. And therefore in that Senſe it is a Taking the Goods of *another.* So if one lends or delivers Goods to keep, and he ſteals them. [f] The *Wife* cannot ſteal Goods from her *Huſband*, for they are not the Goods of *another*; the Huſband and Wife being one Perſon in Law. Thus of the Goods of *another*.

Above the Value of twelve Pence. If the perſonal Goods ſtolen amount to [g] *above* the Value of twelve Pence, then it is Grand Larceny. But if one is indicted for ſtealing Goods to the Value of ten Shillings, or any other Value above twelve Pence, and the Jury find ſpecially, [h] which they frequently do, that he is guilty, but that the Goods are worth but ten Pence, he ſhall not have Judgment of Death, but only as for Petit Larceny; for the Things ſtolen may be reaſonably valued according to the Rate of an Ounce of Silver at this Day, which Lord *Coke* ſays was only of the Value of twenty Pence in the Time of *Ed.* 1. when the Stat. of *Weſt.* 1. which deſcribes Grand Larceny was made. [See 3 *Ed.* 1. *ch.* 15.] Some are of Opinion, that the ſtealing of Goods to the Value only *of* twelve Pence is Grand Larceny: But the Law is ſettled otherwiſe now [i]. [a] If two ſteal Goods to the Value of thirteen Pence, this is Grand Larceny in both; for each Perſon is as much a Felon, as if he had ſtolen that Sum alone. If one at different Times ſteals ſeveral Parcels of Goods from the ſame Perſon, which together do exceed the Value of twelve Pence, they may be put together in one Indictment, and the Offender may be found guilty of Grand Larceny. But this is ſeldom practiſed.

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[a] Dalt. ch. 156. p. 370.

[b] 3 Inſt. 108. H. P. C. 67.

[c] H. P. C. 67. Dalt. ch. 156. p. 373.

[d] 3 Inſt. 110. 12 Rep. 113. H. P. C. 67. Dalt. ch. 156. p. 373.

[e] 3 Inſt. 110. H. P. C. 67. Dalt. ch. 156. p. 373. Pult. 126.

[f] H. P. C. 65. Pult. 126.

[g] 2 Inſt. 189, 190. 3 Inſt. 19. Dalt. ch. 154. p. 366.

[h] Haw. P. C. B. 1. p. 95

[i] 1 H.H.P.C. 530.

[a] H. P. C. 70. Dalt. ch. 154. p. 366. Pult. 125. 2 Inſt. 190.

[By 24 G. 2. ch. 45. *If any Perſon ſhall feloniouſly ſteal any Goods of the Value of forty Shillings, in any Ship, Boat, or Veſſel, on any navigable River, or in any Port of Entry or Diſcharge, or from any Wharf, or Key, or ſhall be preſent or aſſiſting therein, he ſhall be guilty of Felony without Benefit of Clergy.*

By 18 G. 2. ch. 27. *To ſteal any Linen, Fuſtian, or Cotton Yarn, or Goods to the Value of ten Shillings, laid to be printed, bleached, or dried; or to aid or hire another to commit ſuch Offence, is Felony without Clergy: But the Court may order ſuch Offender to be tranſported for fourteen Years.*

[See 5 *An. ch.* 31. As to *Receivers* of Felons and ſtolen Goods, and 29 *G.* 2. *ch.* 30. Of ſtolen Lead, Iron, *&c.* and 25 *G.* 2. *ch.* 10. Of black Lead, and alſo 4 *Geo.* 1. *ch.* 11. and 6 *Geo.* 1. *ch.* 23. For pretending to *help* one to ſtolen Goods, and Tit. *Larceny from the Houſe, poſt.*]

2. [b] *Petit* or *Petty Larceny* is when the Goods ſtolen do not exceed the Value of twelve Pence. If one is indicted for ſtealing Goods of the Value of forty Shillings, and the Jury find ſpecially, as they may, the Value to be but ten Pence, it is but Petty Larceny, as before obſerved, and to be puniſhed with Forfeiture of Goods and Chattels, Tranſportation, [See 4 *Geo.* 1. *ch.* 11.] Whipping, or other corporal Puniſhment[c]. Petty Larceny is Felony, tho' not puniſhable with Death; and agrees with Grand Larceny in all Things, except only as to the Value of the Goods; which makes the Difference of Puniſhment.

3 Burn Juſt. 61.

[b] 2 Inſt. 189, 190. 3 Inſt. 109. H. P. C. 70. Dalt. ch. 154. p. 365, 366.

[c] See B. 4. ch. 5. § 11. poſt.

Thus of *Simple* Larcenies, whether *Grand* or *Petty* Larceny.

See the 10 *Geo.* 3. *ch.* 18. For preventing the ſtealing Dogs, a heavy Penalty or Impriſonment, or Whipping.

2. *Mixt* or *complicated* Larceny has a further Degree of Guilt in it, and is either a Taking 1. From the *Perſon* of a Man, or 2. From his *Houſe*, for Simple Larceny is a Taking away the Goods of another, but not from the *Perſon* or the *Houſe*, as hath been ſaid.

1. Larceny from the *Perſon, either puts him in Fear*, or 2. *Does not put him in Fear.*

3 Burn Juſt. 62.

1. That Larceny from the *Perſon*, that *puts him in Fear*, is *ROBBERY.*

Inſt. 288.a. Inſt. 68, 69. P. C. 71, 73. H. H. P. C. 33, &c. 2 Inſt. 236.

[d] *ROBBERY* (*Rapina, Robberia*, from the *Robe* or Garment) is a felonious and violent Taking from the Perſon of another Goods or Money, to any Value, putting him in Fear. [c] Tho' Robbery is ſometimes taken (in a large Senſe) for a wrongful taking away of Goods.

In this Definition theſe Things are to be conſidered more particularly, (*viz.*) The *violent Aſſault upon the Perſon, the Taking away* from the *Perſon of another*, the *putting of him in Fear.*

[a] 3 Inſt. 68. Dalt ch. 153. p. 363. 1 H. H. P. C. 534.

The violent Aſſault. [a] This agreeth with the Indictment, *Violenter & Felonice Cepit.*

Taking away. Therefore an Attempt to rob by bidding one ſtand, without any Taking is not Felony. For *Cepit* implies that the Thief muſt be in Poſſeſſion of the Thing ſtolen. Yet for this Aſſault he is puniſhable by Fine and Impriſonment. If a Thief, with or without Weapon drawn, bids the Party deliver his Purſe, and he delivers it, this is a Taking to make it Robbery. And tho' the Thief finding little in the Purſe, delivers it back again, yet it is Robbery. If a Thief compels one by Fear to ſwear that he will fetch him a Sum of Money, which he doth accordingly, and the Thief receives it, this is a Taking away and Robbery. If a Thief cuts my Girdle, to which my Purſe is faſten'd, and the Purſe falls to the Ground, no Robbery. But if the Thief takes up the Purſe, it is Robbery, though he letteth it fall again, and leaves it there. So that you may obſerve that there is a Taking in *Deed*, and a Taking in *Law*; and that the Words *Taking away* are to be largely extended.

[*But by* 7 G. 2. ch. 21. *If any Perſon ſhall with any offenſive Weapon or Inſtrument maliciouſly aſſault, or ſhall by Menaces, or in any forcible or violent Manner demand any Money, Goods or Chattels, from any Perſon with a felonious Intent to rob or commit Robbery upon ſuch Perſon, he ſhall be adjudged guilty of Felony, and tranſported for ſeven Years; and ſuch Convicts, breaking Goal, or eſcaping or returning from Tranſportation, are Felons* ſans *Clergy.*]

By 6 Geo. 1. ch. 23. *If any ſhall willfully and maliciouſly aſſault any Perſon in the publick Streets or Highways, with an Intent to tear, ſpoil, cut, burn, or deface, and ſhall tear,* &c. *the Garments or Clothes of ſuch Perſon, upon Conviction he ſhall ſuffer as in caſe of Felony, and may be tranſported for ſeven Years.*

[b] Cromp. 34. 1 And 106. H. P. C. 72. Dalt. ch. 153. p. 364, 365.

[b] All that come in Company to rob are Principals, and are eſteemed to take away, tho' one of the Gang only actually doth it. Nay, tho' the Gang miſs of their firſt intended Prize, and one of them rides from the reſt, and robs another in the ſame Highway out of View of the reſt, and returns to them, all are guilty of the Taking and the Robbery, tho' they did not conſent to the Fact; becauſe they all came with a Deſign of Robbing, and to aſſiſt one another in caſe of Need.

[c] 3 Inſt. 69. H. P. C. 73. Dalt. ch. 153. p. 364. Pult. 128. 2 Str. 1015.

From the Perſon of another. [c] Theſe Words alſo are not to be nicely conſtrued, tho' the Indictment is *a Perſonâ*. In ſome Caſes it may be a Robbery, tho' the Thief doth not take the Goods *from the Perſon* of the Owner, nor yet aſſault him. For not only the taking away a Horſe from me, on which I am actually riding, or Money out of my Pocket, but the Taking away my Horſe ſtanding by me, or of any Thing belonging to me, in my Preſence or before my Face, and againſt my

Will, is in Law a Taking from my Perſon: A Claim of Property without Colour for it, will not avail. Thus if a Thief takes my Purſe, which in my Fright I caſt into a Buſh, or robs my Servant of my Money in my Preſence, or drives my Cattle out of my Ground, while I am ſtanding by, not daring to reſiſt him, this is Robbery. But if one leaves his Horſe tied, and ſteps aſide, or if a Carrier follows his Horſes at a Diſtance, and they are taken by a Thief, it is not a Taking from the Perſon, or Robbery.

To any Value. [a] Somewhat muſt be taken; [but ſee 7 *G.* 2. above] and if it is but a Penny, it is a Robbery. Here it is Felony of Death, tho' the Sum is under twelve Pence, or never ſo ſmall. In other Larcenies Judgment of Death is only where the Thing ſtolen is above the Value of twelve Pence.

[a] 3 Inſt. 69. H. P. C. 73. 74.

Putting him in Fear. [b] This diſtinguiſhes the Robber from a Cut-Purſe, or other Stealing from the Perſon. For if he taketh any Thing from my Perſon on the Highway, without putting me in Fear by Aſſault or Violence, it is not Robbery; but a Felony for which the Offender ſhall have his Clergy. If with his Sword drawn, he bids me deliver my Purſe, and afterwards prays me to give him an Alms, and I give him an Alms accordingly, this is Robbery; for I did it thro' Fear.

[b] 3 Inſt. 68. H. P. C. 71, 73. Finch, ch. 21. p. 217. Dalt. ch. 153. p. 364.

Robbery is Felony without Clergy [c].

[c] See ch. 2. poſt. 4 Burn Juſt. tit. Robbery per tot. 4Black. Com. 241.

The Statutes of 23 *H.* 8. *ch.* 1. 25 *H.* 8. *ch* 3. 1 *Ed.* 6. *ch.* 12. 5 *&* 6 *Ed.* 6. *ch.* 10. 4 *&* 5 *Ph. & Mar. ch.* 4. take away the Benefit of Clergy from thoſe who commit Roberies *in* or *about* or *near* the Highway. Therefore if it is not laid in the Indictment, that the Robbery was committed *in* or *about* or *near* the Highway, and to have put the Perſon robbed in Fear, the Robbery is not within theſe Statutes; and the Offender ſhall have the Benefir of the Clergy.

But by 3 W. & M ch. 9. *One that ſhall rob any Perſon, or ſhall comfort, aid, abet, aſſiſt, counſel, hire, or command any Perſon to commit ſuch Offence, and be convict thereof) or ſtand mute, or challenge peremptorily above twenty, ſhall not have the Benefit of Clergy.*

By Weſt. 1. or 3 Ed. 1. ch. 9. *All Perſons are to be ready at the Summons of the Sheriff and Cry of the Country, to purſue and arreſt Felons and Robbers,* &c. *on pain after Attainder thereof, to make Fine to the King.* [d] This is an Affirmance of the Common Law. [See 4 *Ed.* 1. *Officium Coronatoris.*]

[d] 3 Inſt. 117. 2 Inſt. 172, &c.

If Default be in the Lord of a Franchiſe, the King ſhall ſeiſe his Franchiſe; but if in the Bailiff, he ſhall be impriſoned for a Year, and fined, &c.

By the Statute of Wincheſter *or* 13 Ed. 1. ch. 1. and 28 Ed. 3. ch. 11. *Immediately upon* Robberies *and* Felonies *committed freſh Suit ſhall be made from Town to Town, and Country to Country, by Horſemen and Footmen, to the Sea-ſide. The Conſtable, (the Perſon being deſcribed,* &c.) *is to call upon the Pariſhioners, to aſſiſt him in the Purſuit in his Precinct; and to give Notice to the next Conſtable, who is to do the ſame as the firſt,* &c. *If the Country will not anſwer the Bodies of the Offenders, the whole Hundred ſhall be anſwerable for the Robberies there committed,* &c.

In great Towns walled, the Gates ſhall be ſhut from Sun-ſet to Sun-riſing.

Betwixt Aſcenſion *Day and* Michaelmas, *Watch ſhall be kept in Cities, Boroughs, and Towns, all Night, from Sun-ſet to Sun-riſing.*

See 28 Ed. 1. ch. 17. 7 R. 2. ch. 6. 5 H. 4. ch. 3.]

A

[e] A Stranger cannot be compelled to keep watch. Every Inhabitant is bound to keep it in his Turn, or to find another to keep it for him; otherwiſe indictable for a Refuſal.

[e] 1 Cro. 201.

By 27 El. ch. 13. *The Perſon robbed ſhall maintain an Action againſt the Hundred in which he was robbed, if he gives Notice with convenient ſpeed of the Robbery to ſome of the Inhabitants of ſome near Town, Village, or Hamlet, and within twenty Days before Action brought, is examined upon Oath before a Juſtice of Peace, dwelling within or near the Hundred where,* &c. *whether he knew the Parties that robbed him, or any of them, and commences his Suit within one Year after the Robbery done, and if, upon Examination, he appears to know* [a] *the Parties, he ſhall give Bond to proſecute them; and upon obſerving theſe Requiſites, the Hundred is chargeable, if the Robbers* or one *of the Robbers are not taken.*

[a] 2 Str. 1247.

This Statute hath altered the Statute of *Wincheſter*; for now Notice muſt be given of the Felony, Oath made before a Juſtice of Peace whether he knew the Parties; and if one of the Offenders is taken in the Purſuit, it ſhall excuſe the Hundred, *&c.*

[b] If the Robbery is committed in the Night, the Hundred ſhall not be charged; for no Negligence can be imputed to the Hundred, in not guarding the Country, or not purſuing by Night. Robbers aſſault a Man in the Hundred of *D.* and carry him into the Hundred of *S.* and there rob him; the Hundred of *S.* alone is liable in an Action upon the Statute. Robbers aſſault a Man in the Hundred of *D.* in the Day-time, and carry him into the Hundred of *S.* and rob him at Night; he cannot have an Action. So if ſeized in a Highway, and carried into a Manſion-Houſe; otherwiſe if carried into a Coppice, and robbed there.

[b] 7 Rep. 6, 7. 2 Inſt. 569. 3 Inſt. 117. 1 Cro. 753. 2 Ld. Ray. 826, &c.

[c] By the Common Law, Day-light before Sun-riſing or after Sun-ſetting is accounted Part of the Day, and not of the Night. Days are *natural* and *artificial*. *Natural*, which conſiſt of twenty-four Hours, and contain the ſolar Day and the Night. *Artificial*, which begin from the Riſing of the Sun, and ends when it ſets. But we are ſpeaking of *Day-light*; which (I ſay) is here accounted Part of the Day, tho' the Sun is down.

[c] 7 Rep. 6. 1 Cro. 270. 2 Cro. 106, 497.

To go on with the Statute.

Where Damages are recovered againſt one, or ſome few, of the Inhabitants of the Hundred, and the Reſt refuſe to contribute, two Juſtices of the Peace (1 Q.) *dwelling within or near the ſaid Hundred, ſhall for the levying thereof ſet a Tax upon every Pariſh within that Hundred; according to which the Conſtables of every Town ſhall tax the particular Inhabitants, and levy the Money by Diſtreſs and Sale of Goods.* [See 1 *Geo.* 1. *St.* 2. *ch.* 5. § 6. Concerning the Taxation of a Hundred upon demoliſhing of any Church, Chapel, *&c.* by Rioters.]

The Robbery muſt be committed upon the King's Highway, to intitle the Party robbed to an Action againſt the Hundred; not if it is committed in a [d] Cloſe diſtant from the Highway, *(Qu.)* or in a Houſe. [e] Every Man's Houſe is his Caſtle, which he ought to defend. And if any one is robbed in his Houſe, it ſhall be eſteemed his own Fault.

[d] 3 Cro. 267. H. P. C. 242. 3 Inſt. 220. contra, 1 Mod. 221. 2 Ld. Ray. 828.

[e] 7 Rep. 6. 2 Inſt. 569. 1 Cro. 753.

The Action is grounded upon 13 *Ed.* 1. The 27 *El.* ſhews only how the Examination ſhall be, *&c.*

It is not material if the Notice was given in another Hundred [f], if near the Place of the Robbery.

[f] 3 Cro. 41, 379.

And by 8. Geo. 2. ch. 16. *Where a Robbery is done, in order to enable the Party robbed to ſue the Hundred, he muſt not only give ſuch Notice as is directed by* 27 El. ch. 13. *but muſt alſo, with all convenient Speed, give*

Notice to one of the Conſtables of the Hundred, or to ſome Conſtable, Borſholder, Headborough, or Tythingman of ſome Town, Pariſh, Village, Hamlet, or Tything, [a] *near the Place where,* &c. *either perſonally, or by Writing left at his Houſe, deſcribing as far as the Nature of the Caſe will admit, the Felon or Felons, and Time and Place of the Robbery, and within twenty Days after the Robbery, cauſe publick Notice thereof to be given in the* Gazette, *deſcribing the Robber and Robbery, Time and Place, and Goods and Effects loſt, and before Action enter into a Bond to the High Conſtables of the Hundred, in the Penalty of one hundred Pounds, with two ſufficient Securities, to be approved of by the chief Clerk, Secondary, or Filazer of the County where robbed, or Clerk of the Pleas in the Court where the Action is intended to be brought, or their reſpective Deputies, or the Sheriff of the County, for ſecuring to ſuch High Conſtables their Coſts, in caſe of a Nonſuit, Diſcontinuance, or Judgment againſt the Plaintiff in ſuch Action. And the Hundred is not to be charged, if any of the Robbers are taken within forty Days after ſuch Notice in the* Gazette: *And ten Pounds are to be given by the Hundred for apprehending any Offender in the Time limited. Conſtables,* &c. *neglecting to make Hue and Cry, forfeit five Pounds: And Proceſs againſt Hundreds ſhall not be ſerved on any Inhabitants, but upon the High Conſtable, who ſhall appear and defend the Action on their Behalf.*

[a] 2 Str. 1170.

If a Servant is robbed of his Maſter's Goods, [b] the Maſter may ſue. But then the Servant muſt be examined upon Oath *ut ſupra*, for he might know the Robbers. But the Maſter may be Witneſs in his own Cauſe, to make clear Proof of the Value of the Goods. [c] If a Carrier is robb'd of another Man's Goods, either he or the Owner may ſue the Hundred. But the Carrier muſt give Notice, and make Oath as in Caſe of a Servant, tho' the Owner brings the Action. Each Man here may be a Witneſs in his own Cauſe.

[b] 1 Cro. 142. 3 Cro. 37. 336.

[c] 2 Saund. 380.

By 6 Geo. 1. ch. 1. *No* Receiver General, or *any of his Agents or Servants, employed for carrying any Money to be received on Account of Taxes, ſhall maintain any Action againſt any Hundred for being robb'd on the King's Highway of the ſaid Money, unleſs the Perſons ſo carrying ſuch Money ſhall at the Time of ſuch Robbery be together in Company, and be in Number three at the leaſt, to atteſt the Truth of being robb'd.*

[d] There are two Kinds of *Hues* and *Cries* (from *Huer* to *Hoot* or *Shout*) the one by the *Common Law* for the King, and the other by *Statute*, where the Party grieved is to have his Remedy by Action.

[d] 2 Inſt. 172, 173. 3 Inſt. 116, 117.

Not only thoſe that refuſe to levy Hue and Cry, or do not purſue upon the Hue and Cry, ſhall be puniſhed by Fine and Impriſonment, but thoſe that are preſent when a Man is murdered or robbed, and do not endeavour to arreſt the Offender, or levy a Hue and Cry.

7 Rep. 6, 7.

There muſt be a Felony done, or elſe the Arreſting of the Party is unlawful, tho' it was upon Hue and Cry. But if a Felony is committed, and the Hue and Cry is againſt one that is not of ill Fame, or ſuſpected, or unknown, yet the Arreſt is lawful, tho' he is not Guilty. For the Hue and Cry will juſtify the Arreſt, where a Felony is committed. He that levieth Hue and Cry upon another without Cauſe, ſhall be puniſhed for Diſturbance of the King's Peace.

By 29 Car. 2. ch. 7. *If Perſons travelling on the* Lord's Day *are robbed, the Hundred ſhall not be charged. But Hue and Cry ſhall be made.*

But if a Perſon be robbed on a *Sunday* in going only to his pariſh Church, this is not within this *Stat.* Car. 2. and the Action lies againſt the Hundred.

Comy. 345. 1 Str. 406. S. C.

By 22 Geo. 2. ch. 24. *No Perſon ſhall recover upon the Statutes of Hue and Cry any more than two hundred Pounds, unleſs the Perſon or Perſons robbed ſhall at the Time of the Robbery be together in Company, and be in Number two at leaſt, to atteſt the Truth of the Robbery.*

[*By* 9 Geo. 1. ch. 22. *Called the* Black Act, *the Hundred are to make Satiſfaction, for Damages by killing or maiming of Cattle, cutting down Trees, or ſetting Fire to Houſes, or Buildings, or Stacks of Corn, Hay, or Wood, againſt that Act.*]

See 22 Geo. 2. ch. 46. § 34. *For aſcertaining the Method of levying Writs of Execution againſt the Inhabitants of Hundreds.*

By 4 & 5 W. & M. ch. 8. *He who apprehends and proſecutes a* Highwayman *to Conviction, ſhall within a Month afterwards receive of the Sheriff of the County, where the Robbery was committed, forty Pounds (producing the Certificate of the Judge or Juſtices, before whom he was convicted) with his Horſe, Furniture, Arms, Money, and other Goods, taken with him; not taking away the Rights of any Perſons claiming the ſame, from whom they were before feloniouſly taken.*

If one is kill'd by a Highwayman, when purſuing or endeavouring to apprehend him, his Executors or Adminiſtrators upon Certificate ſhall receive the ſaid Sum of forty Pounds.

If any Perſon out *of Priſon, having committed any Robbery, ſhall afterwards* diſcover *two or more Robbers, ſo that two or more of them ſhall be convicted, ſuch Diſcoverer is intitled to a* Pardon.

By 6 Geo. 1. ch. 23. *The* Streets *of Cities, Towns, and Places, are deemed to be Highways, within the Meaning of* 4 & 5 W. & M. ch. 8.

[a] 3 Inſt. 68, H. P. C. 75. Dalt. ch 153. p. 365.

2. *Larceny* from the *Perſon* which *does not put him in Fear*, is either done *privily* without his Knowledge, or *openly* with his Knowledge. [a] *Privily* and *without* his Knowledge, as by picking the Pocket, or by cutting the Purſe, and ſtealing from thence to the Value of twelve Pence. * If it is laid in the Indictment to be done *Clam et ſecretè à Perſonâ*, purſuant to 8 *El. ch.* 4. the Offender is excluded his Clergy. If thoſe Words are wanting, a private Larceny from the Perſon ſhall have the Benefit of the Clergy. *Openly* and *with* his Knowledge, in his Sight and before his Face; as if one takes off my Hat or Wig from my Head, and runs away with it; or comes into a Shop and cheapens Goods, and runs away with them without paying for them. In all theſe Caſes of open Larcenies with Knowledge, the Offenders are by the Common Law within the Benefit of the Clergy. [But as to *Dwelling-Houſes, Shops, &c.* See 12 *An. ch.* 7. *poſt.*]

By 8 El. ch. 4. *None that taketh any Thing* privily *and feloniouſly from the Perſon of another, ſhall have the Benefit of his Clergy.*

[a] H. P. C. 75. Dalt. ch. 153. p. 365.

The Words are *Taking ANY THING* (generally) *from the Perſon of another privily and feloniouſly*; yet by Conſtruction the Thing taken muſt be above the Value of twelve Pence. The [a] Statute not altering the Offence, but taking away the Privilege of the Clergy, if above that Value; which the Offender had before the Statute. Therefore, if it is under twelve Pence, it is *Petit* Larceny as at Common Law.

This Statute extends not to any *Acceſſories* before or after.

Thus of Larceny from the *Perſon*.

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* *Clam delinquens magis punitur quam palam.* 8 Rep. 127.

2. [b] Lar-

2. [b] Larceny from the *Houſe* is alſo a mixt and complicated Larceny, and ouſted of the Clergy by Statute, tho' but ſimple Felony by the Common Law.

By 23 H. 8. ch. 1. *To rob any Perſon in his* Dwelling-houſe, *the Owner, his Wife, or Servants, being there, and put in Fear, is Felony without Clergy.* [*See* 1 Ed. 6. ch. 12. 25 H. 8. ch. 3 *revived by* 5 & 6 Ed. 6. ch. 10. 4 & 5 Ph. & M. ch. 4. *All which Statutes relate to a Robbery in a Dwelling-houſe,* &c. putting ſome Perſon in Fear. See alſo 3 *W. & M. ch.* 9. *infra.*]

If the Houſe had been broke open in the Night, and Goods ſtol'n, or with Intention to ſteal, though no one was put in Fear, it had been *Burglary* [c].

By 39 El. ch. 15. *A felonious Taking of Goods to the Value of five Shillings out of* Dwelling-houſe *or* Out-houſe, *in the Day-Time, tho' no Perſon there, ouſted of Clergy.*

Robbing the Houſe, when no Perſon was therein, was not ſo penal (before this Statute) as robbing it when ſome Perſon was therein. But bad Perſons took Opportunity to commit Robberies in Houſes, when People were gone to Church, or about their Buſineſs.

[See 5 & 6 *Ed.* 6. *ch.* 9. For Robbing any Perſon in his Dwelling-houſe, Booth, or Tent, in any Fair or Market; whether the Owner be ſleeping or waking; which Statute ouſts of Clergy, if a Perſon is in the Houſe, tho' not put in Fear.]

By 3 W. & M. ch. 9. *If any Perſon ſhall feloniouſly take away any Goods or Chattels, being in any* Dwelling-houſe, *the Owner or any other Perſon being therein, and* put in Fear; *or ſhall rob any Dwelling-houſe in the Day-time,* any Perſon being therein, *or ſhall comfort, hire, command, or aid one to commit any of the ſaid Offences, or to break any Dwelling-houſe, Shop, or Warehouſe thereunto belonging, in the* Day-time, *and take any Money, Goods, or Chattels, to the Value of five Shillings,* altho' no Perſon be therein, *he ſhall not have the Benefit of the Clergy.*

If any Perſon ſhall take away with Intent to ſteal, embezzle, or purloin, any Chattel, Bedding, or Furniture, which by Agreement he is to uſe, or ſhall be let to him to uſe, in Lodgings, *ſuch Stealing is Larceny and Felony.*

By 10 & 11 W. 3. ch. 23. *All Perſons who by Night or Day ſhall in any* Shop, Warehouſe, Coach-houſe, *or* Stable, privately *and feloniouſly ſteal any Goods to the Value of five Shillings, or more, though ſuch Shop,* &c. *be not broke open, or though any Perſon be or be not in ſuch Shop,* &c. *or that ſhall aſſiſt, hire, or command any Perſon to commit ſuch Offence, he ſhall loſe the Benefit of his Clergy.*

If any Perſon ſhall commit any Burglary, Houſe-breaking, or Felony in ſtealing any Horſe, or any Money, Wares, and Goods, from whom the Benefit of the Clergy is by this Act taken away, and being out of Priſon ſhall diſcover, *or cauſe to be diſcovered and apprehended, two or more, who have committed any ſuch Burglary,* &c. *and who ſhall be convicted thereof, he ſhall be intitled to a* Pardon *of all Burglaries,* &c.

Any Perſon taking and proſecuting ſuch Felons to Conviction, upon the Judge's Certificate thereof, which he is to have gratis, or his Aſſignee thereof, he himſelf not having made Uſe thereof, ſhall be exempt from Pariſh and Ward Offices in the Pariſh or Ward where ſuch Felony was committed. Perſons ſlain by any ſuch Houſe-breakers, Horſe-ſtealers, or other Felon afore-

ſaid

[b] H. P. C. 76.

[c] See infra.

ſaid, by endeavouring to apprehend them, their Executors or Adminiſtrators ſhall have ſuch Certificate.

By 5 An. ch. 31. *A* Reward *of forty Pounds is given to any one, that ſhall take and convict one guilty of the felonious Breaking or Entring any* Houſe *in the Day-time; and to the Executors or Adminiſtrators of any Perſon who ſhall be killed in endeavouring to apprehend ſuch Offender.* [*See* 6 Geo. 1. ch. 23.] *And if any Perſon ſhall commit ſuch Felony, and afterwards being out of Priſon,* diſcover *two or more, who have committed ſuch Felonies, ſo as they be convict, ſuch Diſcoverer ſhall have forty Pounds, and ſhall have his* Pardon *for all Felonies, except Murder and Treaſon.*

And if any Perſon ſhall receive or buy knowingly any ſtolen Goods, or knowingly harbour or conceal Felons, he ſhall be taken as Acceſſory to the Felony, and ſuffer Death as a Felon.

By 12 An. St. 1. ch. 7. *If any Perſon ſhall ſteal any Money, Goods, or Wares, of the Value of forty Shillings or more, being in any* Dwelling-houſe, *or* Out-houſe *thereunto belonging, though ſuch Houſe,* &c. *be not* broken *by ſuch Offender, and though any Perſon be or be not in ſuch Houſe,* &c. *or if any Perſon ſhall* aſſiſt *another to commit ſuch Offence, he ſhall be debarr'd the Benefit of the Clergy.*

This Act ſhall not extend to Apprentices under the Age of fifteen Years, who ſhall rob their Maſters.

See of the Clergy, ch. 2. And ſee B. 4. ch. 5. § 11. poſt.

By 4 Geo. 1. ch. 11. *When any Perſon taketh Reward under the Pretence of* Helping *any one to ſtolen Goods, he ſhall (unleſs he apprehends the Felon, and cauſes him to be brought to Trial for the ſame, and gives Evidence againſt him), ſuffer as a Felon, as if he himſelf had ſtolen the Goods.* And,

By 6 Geo. 1. ch. 23. *Whoſoever ſhall diſcover, apprehend, and proſecute to Conviction of Felony* without *Benefit of Clergy, any Perſon for taking a Reward to help any Perſon to ſtolen Goods, (who has not apprehended the Felon,* &c.*) ſhall be intitled to a Reward of forty Pounds.*

After *ſimple* and *mixt* Larcenies, let us ſay ſomething of *Piracy.*

[a] 3 Inſt. 111, 112, 113. H. P. C. 77. Hawk. P. C. B. 1. p. 98, &c. 2 H. H P. C. 14. 15. 4 Black. Com. 71.

3. *Piracy* (*à* πεῖρα *Dolus* or *Deceit*) is a Felony againſt the Goods of a Subject, by a Depredation or Robbing at *Sea.* This is a capital Offence by the Civil Law; but by Act of Parliament it is to be inquired of, heard, and determined according to the Courſe of the Common Law, as if it had been done upon the Land. It ſtill remains an Offence by the Civil Law, and therefore a Pardon of all Felonies, doth not diſcharge it. It being a ſpecial Offence, it ought to be ſpecially mentioned. [For the Method of Trial according to the Common Law, See 28 *H.* 8. *ch.* 15. 11 & 12 *W.* 3. *ch.* 7. and ſee *of the Court of Admiralty, and Court* by *Commiſſion,* upon the 28 *H.* 8. *B.* 4. *ch.* 1. *poſt.*]

By 11 & 12 W. 3. ch. 7. *If any natural-born Subjects or Denizens ſhall commit any Piracy or Robbery, or any Act of Hoſtility againſt others of his Majeſty's Subjects, upon the Sea, under Colour of any Commiſſion from any foreign Prince, or any other whatſoever, ſuch Offenders ſhall be taken to be Pirates, Felons, and Robbers, and ſhall ſuffer as Pirates, Felons and Robbers upon the Seas.* [*Or by* 18 G. 2. ch. 30. *Shall commit any Hoſtilities in the Time of War on the Seas, or in any Place within the Admiral's Juriſdiction, againſt the King's Subjects, by Virtue or under Colour of any Commiſſion from the King's Enemies or be any otherwiſe* *adherent, or giving Aid or Comfort to the King's Enemies on the Seas, or in ſuch Place,* &c. *may be tried, and ſhall ſuffer as Pirates.*]

If any Commander or Maſter of any Ship, or any Seaman, ſhall within the Admiral's Juriſdiction betray his Truſt and turn Pirate, Enemy, or Rebel, and run away with his Ship, or any Boat, Ordinance, Ammunition, or Goods, or yield them up voluntarily to a Pirate, or combine with, or attempt to corrupt any Commander, Officer, or Seaman, to yield up or run away with any Ship or Goods or go over to Pirates, or if any Perſon ſhall lay violent Hands upon his Commander, to hinder him from fighting in Defence of the Ship or Goods committed to his Truſt, or confine his Maſter, or endeavour to make a Revolt in the Ship, he ſhall be adjudged a Pirate, Felon, and Robber, and ſuffer as a Pirate, &c.

If any ſhall on the Land or Sea, knowingly ſet forth any Pirate, or aid, maintain, command, or adviſe any Perſon to commit Piracy, and ſuch Perſon ſhall thereupon commit ſuch Piracy, they ſhall be adjudged acceſſory to ſuch Piracy. Likewiſe if any Perſon, knowing ſuch Piracy to be done, ſhall upon Land or Sea entertain or conceal ſuch Pirate, or receive any Ship, Veſſel, or Goods, which have been by ſuch Pirate piratically taken, he ſhall be adjudged acceſſory to ſuch Piracy, and ſhall be tried according to 28 H. 8. *and ſuffer as the Principals ought to ſuffer.*

[*And by* 4 G. 1. ch. 11. § 7. *Such Offenders are ouſted of Clergy.* [See *B.* 4. *ch.* 1. § 10. *poſt.*]

[*By* 8 G. 1. ch. 24. *If any Maſter of a Ship, or other Perſon, ſhall anywiſe trade with any Pirate, by Truck or otherwiſe, or furniſh him with any Ammunition, Proviſion, or Stores, or ſhall fit out any Ship knowingly, or with Intent to trade or correſpond with, or ſhall conſult, combine, confederate, or correſpond with any Pirate, knowing him to be guilty, he ſhall be deemed guilty of Piracy, Felony, and Robbery, and be tried and ſuffer accordingly. And if any Perſon belonging to any Ship, upon meeting any Merchant Ship on the High Seas, or in any Port, Haven, or Creek, ſhall forcibly enter ſuch Ship, and (tho' they do not ſeize or carry off ſuch Ship) ſhall throw overboard or deſtroy any Part of the Goods belonging to ſuch Ship, he ſhall be deemed, and puniſhed as a Pirate.*

All Perſons declared Acceſſories to Piracy, by 11 & 12 W. 3. ch. 7. *ſhall be deemed Principals, and ſuffer as ſuch.*

Offenders againſt this Act are excluded from the Benefit of Clergy.]

[In Time of War there are *temporary* Statutes made for the Regulation of Privateers, and for the making it Piracy in them to take Ranſom for a neutral Ship without bringing her into Port, &c. as by 32 G. 2. *ch.* 25.]

4. *Private* Felonies againſt the *Dwelling* or *Habitation* of a Man are of two Kinds, 1. *Burglary*, 2. *Arſon*.

1. [a] *Burglary* (*Burglaria*, *Burglar*, from *Burg* a Houſe, and *Laron* a Thief) is a Felony at Common Law; and by the *Common Law* is where a Perſon in the Night breaketh and entereth into the Manſion-Houſe of another, to the Intent to commit ſome Felony there, whether the felonious Intent be executed or not.

[a] 4 Rep. 39. 3 Inſt. 63. H. P. C. 79. 4 Black.Com. 223. 1 Burn Juſt. tit. Burglary.

In the Night. The Word [b] *Noctanter* is neceſſary in every Indictment for Burglary; for if there was ſo much Day-light at the Time, that a Man's Face might be diſcerned thereby, it is not Burglary. The Night

[b] 3 Inſt. 63. H. P. C. 79. 1 H. H. P. C. 551.

aggravates the Crime. If the like Crime is committed by Day, it is called *Houſe-breaking*.

Breaketh and Entereth. [d] The *Breaking* and *Entring* is alſo neceſſary to make it Burglary, not Breaking only. *Felonice & Burglariter Fregit & Intravit* are the Words of the Indictment. Therefore as to *breaking*; if a Door is open, or a Window is open, or a Hole is made in the Wall before, and the Thief enters and ſteals, or draws out the Goods, it is not Burglary; tho' this is Breaking in Law. In Burglary there muſt be an actual Breaking of the Houſe. If the Thief breaketh the Glaſs of the Window, a Hole in the Wall, draws the Latch, unlocks the Door, to rob, *&c.* This is an actual Breaking of the Houſe. As there muſt be a Breaking, ſo there muſt be an *Entry*. Setting the Foot over the Threſhold, after the Door is broke open; putting a Hand, Hook, or Piſtol within the Window or Door broke open, is an Entry.

[d] 3 Inſt. 64. H. P. C. 80, 81, 82. Kely. 68.

If a Maſter lies in one Part of the Houſe, and his Servant in another Part, and the Servant in the Night draws the Latch of the Maſter's Chamber, and enters it, to rob and murder him [or [e] if a Servant draws the Bolt of his Miſtreſs's Chamber, and enters it with Deſign to commit a Rape] here is both a Breaking and Entry.

[e] 1 Str. 481.

But in ſome Caſes one may be guilty of a Burglary, without actual Breaking. As when one comes down a Chimney by Night, to rob [*Qu*[f].] or when ſeveral Perſons come in the Night, with a Deſign to commit Burglary, and one does it, while the reſt watch near the Houſe, that no Help ſhould come to the Owner; here the Act of one is by *Interpretation* eſteemed to be the Act of all of them. But if a Servant opens a Window, to let in a Thief, who comes in and ſteals, it is Burglary in the Stranger, and Robbery in the Servant. [*Qu.* if not Burglary in both[a].] [b] When Thieves, having an Intent to rob, pretend Buſineſs, to get into the Houſe by Night, or raiſe Hue and Cry, and bring the Conſtable, to whom the Owner opens the Door, and when they come in, they bind the Conſtable, and rob the Owner; this being done in * Abuſe of the Law, is by Interpretation eſteem'd to be an actual Breaking and Burglary; and the whole Act ſhall be imputed to the Thieves. [See 12 *Ann. ch.* 7. *poſt.*]

[f] H. H. P. C. 552.
[a] 1 H. H. P. C. 553. Hawk P. C. B. 1. p. 103. 2 Str. 881.
[b] Kely. 42, 62, 63.

The Manſion-houſe of another. [c] Here a Church may be underſtood, for it is the Manſion-houſe of God. (*Qu.*) If a Church is not to be called a Manſion-houſe, it is a diſtinct Burglary to break and enter it in the Night to rob it. [See 1 *Ed.* 6. *ch.* 12.] The *Out-Buildings* adjoining to the Manſion-houſe, as *Barns, Stables, Dairy-houſes*, are to be underſtood as Parcel of the Manſion-houſe, and Burglary may be committed in them. But if the Barn or Stable is at any Diſtance from the Houſe, it is not Burglary. For the Indictment for Burglary muſt ſet forth, that *Fregit et Intravit Domum Manſionalem*. A *Shop* may be Parcel of a Manſion-houſe. [d] But if it is ſevered from the Manſion-houſe by Leaſe, and is for one to work in by Day only, though he goes into his Shop by the ſame Door with the other Inhabitants to work, it is no Burglary to break it open in the Night.

[c] 4 Rep. 40. 3 Inſt. 64, 65. H. P. C. 82, 89. Hawk. P. C. B. 1. p. 103. contra.
[d] 3 Inſt. 64. H. P. C. 83. Kely. 84. 1 H. H. P. C. 557, &c.

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* *Fruſtra Legis auxilium invocat, qui in legem committit.* 3 Inſt. 64.
Merito beneficium legis amittit, qui legem ipſam ſubvertere intendit. 2 Inſt. 53.

Burglary may be committed in a Manſion-houſe, though all the Family are abſent. If a Man hath [e] *two* Houſes, and ſometimes lives in one, and ſometimes in the other, Burglary may be committed in either of them. A *Chamber* in an *Inn of Court* where one uſually lodges, is a manſion-houſe. For every one hath a ſeveral Property there. If one hires *Part* of a Houſe to lodge in, which is divided from the reſt, and hath a Door of its own to the Street, this is his Manſion-houſe. [f] But a Chamber above Stairs or below, where any Perſon doth lodge as an Inmate, cannot be called *his* Manſion-houſe; ſo that if a Burglary is committed in his Apartment, the Indictment ſhall lay the Offence to be in the Manſion-houſe of him that let it. For if the Owner of the Houſe breaks into the Rooms of his Lodgers, and ſteals their Goods, it cannot be Burglary, to break into his own Houſe; but it is Felony, to ſteal their Goods.

[e] 4 Rep. 40. Kely. 67.

[f] Kely 83, 84. Contra. 3 Inſt 65. 1 H. H. P. C. 556. Hawk. P. C. B. 1. p. 104.

To the Intent to commit ſome Felony within the ſame. [g] If one breaks a Houſe, and enters, with an Intent to commit a *Treſpaſs*, as to beat the *Owner*, &c. it is no Felony. But if the Intent was to commit a Felony, by breaking and entering, it is Burglary, tho' the Intent was not executed, or the Thief did no Harm: Otherwiſe of Robbery.

[g] 3 Inſt. 65. H. P. C. 83. Kely. 30.

By 5 & 6 Ed. 6. ch. 9. *To rob any Perſon in a* Booth *or* Tent *in a Fair or Market, the Owner, or any of his Family being within the ſame, is to be puniſhed in like Manner as Burglary, and without Benefit of Clergy, though without his, his Children, or his Servants Notice or Hearing.*

By 18 El. ch. 7. *None ſhall have his Clergy, that commits Burglary.*

By 3 W. & M. ch. 9. *He that ſhall* counſel, hire, *or* command *any Perſon, to commit any Burglary, ſhall not have the Benefit of the Clergy.*

[See 3 *W. & M. ch.* 9. 10 *&* 11 *W.* 3. *ch.* 23. *p.* 367, *&c. ante.* Concerning Robberies of Shops, Warehouſes, Coach-houſes, or Stables, and concerning the *Reward* for *Taking* and *Diſcovering* of Perſons guilty of Burglary. For thoſe Statutes make Larcenies from the Houſe puniſhable in the like Manner as Burglaries.]

By 12 An. St. 1. ch. 7. *If any Perſon ſhall enter the Manſion or Dwelling-houſe of another by* Day *or* Night, *without breaking the ſame, with an Intent to commit Felony; or being in ſuch Houſe, ſhall commit any Felony, and ſhall in the Night-time break the ſaid Houſe to get out of the ſame, ſuch Perſon ſhall be taken to be guilty of* Burglary, *and ſhall not have the Benefit of Clergy.* [See other Parts of this Act, *p.* 368. *ante.* And 6 *Geo.* 1. *ch.* 23. Concerning the Reward of 40 *l.* for apprehending and convicting any Perſon for Burglary. And 24 *H.* 8. *ch.* 5. *p.* 352. *ante.*]

[*By* 12 G. 1. ch. 34. § 7. *To break or enter by Force into any Houſe or Shop, by Day or by Night, with Intent to cut or deſtroy any Serge, or any other Woollen Goods, in the Loom, or any Tools employed in making thereof, is Felony without Clergy.* See more of this Act, *p.* 344 *&* 356. *ante.*]

2. [a] *Arſon* (from *Ardeo* to *burn*) or Houſe-burning, is a Felony at Common Law, and is a malicious and voluntary Burning the Houſe of another, by Night or by Day.

It muſt be a *Burning*; for to put Fire into a Houſe, or any Part of it without Burning, is not Felony. But if Part of the Houſe is burn'd thereby, it is Felony, tho' that Part is not wholly burn'd. If it doth burn, and goeth out of itſelf, it is Felony. For the Words of the Indictment are *Incendit et Combuſſit.*

[a] 11 Rep. 29. 2 Inſt 188. 3 Inſt. 66. H. P. C. 85. 4 Black. Com. 220, 366, 310.

[b] 3 Inſt. 67. H P. C. 85. 3 Cro. 378.

It will be intended to be done [b] *maliciouſly*, if one, deſigning to burn the Houſe of *A.* only, does burn the Houſe of *B.* or if one maliciouſly burns his own Houſe, to the Intent to burn others, if the Intention is executed. But if only his own is burn'd it is not Felony; but it is a great Miſdemeanor, and puniſhable with Fine, Pillory, *&c.* If a Houſe is fired by Negligence or Miſchance, it cannot amount to *Arſon.* For the Words of the Indictment are *Voluntariè ex Malitia ſua Præcogitata et Felonicè.* [See 9 *An. ch.* 31.]

[c] 3 Inſt. 67. 4 Rep 20. H. P. C. 86.

[c] By the *Houſe of another*, not only a Manſion-houſe and the principal Parts thereof, but alſo any other Houſes or Out-buildings, as Barn, and Stable, Cow-houſe, Sheep-houſe, Dairy-houſe, Milk-houſe, Parcel of the Manſion houſe, are to be underſtood. To burn Barns wherein there is Corn, whether they are adjoining to any Houſe or not, is *Arſon.* But by the Common Law, to burn a Barn, not Parcel of a Manſion-houſe, is not Felony. The Burning of a Frame of a Houſe is not accounted Houſe-burning, becauſe the Frame of a Houſe cannot come under the Word *Domus*, which is neceſſary in every Indictment for *Arſon.* In *Arſon* it muſt be *Domus*, tho' a Barn, Malt-houſe, *&c.* whereas in Burglary it muſt be *Domus Manſionalis*, as above-mentioned. And it muſt be the Houſe of *another*. So that the Houſe which he has in his own Poſſeſſion by a Leaſe for Years, is not meant, if the Owner burns it, and no other Houſe is burn'd with it, as before obſerved.

11 Rep. 30, &c.

By 23 H. 8. ch. 1. *Burning of Houſes, or Barns wherein any Corn is, the Principals and Acceſſories are ouſted of Clergy.* [See 25 *H.* 8. *ch.* 3. 1 *Ed.* 6. *ch.* 12. 6 *Ed.* 6. *ch.* 10. and 4 *&* 5. *Ph. & M. ch.* 4.]

By 43 El. ch. 13. *To burn, or cauſe to be burned, wilfully or of Malice, (or to aid, procure, or conſent to the Burning of) any Barn, or Stack of Corn or Grain, in the Counties of* Northumberland, Cumberland, Weſtmoreland, *or* Durham, *is Felony without Clergy.*

By 22 & 23 Car. 2. ch. 7. *It is Felony to burn in the* Night-time *maliciouſly any Rick or Stack of Corn, Hay, or Grain, Barns, or other Houſes or Buildings, or Kilns, in any Place whatſoever. But the Offender may make Election to be tranſported for ſeven Years.*

[*And by* 9 Geo. 1. ch. 22. *If any Perſon ſhall ſet fire to any Houſe, Barn, or Out-houſe, or to any Hovel, Cock, Mow, or Stack of Corn, Straw, Hay, or Wood, (or by* 10 Geo. 2. ch. 32. *To any Delph of Coal) he ſhall ſuffer as a Felon without Clergy.* [See more of this Act under the Title, *Felony* relating to the *Game, infra.*]

By 1 Geo. 1. St. 2. ch. 48. *If any Perſon ſhall maliciouſly ſet on fire or burn any* Wood, *Underwood, or Coppice, or any Part thereof, he ſhall ſuffer as a Felon.* [See concerning the Deſtruction of *Corn* and *Wood*, in *ch.* 3. *poſt.*]

5. There are *other* private Felonies immediately hurtful to the Subject, made Capital by Statutes; which could not properly be reduced to Felonies againſt the *Life, Body, Goods,* or *Habitation.* These concern *Records, Cattle, Game, Ships, Bankrupts, River* and *Sea-Banks, Hop-poles, Grain,* and *Forgery.*

1. Concerning *Records.*

To deface or alter a Record is an Offence at Common Law, and puniſhable by Fine, *&c.* But, *By* 8 H. 6. ch. 12. *If any Clerk or other Perſon ſhall ſteal, or willingly take away, withdraw, or avoid any Record, or Parcel of the ſame, Writ, Return, Panel, Proceſs, or Warrant of Attorney, in the King's Court of* Chancery, Exchequer, *the one* Bench, *or the other, or in his* Treaſury, *by Reaſon whereof any Judgment ſhall be reverſed, it is Felony in the Stealers,* &c. *their Procurers, Counſellors, and Abettors.*

4 Black. Com 128.

[a] This Act does not extend to Judges of any Court, becauſe it begins with naming Clerks, which are inferior to them, [See 8 *Ri.* 2. *ch.* 4.] and it extends only to the Courts expreſſly named; and to the Courts of *Chancery* and *Exchequer* ſo far only, as they proceed according to the Courſe of the Common Law.

[a] 3 Inſt. 71, 72

Theſe Words, *By Reaſon whereof any Judgment ſhall be reverſed,* ſignify, whereby any Judgment ſhall not take Effect; ſo that if the Alteration is made before or aſter the Judgment, it is within the Act.

By 21 Ja. 1. ch. 26. *To acknowledge, or procure to be acknowledged, any Fine, Recovery, Deed inroll'd, Statute, Recognizance, Bail, or Judgment, in the Name of any other Perſon or Perſons, not privy or conſenting to the ſame, is Felony without the Benefit of Clergy; but without Corruption of Blood, or taking away Dower; neither ſhall it extend to a Judgment acknowledged by an Attorney of Record for another Perſon.*

1 Str. 384. 1 H. H. P. C. 696.

By 4 W. & M. ch. 4. *To perſonate any other Perſon before any Commiſſioner authorized to take* Bail *in the* King's Bench, Common Pleas, *or* Exchequer, *whereby the Perſon ſo repreſented may be liable to the Payment of any Money, to be recovered in the ſame Suit, is Felony.*

2. Concerning *Cattle.*

By 22 & 23 Car. 2. ch. 7. *To kill or deſtroy Horſes, Sheep, or other Cattle, in the Night-time, maliciouſly, unlawfully, and willingly, is Felony. But ſuch Attainder ſhall work no Corruption of Blood, Loſs of Dowar, or Diſinheriſon of the Heir. Yet Liberty is given to the Offender to avoid Judgment of Death, by making Election of Tranſportation for ſeven Years. Any returning within ſeven Years ſhall ſuffer Death.*

1 Burn Juſt. 291. 4 Black. Com. 243 244.

If any ſhall in the Night-time, maliciouſly maim *or otherwiſe hurt any Cattle, they ſhall forfeit to the Party grieved treble Damages by Action of Treſpaſs upon the Caſe.*

Upon Complaint of the Parties injured, three or more Juſtices of the Peace may inquire by the Oaths of twelve Men, Examination of Witneſſes upon oath, or any lawful Means, concerning ſuch Offences and Offenders, and iſſue Warrants to ſummon Jurors, and apprehend ſuſpected Perſons, and cauſe others that ſeem likely to make Diſcovery to appear and give Information upon Oath, &c.

The Proſecution muſt be within ſix Months after the Offence committed.

[*By* 9 Geo. 1. ch. 22. *Wilfully and maliciouſly to kill, maim, or wound any Cattle, is made Felony without Benefit of Clergy.*]

3. Concerning the *Game.*

By 9 Geo. 1. ch. 22. *If any Perſon, being armed with offenſive Weapons, and having the Face black'd, or being otherwiſe diſguiſed, ſhall appear in any Foreſt, Chace, Park, Paddock, or Grounds incloſed, wherein Deer have been or ſhall be uſually kept, or in any Warren, or Place where Hares or Conies have been or ſhall be uſually kept, or in any high Road, open Heath, Common, or Down, or ſhall unlawfully hunt, wound, kill, deſtroy, or ſteal, any red or fallow Deer, rob a Warren,* &c. *or ſteal Fiſh out of any River or Pond, or if any Perſon ſhall unlawfully hunt,* &c. *any red or fal-*

low Deer, fed or kept in any Place incloſed in any of the King's Foreſts or Chaces, or in any Park, &c. or break down the Head or Mound of any Fiſh-Pond, whereby the Fiſh ſhall be loſt or deſtroyed, or forcibly reſcue any Perſon, being lawfully in Cuſtody of any Officer or other Perſon for any of the Offences mentioned in this Act [a], *or by Gift or Promiſe of Money, or other Reward, procure any to join in any ſuch unlawful Act, or conceal or ſuccour ſuch Offenders, when by Order of Council required to ſurrender, knowing them to have been ſo charged and required to ſurrender, he is guilty of Felony without Benefit of Clergy.*

[a] See p. 356. ante.

4. Concerning *Ships*.

By 22 & 23 Car. 2. ch. 11. 1 An. St. 2. ch. 9. 4 G. 1. ch. 12. *and* 11 G. 1. ch. 29. § 6. *It is Felony without Benefit of Clergy for any Owner, Captain, Maſter, Mariner, or other Officer, belonging to any Ship, wilfully to caſt away, burn, or deſtroy the ſaid Ship, or procure the ſame to be done, with Intent to prejudice any Owner, or any Under-writer of any Policy of Inſurance thereon, or any Perſon who hath loaded Goods therein.*

B 12 Ann. Seſſ. 2. ch. 18. *If any Perſon makes or aſſiſts in making any Hole in any Part of any Ship in Diſtreſs, or ſteals any Pump belonging to ſuch Ship, or is aiding or abetting to ſuch Stealing, or wilfully does any Thing tending to the immediate Loſs or Deſtruction of ſuch Ship, he ſhall be guilty of Felony without Benefit of Clergy.* And,

By 26 G. 2. ch. 19. *If any Perſon ſhall plunder, ſteal, take away, or deſtroy, any Goods belonging to any Ship in Diſtreſs, or which ſhall be wrecked or ſtranded (whether any living Creature be on board or not) or any Tackle, Proviſion, or Part of ſuch Ship, or ſhall beat, or wound, with intent to kill, or otherwiſe wilfully obſtruct the Eſcape of any Perſon endeavouring to ſave his Life from ſuch Ship, or ſhall put out any falſe Light, with Intent to bring any Veſſel into danger, he ſhall be guilty of Felony without Benefit of Clergy: Provided, That when Goods of ſmall Value are ſtranded, and ſtolen without Circumſtances of Cruelty or Violence, the Offenders may be proſecuted for Petit Larceny only.*

5. Of *Bankrupts*.

By 5 Geo. 2. ch. 30. *If any Perſon becoming a Bankrupt, and againſt whom a Commiſſion of Bankrupt hath been awarded and iſſued out ſhall not, within forty-two Days after Notice in Writing and in the* London Gazette, *or within ſuch farther Time as the Lord Chancellor ſhall think fit to allow him, not exceeding fifty Days, ſurrender himſelf to the Commiſſioners, and ſubmit to be examined upon Oath (except Quakers, who are to be examined upon the uſual Affirmation) touching his Eſtate and Effects, Trade and Dealings; or if he ſhall remove, conceal, or embezzle any Part of his Eſtate or effects, real or perſonal (his and his Wife's and Children's neceſſary wearing Apparel only excepted) to the Value of twenty Pounds, or any Books of Account, Papers or Writings, relating thereto, with an Intent to defraud his Creditors, he ſhall ſuffer as a Felon without Benefit of Clergy, or the Benefit of any Statute made in Relation to Felons; and ſuch Felon's Goods and Eſtate ſhall go to, and be divided among his Creditors under the Commiſſion.*

6. Concerning the Deſtruction of *River* and *Sea Banks*, and *Hop-poles*.

By 6 Geo. 2. ch. 47. *If any Perſon ſhall maliciouſly break or cut down the Bank of any River, or any Sea-Bank, whereby any Lands ſhall be overflowed or damaged, he is guilty of Felony without Clergy. So if he* *maliciouſly cut any Hop-binds growing on Poles in any Plantation of Hops. And the Proviſions contained in* 9 Geo. 1. ch. 22. *are by* 10 Geo. 2. ch. 32. *extended to Offenders againſt this Act.*

7. Concerning *Grain.*

[*By* 11 G. 2. ch. 22. § 2. *Maliciouſly to throw down or deſtroy any Store-houſe, or other Place where Corn is then kept, in order to be exported, or unlawfully to enter the ſame, and take away any Corn, Flour, Meal, or Grain therefrom, or throw abroad, or ſpoil the ſame, or any Part thereof, or unlawfully to enter on board any Ship, Barge, Boat, or Veſſel, and maliciouſly take away, or throw out therefrom, or ſpoil or Damage any Meal, Flour, Wheat, or Grain therein, intended for Exportation, is Felony and Tranſportation, for ſeven Years.*]

8. Concerning *Forgery* of falſe *Deeds,* &c. *Bank-Notes,* &c. *Exchequer-Bills,* &c. *Stamps, South Sea and Eaſt India Bonds,* &c. *Lottery Orders,* &c. *the Common Seal* of either of the Corporations, for *Aſſurances of Ships,* &c. *Mediterranean Paſſes, Letters of Attorney* to tranſfer Stock, *Certificate* of the *Accountant General in Chancery,* &c. *Marriage Licences,* &c. *Seamens Wills,* &c. 4 Black. Com. 245 to 249.

Of falſe *Deeds,* &c.

By 5 El. ch. 14. *To forge or publiſh a forged Deed, Court-Roll or Will in Writing,* &c. *after Conviction for the firſt Offence, is Felony without Clergy.* See of Forgery, ch. 3. post.

By 2 G. 2. ch. 25. *To falſely make, forge or counterfeit, or cauſe, or procure to be falſely made,* &c. *or willingly act or aſſiſt in the falſe making,* &c. *or utter or publiſh as true, knowing the ſame to be falſe,* &c. *any Deed, Will, Teſtament, Bond, Writing obligatory, Bill of Exchange, promiſſory Note for Payment of Money, Indorſment, or Aſſignment of any Bill of Exchange, or Promiſſory Note, for Payment of Money, or any Acquittance, or Receipt, either for Money or Goods, with Intention to defraud any Perſon, is Felony without Benefit of Clergy, but without Corruption of Blood, Loſs of Dower, or Diſheriſon of Heirs.* And,

By 7 G. 2. ch. 22. *To falſely make, alter, forge, or counterfeit, (or to procure, aid, or utter, as in the laſt Statute) any Acceptance of any Bill of Exchange, or the Number or principal Sum of any accountable Receipt for any Note, Bill, or other Security for Payment of Money, or any Warrant or Order for Payment of Money or Delivery of Goods, with Intent to defraud any Perſon, is Felony without Benefit of Clergy.*]

Of *Bank-Notes,* &c.

By 8 & 9 W. 3. ch. 20. § 36. 11 G. 1. ch. 9. *and* 15 G. 2. ch. 13. § 11. *To forge or counterfeit the Common Seal of the* Bank *of* England, *or to forge, alter, or raze any ſealed Bank-Bill or any Bank Note, or Bank-Bill of Exchange, Dividend Warrant, or any Bond, or Obligation under the Seal of the* Company, *or any Indorſement thereon, or knowingly to offer to diſpoſe or demand Payment thereof, with Intent to defraud, is Felony without Clergy.* 1 Str. 18, 19.

Of *Exchequer Bills.*

By 1 G. 3. *ch.* 2. and the ſeveral former Acts which direct the Iſſuing thoſe Bills; to forge or counterfeit them before they are paid off and cancelled, or the Indorſement thereon, or tender in Payment, or demand

Money upon any forged or counterfeit Bill (knowing the ſame to be ſuch) with Intention to defraud, is Felony without Clergy.

Of *Stamps.*

By 9 & 10 W. 3. ch. 25. § 59. *To counterfeit or forge any* Stamp *or Mark or Impreſſion of the ſame, upon any Vellum, Parchment, or Paper, thereby to defraud his Majeſty of his Duties upon Vellum,* &c. *or to utter or ſell Vellum,* &c. *with ſuch counterfeit Mark, knowing ſuch Mark to be counterfeit.* (*And by* 6 G. 1. ch. 21. § 60. *To cauſe or procure the ſame to be forged, or any Vellum, Parchment, Paper, Cards, or Dice, to be marked or ſtampt with a counterfeit Stamp or Mark*) *is Felony without Clergy.* [See 9 *An. ch.* 11. & *ch.* 23. 10 *An. ch.* 19. & 26. 12 *An. St.* 2. *ch.* 9. 5 G. 1. *ch.* 2. and 30 G. 2. *ch.* 19. in Relation to the Stamps or Marks provided by thoſe Statutes.]

Of *South-Sea* and *Eaſt-India Bonds, &c.*

By 9 An. ch. 21. 6 G. 1. ch. 4. § 56. *and* 12. G. 1. ch. 32. § 9. *To forge or counterfeit the common Seal of the* South-Sea Company, *or* Eaſt-India Company, *or to forge, counterfeit, or alter any of their Bonds, or any Aſſignment or Indorſement thereon,* (*or any of their Receipts Warrants, or Indorſements thereon, by* 6 G. 1. ch. 11. § 50.) *or to offer to diſpoſe of, or to put away, any ſuch forged,* &c. *Bond,* &c. (*knowing the ſame to be ſuch*) *or to demand the Money, or any Part thereof, of the Company, or any of their Officers, with Intent to defraud any Perſon, is Felony without Clergy.*

Of *Lottery-Orders, Tickets* or *Certificates.*

By 1 G. 3. *ch.* 7. and the ſeveral former *Lottery Acts,* To forge or counterfeit any *Lottery-Ticket* or *Certificate,* made in the Purſuance of thoſe Acts, or to alter the Number thereof, or to utter, or vend, or offer to diſpoſe of, any forged Ticket, *&c.* knowing the ſame to be ſuch, or to bring the ſame to the Managers, or the Bank, or to any other Perſon, with a fraudulent Intention, is Felony without Clergy.

Of *Policies* of *Aſſurance* of *Ships,* and *Merchandizes* at Sea.

By 6 Geo. 1. ch. 18. *To forge the common Seal of either of the Corporations, or to forge or alter any Policy, Bill, or Bond, under their common Seal, or to offer to diſpoſe of, or pay away, any ſuch forged Policy,* &c. *knowing the ſame to be ſuch, or to demand the Money therein contained, with Intent to defraud, is Felony without Clergy.*

Of *Mediterranean Paſſes.*

[*By* 4 G. 2. ch. 18. *To forge, counterfeit, alter, or eraze any Mediterranean Paſs, or forge the Seal of the Admiralty, or the Hands of the Lord Admiral, or Commiſſioners of the Admiralty thereto, or to procure or aſſiſt therein, or publiſh knowingly,* &c. *is Felony without Clergy.*]

Of *Letters of Attorney* to transfer *Stocks.*

[*By* 8 G. 1. ch. 22. § 1. & 9 G. 1. ch. 12. § 4. *To forge or counterfeit any Letter of Attorney, or other Authority to transfer, aſſign, ſell or convey any Share in the Stock or Funds of any publick Company eſtabliſhed by Act of Parliament, or to receive any Annuities or Dividends attending the ſame, or the Name of any Proprietor to ſuch pretended Letter of Attorney, or Authority, or fraudulently to demand, or endeavour to have ſuch Share transferred*

ferred, &c. *or ſuch Annuities or Dividends received by Virtue thereof, or perſonating any true Proprietor, whereby to transfer or receive, or endeavour to transfer or receive his Share, Annuities, or Dividends, or to procure or aſſiſt in any ſuch Forgery,* &c. *is Felony without Benefit of Clergy.*]

Of *Certificates* of the *Accountant General* in *Chancery*, &c.

[*By* 12 G. 1. ch. 32. § 9. *To forge or counterfeit the Name of the Accountant General, Regiſter, Clerk of the Report Office, or Caſhier of the Bank, to any Certificate, Report, Entry, Indorſement, Declaration of Truſt, Note, Direction, Authority, Inſtrument, or Writing whatſoever, for, or in order to the receiving or obtaining any of the Money or Effects of the Suitors of the Court of Chancery, or to forge or counterfeit any ſuch Certificate,* &c. *or to utter or publiſh the ſame knowingly, with Intent to defraud, or to procure or aſſiſt in any ſuch Forgery, is Felony without Clergy.*]

By 32 G. 2. ch. 14. § 9. *To forge the Mark or Hand of the Receiver of Poſt-Fines, is Felony without Clergy.*

Of *Marriage Licences*, &c.

[*By* 26 G. 2. ch. 33. *Wilfully and with Intent to elude the Force of this Act, to inſert, or cauſe to be inſerted, in the Regiſter Book of any Pariſh or Chapelry, any falſe Entry of any Thing relating to any Marriage, or falſely to make, alter, forge, or counterfeit any ſuch Entry in ſuch Regiſter, or any Licence of Marriage, or knowingly to publiſh as true any ſuch forged Regiſter or Licence, or to procure or aſſiſt in any ſuch Forgery, or wilfully to deſtroy, or cauſe or procure to be deſtroyed, any Regiſter Book of Marriages, or any Part thereof, with Intent to avoid any Marriage, or to ſubject any Perſon to any of the Penalties of this Act, is Felony without Clergy.*]

Of *Seamen's Wills*, &c.

[*By* 31 G. 2. ch. 10. *To perſonate or aſſume, or procure any other to perſonate or aſſume, the Name or Character of any Officer, Seaman, or other intitled, or ſuppoſed to be intitled, to any Wages, Money, or Prize Money, for Service done on Board of a King's Ship, or of his Executor, or Adminiſtrator, Wife, Relation, or Creditor, or to forge, or counterfeit, or procure ſo to be, any Letter of Attorney, Bill, Ticket, Certificate, Aſſignment, laſt Will, or any other Power or Authority whatſoever, in order to receive any Wages, Money, or Prize Money, due, or ſuppoſed to be due, on Account of ſuch Service, is Felony without Benefit of Clergy.* See of *Perjury, ch.* 3. *poſt.*]

[Beſides all which, there are alſo ſeveral other Felonies made ſuch by Statutes, too long to be here inſerted. Therefore ſee of Felonies by *Gaolers*, 14 *Ed.* 3. *ch.* 10. By *Hunters* in the Night, or with painted Faces, *&c.* 1 *H.* 7. *ch.* 7. By *Purveyors*, 28 *Ed.* 1. *ch.* 2. and 36 *Ed.* 3. *ch.* 2, 3, *&c.* [But *Purveyance* is now taken away by 12 *Car.* 2. *ch.* 24. § 12.] By *Egyptians*, 1 & 2 *Ph.* & *M.* *ch.* 4. 5 *El.* *ch.* 20. By Cutters of *Powdike*, 22 *H.* 8. *ch.* 11. 2 & 3 *Ph.* & *M.* *ch.* 19. By Deſtroyers of the Works of *Putney* Bridge, 12 *Geo.* 1. *ch.* 36. *Weſtminſter* Bridge, 9 *G.* 2. *ch.* 29. *Walton* Bridge, 20 *G.* 2. *ch.* 22. *Hampton-Court* Bridge, 23 *G.* 2. *ch.* 37. *Ribble* Bridge, 24 *G.* 2. *ch.* 36. Of the Works for draining *Bedford Level*, 27 *G.* 2. *ch.* 19. *Sandwich* Bridge, 28 *G.* 2. *ch.* 55. *Wye* Bridge 29 G. 2. *ch.* 73. *Black-Fryars* Bridge, 29 *G.* 2. *ch.* 86. *Jeremy's Ferry* Bridge, 30 *G.* 2. *ch.* 59. *Kew* Bridge, 30 *G.* 2. *ch.* 46. *London* Bridge, 31 G. 2. *ch.* 20. and alſo *ch.* 59. *Trent* Bridge; ſome of which are ouſt of Clergy. By Treſpaſſers on the *Borders* and Rioters in the *Counties* of *Cumberland, Weſtmoreland*, and Biſhoprick of *Durham*, 43 *El. ch.* 13. For the Suppreſſion of *Moſs-Troopers*, 13 & 14 *Car.* 2. *ch.* 22. 18 *Car.* 2. *ch.* 3. § 2. and 31 *G.* 2. *ch.* 42. For preventing Abuſes in paying *Seamens Wages*, 9 & 10 *W.* 3. *ch.* 14. 1 *Geo.* 1. *ch.* 25. And 4 G. 1. *ch.* 11. For more effectual Tranſportation of unlawful *Exporters of Wool.* See of *Perjury*, and alſo of *Deceit* and *Cozenage*, *ch.* 3. *poſt.*]

I have now given a ſummary Account of the *capital* Offences, (*viz.* Of High Treaſon, Petit Treaſon, and Felonies *publick* and *private.*) It followeth that I ſhould treat of Miſdemeanors or Offences *not Capital.* Becauſe in this Account I have frequently mentioned *Principals* and *Acceſſories*, and the *Benefit* of the *Clergy*, it may not be improper firſt to ſay ſomething of the Nature of the *Principals* and *Acceſſories*, and of the *Benefit* of the *Clergy*.

CHAP. II.

Of *Principal* and *Acceſſory*, and of the *Benefit* of the *Clergy*.

Of Principals. 4 Black Com. ch 3 per tot. Foſter, ſee the Table tit. Acceſſaries, and tit. Principal.

[a] 3 Inſt. 59, 138. 2 Inſt. 183. 4 Rep. 44. 9 Rep. 81. H. P. C. 80. 81, 215, 216, 217. Dalt. ch. 161. p. 395.

[b] H. P. C. 43. Dalt. ch. 161. p. 401.

[c] 3 Inſt. 20, 21, 138. H. P. C. 127, 215.

[d] 2 Inſt. 183. 12 Rep. 81. 3 Cro. 750. See p. 361. ante.

[a] A *Principal* is he that is an Actor, or preſent and aiding and abetting in a Felony. In ſome Caſes a Perſon *abſent* may be a Principal, as he that puts Poiſon into Drink, with an Intent to poiſon another, and then leaves it, though not preſent when taken by that Perſon or any other; or when many come to do an unlawful Act, and one is upon the ſame Ground, or in the ſame Houſe, though not within View when the Fact is done. [b] He who incites a Madman to do a Murder is a principal Murderer. [c] In High Treaſon all are Principals. So that he who by Command or Perſuaſion induces another to commit Treaſon, or receives a Traitor knowingly after Treaſon committed by him, is a Traitor. For whatſoever will make a Man an Acceſſory in Felony, will make him a Principal in High Treaſon. [d] In *Petty Larceny*, and in *Treſpaſſes vi & Armis*, all are Principals.

By 8 H. 6. ch. 12. *Procurers, Counſellors, and Abettors in ſtealing or embezzling any* Record, *are principal Felons.*

By 3 H. 7. ch. 2. *Receivers of a* Woman, *Wife, Widow, or Maid, having Lands or Goods, and carried away againſt her Will, and married or defiled, and alſo Procurers and Abettors to the forcibile taking her away, are to be deemed principal Felons.*

Here the Common Law is altered by the expreſs Words of the Statutes.

Of Acceſſories. [a] 2 Inſt. 182, 183. Dalt. ch. 161. p. 396.

II. An *Acceſſory, Particeps Criminis,* (*Acceſſorius*) is he that is concerned in the Felony by Commandment, Aid, or Receipt. [a] By *Commandment*

mandment all thoſe are included, that incite, procure, ſet on, or ſtir up any other to do the Fact, and are not preſent when the Fact is done. So by *Aiding*, all Perſons, counſelling, abetting, plotting, conſenting, furniſhing with Weapons, and encouraging to do the Act may be included, if they are not preſent when the Act is done. If the Party commanding or aiding is preſent, he is a Principal. And by ſome Statutes Acceſſories are made Principals, tho' not preſent when the Act is done[b]. *Receipt* is, when one, knowing of the Felony, receives the Felon and conceals him and his Offence.

[b] 2 Ld Ray. 845.

[c] In *High Treaſon* there are no Acceſſories, but all are Principals.

[c] 1 Inſt. 57. a. & b. 2 Inſt. 183. 3 Inſt. 20, 21, 138, 139. H. P. C. 215, 223. Dalt. ch. 161. p. 394. Hawk. P. C. B. 2. p. 311.

In *Petty Treaſon* and other *Felonies* (except Petty Larceny) there may be Acceſſories. * Yet the Acceſſory cannot be guilty of Petit Treaſon, where the Principal is found guilty of Murder. The Offence of the Acceſſory can never be of a higher Nature than that of the Principal.

There may be an Acceſſory in *Mayhem*, *Piracy*, [See 11 & 12 *W.* 3. *ch.* 7. 8 *Geo.* 1. *ch.* 24. § 3.] and *Premunire* (*Qu.*). In *Petit Larcenies*, *Treſpaſſes*, *vi & Armis*, there are no Acceſſories. For as in the higheſt Offence there is no Acceſſory, ſo it is in the loweſt Offences, or in all Offences under Felony, as in Riots, Routs, forcible Entries, and other Treſpaſſes *vi & Armis*. Here all are Principa's as before obſerved. [d] He that receiveth a Treſpaſſer on Lands and Goods, after the Treſpaſs is committed, is no Treſpaſſer unleſs the Treſpaſs was done to his Uſe and Benefit, and he agreeth to it afterwards; for then his ſubſequent Agreement amounteth to a Commandment, and makes him a Principal. Yet if the Treſpaſs was on the Perſon of any one, ſuch After-Agreement will not make him a Treſpaſſer. By the Laws of the *Foreſt*, a Receiver within the Foreſt is a principal Treſpaſſer, tho' the Treſpaſs was not done to his Uſe and Benefit. So if he receives the Fleſh of the King's Veniſon, knowing it to be the King's Veniſon.

[d] 1 Inſt. 180. b. 4 Inſt. 317.

[e] There are Acceſſories *before* and *after* the Fact. 1. An Acceſſory *before* the Fact is he that hireth, commandeth, counſels, or aideth in the Commiſſion of a Felony, and is abſent when it is done. But when the Execution varies from the Command, as to the Perſon ſlain (as by killing one inſtead of another, not as to the Time or Place) or in the Nature of the Offence, or if the Commander revokes his Command, the Commander is not acceſſory. But if one commands another to poiſon ſuch a particular Perſon, and he ſhoots him, or if one commands another to beat ſuch a Man, and he beats him to Death, the Commander is acceſſory. This is the ſame Felony in Subſtance. In *Manſlaughter* there can be no Acceſſories before the Fact, becauſe the Killing is ſuppoſed to be done ſuddenly, and without Premeditation. But there may be Acceſſories in Manſlaughter, after the Fact. No one can be puniſhed as acceſſory to any Homicide committed by *Miſchance*, or *Se Defendendo*. 2. [f] An Acceſſory *after* the Fact is, when one receiveth a Felon by concealing or relieving him, whom he knoweth to have committed a Felony. An Acceſſory after the Fact is only by receiving. [See 3 *W.* & *M.* *ch.* 9. 5 *An.* *ch.* 31. 4 *Geo.* 1. *ch.* 11. 6 *Geo.* 1. *ch.* 23. Concerning the Buying or Receiving ſtolen Goods.] A Felony muſt be committed, and

[e] 2 Inſt. 182. 1 Inſt. 57. b. H. P. C. 217, 218. 4 Rep. 44. Dal. ch. 161. p. 395, 396, 397.

[f] 2 Inſt. 182, 183. H. P. C. 218, 219. Dalt. ch. 161, p. 398. Hawk. P. C. B. 2. p. 318. 3 Wms. 485.

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* *Acceſſorius ſequitur naturam ſui principalis.* 3 Inſt. 139.

one muſt know him to be the Felon, to be an Acceſſory after the Fact. [a] Therefore where a Man receives a Murderer after the Stroke given, but before the Death; he is not Acceſſory. A Relieving a Felon with Money, Victual, or a Horſe for his Journey, knowing him to be ſuch, makes one acceſſory to the Felony after the Fact. [b] And the Law is ſo ſtrict in this Caſe, that a Brother receiving his Brother, or a Huſband receiving his Wife, may be Acceſſories. But if the Wife receives the Huſband, ſhe ſhall not be puniſhed as an Acceſſory; for ſhe is not bound to diſcover the Offence of her Huſband; neither ought ſhe to accuſe him.

[a] 2 Ld. Ray. 827.
[b] 3 Inſt. 108. H. P. C. 65, 219. Dalt. ch. 161. p. 398, 399. See p. 336. ante.

If a Man is attainted of Felony in one County, Notice of the Attainder is preſumed in the ſame County, to make one acceſſory by receiving him; [but it ſeems to have been the better Opinion formerly, and is now ſettled, that this Notion of preſumptive Notice is not Law [c].] but not in another County.

[c] Hawk. P. C. B. 2. p. 319. 3 Wms. 494, &c.

[d] One receiving a Felon that hath entered into a Recognizance to appear, or one ſending Letters in his Favour, or adviſing Witneſſes not to appear againſt him, is not acceſſory; for this is not receiving the Felon; tho' ſending Letters in his Favour, or adviſing Witneſſes not to appear, is a Miſdemeanor, and may be puniſhed by Fine and Impriſonment.

[d] 3 Inſt. 138, 139 H. P. C. 218, 219. Dalt. ch. 161. p. 398, 400.

One may be an Acceſſory to an Acceſſory; as by willingly receiving an Acceſſory to a Felony.

[e] 2 Str. 904.

The ſame Receipt of an Offender, which will make the Receiver an Acceſſory after the Fact in caſe of Felony, will make him a Principal in High Treaſon, as hath been already obſerved.

RULES *concerning* Acceſſories.

[f] WHERE an Act of Parliament makes a Felony, it doth incidently make ſuch Acceſſories, as would be Acceſſories *before*, or *after* a Felony at Common Law; tho' many Acts of Parliament, which makes an Offence Felony, expreſſly make mention of Abettors Counſellors, Procurers, and Concealers; which the Law would have interpreted to be included of Courſe.

[f] 3 Inſt. 16, 20, 45, 59, 72, 73. Cont. S. P. C. 44. H. P. C. 215. Dalt ch 161. p. 396, 397, 400. 2 Ld. Ray. 844.

[g] He that commandeth or counſelleth to commit an unlawful Act, is acceſſory to all that ſhall enſue upon that evil Act, if it was executed in the ſame Manner, as it was commanded or counſelled; but not to any Act, that is diſtinct from it.

[g] 3 Inſt. 51. Hawk. P. C. B 2. p. 316. Semb Contra.

[h] The Acceſſory ought not by *Common Law* to be forced to anſwer, before the Principal is attainted or convicted; (*Qu.*) but certainly he cannot be tried firſt [i]. Yet if the Acceſſory will, he may pray Proceſs againſt the Inqueſt, before the Principal is attainted; for every Man may renounce the Right which the Law allows. But the Courſe is, to indict them both by one Indictment, and then if the Principal pleads, Not guilty, the Acceſſory ſhall alſo plead, Not guilty, and they may be tried by one Inqueſt. But if the Jury find the Principal Not guilty, they muſt find the Acceſſory alſo Not guilty.

[h] 2 Inſt. 183. 3 Inſt. 139, 231. 4 Rep 43. H. P. C. 221, 222. Dalt. ch. 161. p. 400.
[i] Hawk. P. C. B. 2. p. 322. 1 H. H. P. C. 623.

[a] If the Principal upon his Arraignment confeſſes the Felony, and before Judgment obtains Pardon, the Acceſſory is thereby diſcharged, becauſe the Principal was never attainted. [But ſee 1 *An ch.* 9. *poſt.*]

[a] 2 Inſt. 183. 4 Rep. 43, 44. H. P. C. 221.

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[h] *Ubi factum nullum, ibi fortia nulla.* 4 Rep. 43. b.
Ubi non eſt Principalis, non poteſt eſſe acceſſorius. Ibid.

[b] One acquit as Principal ſhall not be arraigned as Acceſſory before the Fact; but he may as Acceſſory after the Fact. But if he is acquit as Acceſſory, he may be arraigned as Principal.

[b] H. P. C. 224, 244. Kely. 25, 26.

[c] Acceſſories before and after the Fact are puniſhable with Death.

By 2 & 3 Ed. 6. ch. 24. *An Acceſſory in one County to a Felony committed in another County, may be tried in the County where he was Acceſſory.*

[c] 3 Inſt. 138. Dalt. ch. 116. p. 396, 400. See § 3. poſt.

By 3 W. & M. ch. 9. *If any Perſon ſhall buy or receive any Goods that ſhall be feloniouſly taken, knowing the ſame to be ſtolen, he ſhall be taken as acceſſory to ſuch Felony after the Fact, and ſhall ſuffer as an Acceſſory to the Felony after the Felony committed.*

By An. St. 2. ch. 9. *If the Principal be convict of Felony, ſtands mute, or challenges peremptorily above twenty Jurors, the Acceſſory may be proceeded againſt, as if ſuch principal Felon had been attainted, notwithſtanding ſuch Principal be admitted to his Clergy, pardoned, or otherwiſe delivered before Attainder. And ſuch Acceſſory, if he is convicted, or if he ſtands mute, or challenges as aforeſaid, ſhall ſuffer as if the Principal had been attainted.*

Buyers *and* Receivers *of ſtolen Goods knowingly, may be proſecuted for a Miſdemeanor, before the Principal is convicted, which ſhall exempt them from being puniſhed as Acceſſories, when the Principal is convicted.*

By 5 An. ch. 31. *If any Perſon ſhall* receive *or* buy *knowingly any ſtolen Goods, or knowingly harbour or* conceal *Felons, he ſhall be taken as acceſſory to the Felony, and being convict ſhall ſuffer Death as a Felon. And if the Principal cannot be taken, ſo as to be convict, yet the Perſon buying or receiving knowingly may be proſecuted for a Miſdemeanor; which ſhall exempt the Offender from being puniſhed as Acceſſory, if the Principal be afterwards convict.*

[*And by* 29 G. 2. ch. 30. *The Buyer or Receiver of ſtolen Lead, Iron, Copper, Braſs, Bell-Metal, or Solder, may be convicted, although the Prinpal hath not been convicted, and ſhall be tranſported for fourteen Years.*]

See of *Arraignment*, *B.* 4. *ch.* 5. *poſt.*

III. [d] The *Benefit* of the *Clergy* was an ancient Privilege of the Church, where one in Orders claimed to be delivered to his Ordinary, to purge himſelf of a Felony. For the Pope endeavoured to exempt the Clergy from the Juriſdiction of lay Judges in caſe of Life and Member; which the Temporal Courts would not yield to, but only in Part (*viz.*) as to this Privilege in Caſe of Felony. [See *Weſt.* 1 *ch.* 2. *Art. Cler. ch.* 15.] The Controverſy betwixt the Eccleſiaſtical and Temporal Juriſdiction being thus adjuſted, all Perſons that could read were allowed to be Clerks. For heretofore few were bred up to Learning, unleſs thoſe who were deſigned for Orders. But if the Party could not read he was to be hang'd.

Of the Benefit of the Clergy. 4 Black. Com. 358, 406, 422, 4 4. [d] 2 Inſt. 633, 634, 636, 637. See Foſter in the Table title Clergy. Hob. 288. 2 Cro. 143. Kely 99 100, 101, 102.

Men that were *blind*, or *Women* (which by any Diſpenſation could not be admitted to be of the Clergy) *Infidels* and *Hereticks convict*, were not allowed it. But where it was allowable, there were very few Caſes, wherein the Common Law denied it.

This Claim of Clergy might anciently be made upon Arraignment, and before Conviction, or as ſoon as the Priſoner was brought to the Bar. [a] Afterwards it could not be claimed till after Conviction, becauſe it is for the Advantage of the King as to the Forfeiture of the Lands and Goods of the Clerk convict, and for the Advantage of the Clerk himſelf to make his Challenges to the Inqueſt; and perhaps he may

[a] 2 Inſt. 164, 635. Hob. 289, 290. H. P. C. 239. Finch 463.

may be acquitted, and then he will not need this Privilege. See 25 *Ed.* 3. *St.* 3. *ch.* 4.] [b] After Conviction it may be allowed as a Favour, tho' the Party does not claim it; yet others ſay, that the Criminal muſt claim it. When it was allow'd, the Clerk was delivered to the Ordinary, to make his Purgation. This Purgation was to be by his own Oath, aſſirming his Innocency, and the Oaths of twelve Compurgators as to their *Belief* of it, before a Jury of twelve Clerks. If the Clerk fail'd in his Purgation, he was deprived of his Character, whereby he became a meer Layman, or he was to be kept in Priſon 'till a Pardon. If he purged himſelf, he was ſet at Liberty. Sometimes the Delivery to the Ordinary was [c] without Purgation, as upon Attainder by Confeſſion of the Felony, or by Verdict, where the Felony was notorious, and then the Clerk was to be degraded, or kept in Priſon by the Ordinary. [See 23 *H.* 8. *ch.* 1.] tho' the Ordinaries, even in thoſe Caſes, would frequently proceed to Purgation.

[b] 2 Inſt. 634. Hob. 289. 290, 291, 292. S. P. C. 138.

[c] 2 Inſt. 638. 5 Rep. 110. 11 Rep. 30. Hob. 289. Yelv. 38. H. P. C. 240. See B. 4. ch. 5. § 5. poſt.

By 4 H. 7. ch. 13. *A Convict of Felony (not being within* [d] *Orders) ſhall be burn'd in the Brawn of the left Thumb, before he is delivered to the Ordinary.*

Every Perſon (not being within Orders) who hath been once admitted to the Benefit of Clergy, upon the ſecond Arraignment ſhall not be admitted to it. But if one in Orders aſks the Benefit of the Clergy the ſecond Time, he muſt ſhew his Orders, or his Ordinary's Certificate.

[d] 2 Inſt. 637. Hob. 288, 294. H. P. C. 230, 238, 239. Dalt. ch. 190. p. 523.

So that Clergymen may have the Benefit of the Clergy twice, and ſhall not be burnt in the Hand; except they ſhall be outlawed, [or challenge above twenty. *Qu.*] [See 28 *H.* 8. *ch.* 1. and 32 *H.* 8. *ch.* 3. which was repealed in Part by 1 *Ed.* 6. *ch.* 12. § 4. and the above Statute of *H.* 7. thereby became revived.] [e] It was the firſt Statute that was made for Burning in the Hand, yet it did not intend that the Burning ſhould be any Part of the Judgment [*Qu* [f].] but only that the Criminals might be known upon the ſecond Offence. For at the Common Law one might have his Clergy *in Infinitum.*

Hawk P. C. B. 2. p. 340, &c. 2 H. H. P. C. 376, 345, 270.

[e] 3 Inſt. 37. Hob. 294. 5 Rep. 50, 110. H. P. C. 252.

[f] 3 Wms. 452, &c.

By 18 El. ch. 7. *An Offender admitted to his Clergy, after Burning in the Hand, ſhall not be delivered to his Ordinary, but ſhall be enlarged by the Court, or be detained in Priſon at Diſcretion; but not longer than for one Year.* [See 5 *An. ch.* 6. *poſt.*]

So that now Purgation is wholly taken away by this Statute.

If the King pardoneth the Burning of the Hand; * It is within the Act, tho' the Words are *after Clergy and Burning of the Hand*; for the Pardon hath diſcharged the Puniſhment. And if one obtaineth a Pardon before Conviction, he ſhall not forfeit his Goods, nor the Profits of his Lands.

* 5 Rep. 50, 110. 3 Wms. 488.

To go on with the Statute:

One admitted to his Clergy ſhall nevertheleſs anſwer for all other Felonies.

But the [a] Practice is otherwiſe, as to Felonies within the Benefit of the Clergy, and is thought to be according to Law.

[See 8 *El. ch.* 4. As to Felonies not within the Benefit of the Clergy.]

[a] Kely. 41. 42 Contra. 5 Rep. 50. H. P. C. 213. 249.

By 3 W. & M. ch. 9. *If a* Woman *is convicted of an Offence, for which a Man might have the Benefit of his Clergy, ſhe (upon her Prayer to have the Benefit of this Act) ſhall be forthwith burn'd in the Hand, and kept in Priſon not exceeding a Year.* [See 21. *Ja.* 1. *ch.* 6.]

Perſons indicted of any Offence, for which by Virtue of any former Law *they are excluded Clergy, if convict by Verdict or Confeſſion, ſhall not be ad-*

mitted to the Benefit thereof, if they ſtand mute, or will not anſwer directly to the Felony, or ſhall challenge peremptorily above twenty. [See 1 *An. St.* 2. *ch.* 9.]

This Statute extends not to Appeals, nor to Offences made Felonies by ſubſequent Statutes.

Note, That by the *Common Law,* where the Clergy was allowable, it was allowed tho' the Party was convict by Confeſſion or Verdict, or ſtood mute, or challenged above thirty-five, or was outlawed. So that if a Statute takes away the Benefit of the Clergy only upon Conviction by Confeſſion or Verdict, the Benefit of the Clergy remains to one ſtanding mute, *&c.* till that alſo is taken away by Statute, as in the Statute above mentioned.

By 4 & 5 W. & M. ch. 24. *If any* Woman *is convicted of a Felony, and hath once had the Benefit of the Clergy, ſhe ſhall be excluded it upon a Conviction of any other Felony.*

By 5 *An.* ch. 6. *If any Perſon convict of ſuch Felony, for which he ought to have the Benefit of the Clergy, doth pray the Benefit of this Act, he ſhall not be required to read, but ſhall be puniſhed as a Clerk convict. And Perſons burn'd in the Hand for Theft or Larceny, may be ſent by the Judges to a Houſe of Correction or Workhouſe, for not leſs than ſix Months, nor above two Years.*

So that *Reading* at laſt as well as *Purgation* is wholly laid aſide. The actual Burning is now taken for the Benefit of the Clergy, which hath the ſame Effect as Purgation had before.

Note, That a Lord of Parliament ſhall have the Benefit of his Clergy, tho' he cannot read, without Burning; but for the firſt Time only. [See 1 *Ed.* 6. ch. 12.]

By 4 Geo. 1. ch. 11. *Perſons convict of Larceny or any felonious Taking or Stealing, within the Benefit of the Clergy, (except Receivers or Buyers of ſtolen Goods) may be ſent to the Plantations in* America *for ſeven Years, inſtead of being burnt in the Hand.* [See of *Judgment* in *Felony, B.* 4. *ch.* 5. *poſt.*]

RULES *concerning the* Benefit *of the* Clergy.

IN all [a] Felonies (except for robbing Churches) the Offender ſhall have his Clergy, unleſs it is expreſſly taken away by ſome Statute. a 11 Rep. 29. 3 Inſt. 114. H. P. C. 230.

[b] Where any Offence is made Felony by a Statute, the Benefit of the Clergy is to be allowed, tho' the Statute ſays expreſſly, that the Offender ſhall ſuffer Pains of *Death.* For the Benefit of the Clergy is ſuch a Privilege, that no general Words in an Act of Parliament ſhall take it away from the Offender. b 3 Inſt. 39, 73. H. P. C. 230. Kely. 104.

[c] Wherever Clergy is taken away by Statute, the Offence laid in the Indictment muſt be upon that very Statute, otherwiſe the Offender ſhall have his Clergy; as upon 4 & 5 *Ph. & M. ch.* 4. The Indictment muſt be *Malitioſe*; upon 8 *El. ch.* 4. It muſt be *Clam et Secretè*, otherwiſe Clergy allowable. c 11 Rep. 37. H. P. C. 231.

[d] If a Statute takes away Clergy from the Principal, it is not to be taken away from the Acceſſory; unleſs the Acceſſory alſo is particularly included. d H. P. C. 231. 11 Rep 37.

So where a Statute takes away Clergy from Aiders and Abettors, yet Acceſſories ſhall have their Clergy. [*Qu.*] 2 Ld. Raym. 846.

[e] If one hath his Clergy allowed, he may afterwards purchaſe Goods, tho' the Goods which he had at the Time of Conviction were forfeited. And he may retain the Profits of his Lands, that ſhall ariſe afterwards. For by 24 *El. ch.* 7. Allowance of Clergy and [f] Burning is in lieu of Purgation or Pardon, by Virtue of the Words *he ſhall be preſently enlarged and delivered.*

[g] The Benefit of the Clergy, or actual Burning in the Hand, reſtores one to his Credit; becauſe it comes into the Place of Purgation at the Common Law, which ſuppoſeth he might be Not guilty, though it is contrary to the Verdict.

I hinted before, that there were very few Caſes, wherein the Common Law denied the Benefit of the Clergy. [h] It was denied only in High Treaſon againſt the King, Petit Treaſon, and Sacrilege. And as to Sacrilege, the Ordinary might have allowed it if he pleaſed.

By 25 Ed. 3. St. 3. ch. 4. Pro Clero, *Every Clerk convict of any Treaſon or Felony (not touching the King himſelf) ſhall be delivered to the Ordinary.*

So that after this Statute there was Clergy in all Caſes but High Treaſon and Sacrilege. But now this Privilege is taken away by many ſubſequent *Statutes* in ſeveral Offences, which I ſhall ſet down *Alphabetically.*

Acceſſory.	Before the Fact maliciouſly in Petty Treaſon, Murder, Burglary, Robbery in Dwelling-houſes or in or near the Highway, Houſe-burning, or burning of Barns wherein there is Corn or Grain. 4 & 5 *Ph. & M. ch.* 4. [See under the proper Heads, *infra.*]
Armour.	— See *Naval Stores.*
Bail.	To acknowledge, or procure to be acknowledged, (being acceſſory before the Fact) any Fine, Recovery, Deed enroll'd, Statute, Recognizance, *BAIL*, or Judgment in the name of another, not conſenting or privy. 21 *J.* 1. *ch.* 26.
Banks of Rivers,	— See *Sea Banks.*
Bank of England.	[Their Officers or Servants embezzling any Money, Notes, *&c.* 15 *G.* 2. *ch.* 13.]
Bankrupts.	Not ſurrendering themſelves, and ſubmitting to be examined, or concealing to the Value of twenty Pounds. 5 *Geo.* 2. *ch.* 30.
Baſtard Children.	Where the Mother hath conceal'd the Birth, ſo that it doth not appear whether the Child was born alive or dead. 21 *Ja.* 1. *ch.* 27.
Booth.	Taking away the Goods in any Booth or Tent in any Fair or Market. 5 & 6 *Ed.* 6. *ch.* 9.
Buggery.	— 25 *H.* 8 *ch.* 6. and 5 *El. ch.* 17.
Burglary.	1 *Ed.* 6. *ch.* 12. 18 *El. ch.* 7. 12 *An. St.* 1. *ch.* 7. Acceſſories before, 3 *W. & M. ch.* 9.
Burning Houſes or *Barns* with *Corn.*	23 *H.* 8. *ch.* 1. 25 *H.* 8. *ch.* 3. 43 *El. ch.* 13. Acceſſories before, 4 & 5 *Ph & M. ch.* 4. [or without Corn, or Outhouſes, or to ſet fire thereto, or to any Cock, *&c.* of Corn, Hay, Straw, or Wood. 9 *G.* 1. *ch.* 22.]

[e] 5 Rep. 110. H. C. P. 241, Hob. 292, 293. See B. 4. ch. 5. §. 12. poſt.

[f] 3 Wms. 486, &c.

[g] Hob. 294. H. P. C. 241. Kely. 37, 38. 3 Wms. 486, &c. See of Evidence, B. 4. ch. 4. poſt.

[h] 2 Inſt. 150, 634, 635, 636. 11 Rep. 29. H. P. C. 229, 230. 3 Inſt. 114.

Captains.	— See *Mariners.*
Cattle.	[Maliciouſly to kill, wound, or maim any Cattle, by 9 *G.* 1. *ch.* 22.] or to ſteal or kill any Bull, Cow, Ox, Steer, Bullock, Heifer, Calf, Sheep, or Lamb, with Intent to ſteal the Carcaſs or any Part thereof, 14 *G.* 2. *ch.* 6. 15 *Geo.* 2. *ch.* 34.
Challenge of Jurors.	Above twenty, if the Indictment be for ſuch an Offence, for which the Clergy is not allowed, if the Party is convicted by Verdict or Confeſſion. [a] 25 *H.* 8. *ch.* 3. 4 & 5 *Ph.* & *M.* *ch.* 4. 3 *W.* & *M.* *ch.* 9. 1 *An.* *ch.* 9.
Coal.	— [To ſet on fire any Delph of Coal, 10 *G.* 2. *ch.* 32.]
Cuſtoms.	Three or more going arm'd or diſguiſed, in Defiance of the Laws of Cuſtoms or Exciſe. *By* 19 Geo. 2. ch. 34.
Cut-purſe.	— See *Pick-pocket.*
Deeds inroll'd	To acknowledge in the Name of another. See *Bail, ante.*
Deer.	[Being armed and diſguiſed, to hunt, wound, kill, or ſteal; or unlawfully to hunt, wound, &c. in any Park or other incloſed Place. 9. *G.* 1. *ch.* 22.]
Diſguiſe.	[To appear armed and diſguiſed in any Foreſt, Road, or other Place. 9 *G.* 1. *ch.* 22. To join in Riot, or oppoſe Execution of Proceſs in Diſguiſe in the *Mint* in *Southwark.* 9 *G.* 1. *ch.* 28.]
Egyptians.	To remain above a Month in *England* or *Wales.* 1 & 2 *Ph.* & *M.* *ch.* 4 Conſorting with them for a Month. 5 *El.* *ch.* 20.
Exciſe.	— See *Cuſtoms.*
Fines.	— To acknowledge in the Name of another. See *Bail.*
Fiſh and Fiſh Ponds.	[To ſteal Fiſh, being armed and diſguiſed, out of a River or Pond, or to break down the Head of any Fiſh Pond. 9 *G.* 1. *ch.* 22.]
Flood-gates.	— [Maliciouſly to deſtroy. 8 *G.* 2. *ch.* 20.]

[a] Hawk. P. C. B. 2. p. 344.

Forgery.	Of *Deeds*, *Wills*, *Writings*, *Bonds*, *Notes*, *Receipts*, &c. upon ſecond Conviction. 5 *El. ch.* 14. and on the firſt Conviction, by 2 *Geo.* 2. *ch.* 25. and 7 *G.* 2. *ch.* 22. Of *Bank-Notes*, *&c.* 8 *&* 9 *W.* 3. *ch.* 20. § 36. 11 *G.* 1. *ch.* 9. § 6. 15 *G.* 2. *ch.* 13. § 11. Of Exchequer Bills. By 1 *G.* 3. *ch.* 2. and the ſeveral other Acts which direct the iſſuing the ſame. [Of the Hand of the Receiver of the Poſt Fines. 32 *G.* 2. *ch.* 14. § 9.] Of *Stamps*, 9 *&* 10 *W.* 3. *ch.* 25. § 59. 6 *Geo.* 1. *ch.* 21. § 60, *&c.* *South-Sea and Eaſt-India Bonds*, *&c.* 9 *An. ch.* 21. 6 *G.* 1. *ch.* 4. § 56. 6 *G.* 1. *ch.* 11. § 50. 12 *G.* 1. *ch.* 32. § 9. *Lottery-Orders*, *Tickets*, *&c.* By 1 *G.* 3. *ch.* 7. and the ſeveral other Lottery Acts. *Policies of Aſſurance of Ships*, &c. 6 *Geo.* 1. *ch.* 18. § 13. [Marriage Licence or Regiſtry of Marriage, 26 *G.* 2. *ch.* 33 Letter of Attorney to transfer any Stocks, 8 *G.* 1. *ch.* 22. § 1. 9 *G.* 1. *ch.* 12. § 4. Seamen's Wills, Powers, *&c.* 31. *G.* 2. *ch.* 10. 9 *Geo.* 3. *c.* 30. Mediterranean Paſſes, 4 *G.* 2. *ch.* 18. Certificate of the Accountant General in Chancery, 12 *G.* 1. *ch.* 32. § 9.] See of *Forgery*, *ante*. And 9 *An. ch.* 11. & 23. 10 *An. ch.* 19. 5 *Geo.* 1. *ch.* 2. 6 *Geo.* 1. *ch.* 21. § 60. For *Stamps* on Cards, Dice, Linen, Silks, Paper, Leather, *&c.*
Game.	— See *Deer*, *Warren*, and *Fiſh.*
Helping to ſtolen Goods for Reward.	Unleſs he apprehends the Offender, *&c.* In ſome Caſes ouſt of Clergy. 4 *Geo.* 1. *ch.* 11.
Horſe-ſtealing.	*Principals* by 1 *Ed.* 6. *ch.* 12. 2 & 3 *Ed.* 6. *ch.* 33. And Acceſſories before and after, by 31 *El.* *ch.* 12.
Hop-binds.	— [Maliciouſly to cut, 6 *G.* 2. *ch.* 47.]
Houſe-breaking.	In the Day-time, and taking to the Value 5 *s.* 39 *El. ch.* 15. 3 *W.* & *M. ch.* 5. See *Robbery*,
Houſes, &c. demoliſhed by Rioters.	See Rioters.
Jeſuits.	— See *Prieſts.*
Imbezilling.	— See *Naval Stores.*
Inliſting.	[Any Subject, or enticing him to inliſt as a Soldier in any foreign Service, without Licence. 9 *G.* 2. *ch.* 30. 29 *G.* 2. *ch.* 17.]
Judgments.	To acknowledge in the Name of another not Privy. See *Bail.*
Linen.	Stealing any Linen, Fuſtian, or Cotten Goods, to the Value of ten Shillings, laid in any bleaching Ground, *&c.* is Felony without Clergy; but the Judge may order Offender to be tranſported for fourteen Years. 18 *Geo.* 2. *ch.* 27.

Maiming.	Any Perſon maliciouſly, and by lying in Wait, 22 & 23 *Car.* 2. *ch.* 1. Counſellors, Aiders, and Abettors, are alſo Felons without Clergy. *Ibid.*	
Maid.	—See *Woman.*	
Mariners.	Captains and Mariners belonging to Ships and deſtroying the ſame. 1 *An. St.* 2. *ch.* 9. 4 *Geo.* 1. *ch.* 12. and 11 *G.* 1. *ch.* 29. [See *Wreck.*]	
Munition.	—To Embezzle. See *Naval Stores.*	
Murder.	Principals, by 23 *H.* 8. *ch.* 1. 25 *H.* 8. *ch.* 3. 1 *Ed.* 6. *ch.* 12. And Acceſſories before, by 4 & 5 *Ph.* & *M. ch.* 4.	See Hawk. P. C. B. 2. p. 349.
Mute ſtanding, or not anſwering directly.	25 *H.* 8. *ch.* 3. 1 *Ed.* 6. 12. 4 & 5 *Ph.* & *M. ch* 4. 3 *W.* & *M. ch.* 9. 1 *An. ch.* 9.	Hawk. P. C. B. 2. p. 344, &c.
Naval Stores.	To Embezzle to the Value of twenty Shillings. 22 *Car.* 2. *ch.* 5.	
Outlawry.	For an Offence not within the Benefit of the Clergy. 1 *Ed.* 6. *ch.* 12. 4 & 5 *Ph.* & *M. ch.* 4. 8 *El. ch.* 4. 18 *El. ch.* 7. 22 *Car.* 2. *ch.* 5. 3 *W.* & *M. ch.* 9.	
Perjury.	[[a] Taking a falſe Oath to obtain Probate of a Will, or Letters of Adminiſtration to one who has ſerved on board a King's Ship, in order to receive his Wages, &c. 31 *G.* 2. *ch.* 10. By Inſolvent Debtors ſeeking Relief under 1 *G.* 3. *ch.* 17.]	[a] See of Perjury, ch. 3. poſt.
Pick-pocket.	Taking above twelve Pence from the Perſon *Clam et Secretè.* 8 *El. ch.* 4.	
Piracy.	11 & 12 *W.* 3. *ch.* 7. 4 *Geo.* 1. *ch.* 11. 8 *G.* 1. *ch.* 24. 18 *G.* 2. *ch.* 30. and the Acceſſory before and after in ſome Caſes to ſuffer as Principal.	
Plague.	—See *Quarantine.*	
Poiſoning.	—Of Malice prepenſed. 1 *Ed.* 6. *ch.* 12.	
Popiſh Recuſants.	Not departing the Realm within a Time limited, or returning without the King's Licence. 35 *El. ch.* 2.	
Prieſts and Jeſuits.	Thoſe who receive, relieve or maintain them knowingly 27 *El. ch.* 2.	
Private ſtealing.	—See *Pick-pocket.*	
Privy Counſellors.	Thoſe who attempt to kill, or do ſtrike or wound him in the Execution of his Office. 9 *An. ch.* 16.	
Quarantine.	— Not performing. 26 *G.* 2. *ch.* 6.	
Rape.	— 18 *El. ch.* 7.	
Recognizance.	To acknowledge in the Name of another. See *Bail.*	
Recovery.	To acknowledge in the Name of another. See *Bail.*	
Reſcuers.	[Of Murderers, 25 *G.* 2. *ch.* 37. Of Offenders againſt 9 *G.* 1. *ch.* 22. called the *Black Act.* [See *Diſguiſe* and the ſeveral other Heads, *ſupra*] of felonious Offenders againſt the Laws of Cuſtoms or Exciſe, 19 *G.* 2. *ch.* 34.]	

Rioters.

	Rioters.	1 *Geo.* 1. *ch.* 5. [In Diſguiſe in the *Mint* in *Southwark.* 9 *G.* 1. *ch.* 28.]
[a] See Hawk. P. C. B. 2. p. 351.	*Robbery* of Churches, or Sacrilege.	Principals by 23 *H.* 8. *ch.* 1. 25 *H.* 8. *ch.* 3. 1 *Ed.* 6. *ch.* 12. 5 & 6 *Ed.* 6 *ch.* 10. Acceſſories before, by 23 *H.* 8. *ch.* 1. *Qu.*[a]
	Robbery in or near the *Highway.*	Principals by 23 *H.* 8. *ch.* 1. 25 *H.* 8. *ch.* 3. 1 *Ed.* 6. *ch.* 12. And Acceſſories before, by 4 & 5 *Ph.* & *M.* *ch.* 4. [And Robbery of any Perſon generally 3 *W.* & *M.* *ch.* 9.]
	Robbery in *Dwelling-houſes*, *Shops*, *Warehouſes*, *Coach-houſes*, or *Stables.*	Principals by 23 *H.* 8. *ch.* 1. 25 *H.* 8. *ch.* 3. 1 *Ed.* 6. *ch.* 12. 5 & 6. *Ed.* 6. *ch.* 9. 39 *El.* *ch.* 15. 3 *W.* & *M.* *ch.* 9. 10 & 11 *W.* 3. *ch.* 23. 12 *An.* *St.* 1. *ch.* 7. Alſo the Acceſſories, by 23 *H* 8. *ch.* 1. 4 & 5 *Ph.* & *M.* *ch.* 4. 3 *W.* & *M.* *ch.* 9. 10 & 11 *W.* 3. *ch.* 23.
	Sacrilege.	— See *Robbery of Churches.*
	Sea Banks.	[Maliciouſly to deſtroy them, or Banks of Rivers. 6 *G.* 2. *ch.* 47.]
	Sheep-ſtealing.	— 14 *Geo.* 2. *ch.* 6. 15 *Geo.* 2. *ch.* 34.
	Smugglers.	— 18 *Geo.* 2. *ch.* 28. 19 *G.* 2. *ch.* 34.
	Soldiers.	Departing without Licence, 7 *H.* 7. *ch.* 1. 3 *H.* 8. *ch.* 5. 2 *Ed.* 6. *ch.* 2. [For ſeducing Soldiers to depart, See 1 *Geo.* 1. *ch.* 47.] Wandering without Teſtimonial of a Juſtice of the Peace, or with a forged one. 39 *El.* *ch.* 17. [Subjects inliſting or agreeing to inliſt as Soldiers in any foreign Service. 9 *G.* 2. *ch.* 30. 29 *G.* 2. *ch.* 17. See *Inliſting.*
	South-Sea Company.	[Their Officers or Servants embezzling Caſh, Notes, &c. 24 *G.* 2. *ch.* 11.]
	Shooting at.	— Any Perſon maliciouſly. 9 *G.* 1. *ch.* 22.]
	Ships.	— Deſtroying, See *Mariners.*
	Stabbing.	— 1 *Ja.* 1. *ch.* 8.
	Statute.	To acknowledge in the Name of another. See *Bail.*
	Tranſported Felons, &c. Returning within the Time limited, and Perſons reſcuing them when going to be tranſported.	4 *Geo.* 1. *ch.* 11. 6 *Geo.* 1. *ch.* 23. 16 *Geo.* 2. *ch.* 15.
	Theft.	[To the Value of forty Shillings in a Ship or Boat, in a River, or Port, or from any Wharf or Key. 24 *G.* 2. *ch.* 45.]
	Treaſon High.	As to the *Coin*, *Proteſtant Succeſſion*, and *Soldiers.* See the Statutes, *ante.*
See Hawk. P. C B. 2. p. 348.	*Treaſon Petit.*	The Principal, by 23 *H.* 8. *ch.* 1. 25 *H.* 8. *ch.* 3. 5 & 6 *Ed.* 6. *ch.* 10. And Acceſſories before, by 4 & 5 *Ph.* & *M.* *ch.* 4.
	Threatning Letters.	— [To ſend 9 *G.* 1. *ch.* 22. 27 *G.* 2. *ch.* 15.]

Trees.	[Maliciouſly to cut down or deſtroy them, in Avenue, Orchard, Garden, or Plantation. 9 *G.* 1. *ch.* 22.]
Turnpikes.	[Maliciouſly to pull down or deſtroy. 8 *G.* 2. *ch.* 20.]
Warren.	[To rob a Warren, being armed and diſguiſed. 9 *G.* 1. *ch.* 22.]
Woollen Cloth.	Cut or ſtolen from the Tenters in the Night, 22 *Car.* 2. *ch.* 5. [or deſtroyed in the Loom, or in the Rack, *&c.* or to break into a Houſe or Shop with Intent to deſtroy the ſame. 12 *G.* 1. *ch.* 34.]
Wool.	Unlawful Exporters aſſembled to the Number of three or more. 19 *G.* 2. *ch.* 34. [See 4 *G.* 1. *ch.* 11.
Women.	Stolen having Lands or Goods, or being Heirs apparent, contrary to 3 *H.* 7. *ch.* 2. Offenders ſhall not have the Benefit of the Clergy. Nor Acceſſories before the Fact. 39 *El. ch.* 9. Known carnally under ten Years of Age. 18 *El. ch.* 7. Convicted of an Offence that was within Clergy, ſhall be excluded the Benefit of the Clergy upon Conviction of any other Felony. 4 & 5 *W.* & *M. ch.* 24.
Wreck.	Making Holes in any Part of the Ship, or ſtealing any Pump, or Goods, *&c.* from any Ship in diſtreſs. 12 *An. Seſſ.* 2. *ch.* 18. 26 *G.* 2. *ch.* 19.

Thus has the Benefit of the Clergy been taken away by Acts of Parliament in Abridgment of the *Common Law.*

By 3 W. & M. ch. 9. *Perſons indicted for ſtealing any Goods in any* County, *and thereof convicted,* &c. *ſhall not have Clergy, if it appears upon Evidence, that the ſaid Goods were taken in any other County, and they ſhould have loſt the Benefit of the Clergy, if they had been convicted by a Jury in that County.*

A Tranſcript certified by the Clerk of the Crown, Clerk of the Aſſizes, or Clerk of the Peace, of the Tenor of the Indictment, and of the Perſon's having had the Benefit of the Clergy, or of this Act, to the Judges or Juſtices in any other County, ſhall be a ſufficient Proof that ſuch Perſon hath had the Benefit of the Clergy, and of this Act. [See 34 & 35 *H.* 8. *ch.* 14.]

CHAP. III.

Of Crimes not Capital. *And therein,* 1. *Of Offences againſt the Temporal Laws made for the Support of* Religion. 2. *Of Offences immediately againſt his Majeſty's* Crown *and* Dignity. 3. *Of Offences that are hurtful to the King's* People, *or againſt the* Commonwealth *in general, in Reſpect of Publick* Juſtice, *Publick* Peace, *Publick* Trade, *the* Health *and* Eaſe *of the King's People.*

Of Crimes not capital.

CRIMES *not Capital* are thoſe for which (as I ſaid before) the Offender ſhall not ſuffer Death, but only Forfeiture of Lands, or Goods, or Fine, or corporal Puniſhment.

Theſe Offences are againſt the temporal Laws, made for the Support of *Religion*; againſt his Majeſty's *Crown* and *Dignity*; againſt the *Commonwealth* in general, in reſpect of publick *Juſtice*, publick *Peace*, publick *Trade*, the *Health* and *Eaſe* of the King's People. This Diviſion includes the remaining Part of the *Pleas* of the *Crown*, which ſhall be treated of in this Chapter.

Of Offences againſt Religion.

I. Of Offences againſt the Temporal Laws, made for the Support of * *Religion*. Theſe are *Witchcraft*, *Blaſphemy* and *Profaneneſs*, *Drunkenneſs*, *Bawdry*, *Hereſy*, *Simony*, Offences againſt the *eſtabliſh'd Church*.

1. Of *Witchcraft*; [This being in former Times conſidered as an Offence which might be committed, was puniſhable at Common Law, or in the Eccleſiaſtical Courts; and by 1 *Ja.* 1. *ch.* 12. was in ſome Inſtances made Felony. But now by 9 *G.* 2. *ch.* 5. *That Statute is repealed. And it is enacted, That no Proſecution, Suit, or Proceeding, ſhall be commenced or carried on againſt any Perſon for Witchcraft, Sorcery, Inchantment, or Conjuration, or for charging another with any ſuch Offence in any Court whatſoever in* Great Britain.

And for preventing and puniſhing any Pretences to ſuch Arts or Powers; it is enacted, That if any Perſon ſhall pretend to exerciſe any kind of Witchcraft, Sorcery, Inchantment, or Conjuration, or undertake to tell Fortunes, or pretend by crafty Science to diſcover ſtolen Goods, he ſhall ſuffer Impriſonment for a Year, without Bail or Mainprize, and ſtand in the Pillory for an Hour once in every Quarter of the ſaid Year, and if the Court ſhall think fit, ſhall alſo find Sureties for his good Behaviour.

4 Black. Com. 59.

2. Of *Blaſphemy* and *Profaneneſs*.

[a] Lyndwood de Officio Archipr. c. 1. Ignorantia Sacerdo. v. Blaſphemia.

[a] *Blaſphemy* (from Βλάπτειν τὴν φήμην, *Lædere Famam)* is an Injury offered to God, by attributing to him what doth not belong to him, or by

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* *Summa ratio eſt, quæ pro religione facit.* 5 Rep. 14. 10 Rep. 55. 11 Rep. 70. 1 Inſt. 341. a.

denying him what doth belong to him; or by attributing to the Creature, that which is only proper to God.

All Blaſphemy and Profaneneſs are Offences [b] by the *Common Law*, and are puniſhable by Fine and Impriſonment.

[b] 2 Str. 834. 1 Burn. Juſt. 216. 3 Burn. Eccl. Law. 201.

Concerning *Blaſphemy*, as puniſhable by *Statute*.

By 9 & 10 W. 3. ch. 32. *If any Perſon educated in, or having made Profeſſion of the Chriſtian Religion, ſhall be convicted in any of the Courts at* Weſtminſter, *or at the Aſſizes, of denying any one of the Perſons of the Holy Trinity to be God, or of maintaining that there are more Gods than one, or of denying the Truth of the Chriſtian Religion, or the Divine Authority of the Holy Scriptures; he ſhall for the* firſt *Offence be adjudged incapable of any Office; and for the* ſecond *Offence ſhall be diſabled to ſue any Action, or to be Guardian, Executor, or Adminiſtrator, or to take any Legacy, or Deed of Gift, or to bear any Office, civil or military, or Benefice Eccleſiaſtical, for ever, and alſo ſhall ſuffer impriſonment for three Years.*

No Proſecution ſhall be for Words ſpoken, unleſs the Information be given upon Oath before ſome Juſtice of Peace within four Days, and the Proſecution be within three Months after ſuch Information.

Renouncing ſuch erroneous Opinions in open Court upon the firſt Offence, within four Months after Conviction, ſhall diſcharge all Penalties.

[See 13 *El. ch.* 12. 29 *Car.* 2. *ch.* 9. under the Tit. *Hereſy*, *poſt.*]

Concerning *Profaneneſs*.

Profaneneſs (qu. procul à Fano) is a Diſreſpect paid to the *Name* of God, and to *Things* and *Perſons* conſecrated to him. Or a contemptuous treating of any Thing, in which God's *Name* or his *Honour* are concerned.

Profaneneſs is puniſhable by *Statutes*; for reviling the *Sacrament* of the Lord's Supper; Profanely uſing the Name of *God*, &c. in Plays: Profaning the *Lord's Day*; *Curſing* and *Swearing*.

For Reviling the *Sacrament* of the *Lord's Supper*.

By 1 Ed. 6. ch. 1. *and* 1 El. ch. 1. § 14. *To revile the* Sacrament *of the Lord's Supper, is Fine and Impriſonment.*

For profanely uſing the *Name* of *God*, &c.

By 3 Ja. 1. ch. 21. *If any Perſon ſhall in any Stage-Play, Interlude, or Shew, jeſtingly or profanely uſe the* Name *of* God, *or of* Jeſus Chriſt, *or of the* Holy Ghoſt, *or of the* Trinity, *he ſhall forfeit ten Pounds; the one Moiety to the King, the other to him that will ſue for the ſame.*

For profaning the *Lord's Day*.

By 1 Car. 1. ch. 1. *There ſhall be no Aſſembly of People out of their own Pariſhes on the* Lord's Day, *for any Sports whatſoever; nor any Bull-baiting or Bear-baiting, Interludes or common Plays, or other unlawful Exerciſes or Paſtimes, uſed by any Perſons in their own Pariſhes; on Pain that every Offender, upon View of a Juſtice, Confeſſion, or Proof by one Witneſs, ſhall forfeit three Shillings and four Pence to the Uſe of the Poor of the Pariſh where Offence committed.*

3 Burn Eccl. Law Title Lord's Day. 4 Black Com. 63.

By 1 Ja. 1. ch. 21. *A Shoemaker putting Boots or Shoes to ſale on the* Lord's Day, *forfeits three Shillings and four Pence, and the Value.*

By 3 Car. 1. ch. 1. *No Butcher ſhall kill or ſell any Victual upon the* Lord's Day, *in pain of ſix Shillings and eight Pence.* And,

By 29 Car. 2. ch. 7. (This Statute being more full, and the Conviction made more eaſy) *No Perſons whatſoever ſhall exerciſe any worldly Labour, Buſineſs or Work of their ordinary Calling, on the* Lord's Day, † *(except Works of Neceſſity and Charity, and the Dreſſing of Meat in Families, and the Dreſſing and Selling of Meat in Victualling Houſes) but ſhall exerciſe themſelves in Duties of Piety, publickly and privately; on pain of five Shillings, if the Perſon is fourteen Years old. And no Perſon ſhall publickly cry or expoſe to ſale, any Goods whatſoever on this Day, (except Milk, which may be cried and ſold before nine in the Morning, and after four o'Clock in the Afternoon) on pain of Forfeiting the ſame.*

Alſo no Drover, Horſe-Courſer, Waggoner, Butcher, or Higler, or his Servant, ſhall travel, or come to his Inn or Lodging on this Day, on pain of twenty Shillings.

And no Perſon ſhall uſe or travel with any Boat, Lighter, or Barge, on this Day, except upon extraordinary Occaſion, with the Allowance of ſome Juſtice of Peace, on pain of five Shillings.

The Penalties and Forfeitures to go to the Poor of the Pariſh; and the Conviction may be on View of one Juſtice, Confeſſion, or Oath of one Witneſs; and in Default of Diſtreſs, or in caſe of Inability, to pay the Penalty, the Offender ſhall be ſet in the Stocks two Hours, and the Proſecution muſt be within ten Days after the Offence. [But ſee 11 & 12 *W.* 3. *ch.* 21. For the Allowance of forty *Watermen* to ply on the *Thames, &c.* 9 *An. ch.* 23. For the Allowance of *Hackney-Coachmen* and *Chairmen* to ply on *Sundays* within the Bills of Mortality.]

See ante. *If any Perſon travelling on the* Lord's Day *is* robbed, *the Hundred ſhall not be charged.*

No Perſon on the Lord's Day *ſhall ſerve any Writ, Proceſs, Warrant,* (*Eſcape Warrants may be executed on* Sunday, *by* 5 An. ch. 9.) *Order, Judgment, or Decree, except in Caſes of Treaſon, Felony, or Breach of the Peace. The Service of all ſuch Proceſſes ſhall be void; and the Perſon ſerving the ſame, ſhall anſwer Damages as if he had done the ſame without Warrant.*

4 Black. Com. 59. 4 Burn. Juſt. 257. 3 Burn Eccl. Law, 360.

For *Curſing* and *Swearing*.

By 22 G. 2. ch. 33. *All Perſons in the King's Pay at Sea ſhall be puniſhed for profane* Oaths *or* Curſes, *as a Court Martial ſhall think fit.*

By 19 Geo. 2. ch. 21. *Every Perſon convicted by Confeſſion, or by the Oath of one Witneſs, before any one Juſtice of the Peace, of profanely Curſing or Swearing ſhall forfeit, if a Day-Labourer, common Soldier, or common Sailor, one Shilling. Every other Perſon, under the Degree of a Gentleman, two Shillings. Every Perſon of or above the Degree of a Gentleman, five Shillings. For a ſecond Offence, after Conviction, double, and every other Offence, after a ſecond Conviction, treble.*

Any Perſon profanely Curſing or Swearing, in the Hearing of a Juſtice of Peace, may be convicted by him without further Proof.

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† Baking Puddings, Pies, and ſuch Things for Dinner on a Sunday by a Baker in the way of his Trade, is not an Offence meant by 29 *Car.* 2. *ch.* 7.: But is within the Equity of the Proviſo in the 3d Section of it, as a Cook's Shop; and within the Exception of Works of Neceſſity and Charity. 2 *Burr.* 787, 788.

A Conſtable ſhall apprehend every Perſon (if unknown to him) who ſhall curſe or ſwear in his Hearing, and carry him before a Juſtice of Peace; if the Party be known to the Conſtable, he is ſpeedily to make Information before a Juſtice of Peace.

Offender, on Default of Paying the Penalty, is to be committed to the Houſe of Correction, and kept to hard Labour for ten Days; if a common Soldier or common Sailor, he is to be ſet in the Stocks.

Juſtices not doing their Duty forfeit five Pounds.

Conſtables not doing their Duty forfeit forty Shillings.

Convictions not removeable by Certiorari, *but to be final.*

Penalties to go to the Poor. Charges of the Conviction to be paid by the Offender, or he to be committed to the Houſe of Correction for ſix Days extraordinary.

Proſecution to be within eight Days after the Offence.

This Act to be read by the Miniſter in all Churches and Chapels after Morning or Evening Prayer, on the Sundays *after* March 25. June 24. September 29. *and* December 25. *in every Year, on pain of five Pounds.*

3. Concerning *Drunkenneſs.*

By 4 Ja. 1. ch. 5. *If any Perſon ſhall be* drunk, *and convicted thereof, he ſhall forfeit for every Offence five Shillings, to be paid within one Week after Conviction, to the Churchwardens, for the Uſe of the Poor of the Pariſh: Upon Refuſal or Neglect to pay the Forfeiture, it is to be levied by Warrant from the ſame Court, before whom the Conviction ſhall be. If the Offender is not able to pay, he ſhall be committed to the Stocks by the Space of ſix Hours.*

4 Black.Com. 25, 64
1 Burn Juſt.
3 Juſt. 39 to 51.
2 Burn Eccl. Law, 19

One convicted a ſecond Time of Drunkenneſs, ſhall be bound in ten Pounds, with two Sureties, to the good Behaviour.

Conſtables, Churchwardens, &c. *ſhall be charged on their Oaths, to preſent the ſaid Offences.*

This Offence ſhall be inquired of, heard, and determined, at the Aſſizes, Quarter-Seſſions, and in Leets, but it muſt be within ſix Months after Offence.

This Act ſhall not reſtrain Eccleſiaſtical Juriſdiction, nor the two Univerſities.

By 21 Ja. 1. ch. 7. *One Witneſs, or the Party's own Confeſſion, ſhall be ſufficient Proof of the Breach of* 4 Ja. 1. ch. 5. *and the Oath of the Party that made the voluntary Confeſſion againſt himſelf, ſhall be ſufficient to convict any other. And any Juſtice of Peace, within his Limits, hath Power upon his own View, Confeſſion of the Party, or Proof of one Witneſs upon Oath before him, to convict a Drunkard, as well for the Penalty of five Shillings, as for the Binding of him to the good Behaviour, according to* 4 Ja. 1. ch. 5.

[See 5 & 6 *Ed.* 6. *ch.* 25. 3 *Car.* 1. *ch.* 3. 2 *G.* 2. *ch.* 28. and 26 *G.* 2. *ch.* 31. *Concerning the* Licenſing *of* Alehouſes, *and Puniſhment of thoſe that keep Alehouſes without Licence.*]

See 1 *Ja.* 1. *ch.* 9. 21 *Ja.* 1. *ch.* 7. 1 *Car.* 1. *ch.* 4. Concerning the Puniſhment of Alehouſe-keepers, Inn-keepers, Vintners, or Victuallers, that ſuffer any of the ſame Pariſh, or *any Perſon whatſoever,* to ſit tippling in their Houſes. And for the Puniſhment of thoſe that do ſit tippling at ſuch Houſes. [And ſee Offences againſt the *Health* and *Eaſe* of the People, *poſt.*]

By 21 Ja. 1. ch. 7. *An Alehouſe-keeper offending againſt* 1 Ja. 1. ch. 9. *or* 4 Ja. 1. ch. 5. *is diſabled to keep an Alehouſe within three Years after.*

By 22 G. 2. ch. 33. *All Perſons in his Majeſty's Pay at Sea ſhall be puniſhed for* Drunkenneſs, *as the Court Martial ſhall think fit.*

Note, That Profanation of the *Lord's Day, Swearing, Curſing,* and *Drunkenneſs,* and other lewd and diſorderly Practices, are uſually puniſhed by a Juſtice of the Peace. But they may be preſented in the Seſſions.

4 Black. Com. 29, 64, 167. 3 Burn Juſt. 95. 2 Burn Eccl. Law, tit. Lewdneſs. a 3 Inſt. 205. 1 Salk. 382. 2 Ld. Ray. 1197. S. C. b Dalt. ch. 124. p. 292, 293. c Poph. 208.

4. Concerning *Bawdry.*

[a] Though Adultery and Fornication are puniſhable by the Eccleſiaſtical Law, yet the keeping of a Houſe of Bawdry, Stews, or Brothel-houſe, being as it were a common Nuſance, is puniſhable by the Common Law upon an Indictment, by Fine and Impriſonment.

And thoſe, that are vehemently ſuſpected of reſorting to Houſes of Bawdry, may be bound to their [b] good Behaviour, as well as common Whoremongers and common Whores. For Adultery and Fornication are Offences temporal as well as ſpiritual, being Offences prejudicial to Mens Bodies and Eſtates, as well as to their Souls, and highly deſtructive of the publick Government. [c] But if one is indicted for frequenting a Bawdy-houſe, or for inticing an Apprentice to a Bawdy-houſe, and cauſing him to ſpend his Maſter's Money, it muſt appear, that he did know it to be ſuch a Houſe, and it muſt be expreſſly alledged, that it is a Bawdy-houſe, and not that it is ſuſpected to be ſuch a Houſe.

d 3 Inſt. 206.

[d] By the *Cuſtom* of *London* a Conſtable may enter a Houſe, and arreſt a common Strumpet, and carry her to Priſon; and by the *Cuſtom* alſo, ſhe may be carted.

e 1 Sid. 168.

[e] All open Lewdneſs, as was that of a Perſon, who expoſed himſelf naked to the People from a Balcony in *Covent-Garden,* &c. is indictable at Common Law. One was fined for this Offence 2000 Marks, committed for a Week without Bail, and to be of the good Behaviour for three Years.

[See, for puniſhing Perſons keeping diſorderly Houſes, 25 *Geo.* 2. *ch.* 36.]

4 Black. Com. 44. 2 Burn Eccl. Law, 258, to 260. a 3 Inſt. 40. H. P. C. 3, 4.

5. Of *Hereſy.*

Hereſy Αἵρεσις, *Optio* or *Electio*) is an Opinion repugnant to the Doctrine of the Chriſtian Faith, obſtinately maintained and perſiſted in, by ſuch as profeſs the Name of Chriſt. There is no expreſs Statute, that does determine what ſhall be called Hereſy. [a] Yet becauſe 1 *El. ch.* 1. directed the *High Commiſſion* Court (which is now aboliſhed) to reſtrain it, to what hath been adjudged ſo by the Authority of the canonical Scriptures, or by one of the firſt four general Councils, or by any other general Council, wherein the ſame was declared Hereſy by expreſs Words of Scripture, or as ſhall hereafter be determined to be Hereſy by Parliament, with the Aſſent of the Convocation, this may ſerve for a Direction to other Judges; but it is not obligatory.

b 3 Inſt. 39, 40. 12 Rep. 56, 57. H. P. C. 4 5. Finch, ch. 25. p. 219. 1 Salk. 135.

[b] The *temporal Judge* cannot have Cognizance of any Perſon for Hereſy by Indictment or otherwiſe. Some ſay poſitively, that an Heretick may be convicted before an Archbiſhop and Biſhops and the Clergy at a general Synod or Convocation. (*Qu.*) But it is allowed, that they may declare what Opinions are heretical. And that the Archbiſhop or the

Biſhop of every Dioceſs may convict any for Hereſy. This is by the *Common Law*. And,

By 23 H. 8. ch. 9. *Every Archbiſhop may* cite *any Perſon dwelling in any Biſhop's Dioceſs within his Province for* Hereſy, *if the Biſhop or other immediate Ordinary conſents; or if that ſame Biſhop, or other immediate Ordinary, or Judge do not his Duty, in puniſhing the ſame.*

But yet the *temporal Courts* may *incidently* adjudge, whether any Tenet be Hereſy or not; [c] as in a *Quare Impedit*, if a Biſhop pleads that he refuſed the Clerk for Hereſy, he muſt ſet forth the particular Hereſy, that the temporal Court may judge of it, after a Conſultation with Divines. Upon this Account I thought it not improper, to mention this Offence.

By 13 El. ch. 12. *If any Perſon Eccleſiaſtical, or which hath an Eccleſiaſtical Living, ſhall adviſedly maintain any Doctrine, directly contrary or repugnant to any of the thirty-nine* Articles *of* Religion, *and being convened before the Biſhop or Ordinary, ſhall perſiſt therein, or after Revocation thereof ſhall again affirm the ſame, it ſhall be lawful for the Biſhop or Ordinary, to* deprive *him.*

The Puniſhment for Hereſy was [d] Burning by Force of the Writ *De Hæretico Comburendo*, grantable out of *CHANCERY*, upon Certificate of ſuch Conviction. But,

By 29 Car. 2. ch. 9. *The Writ* De Hæretico Comburendo, *with all Proceedings thereon, and all Puniſhments by Death in purſuance of any Eccleſiaſtical Cenſures, are utterly aboliſhed.*

Yet by the Canon Law an obſtinate Heretick may be excommunicated; and is ſtill liable to be impriſoned upon the Writ *de Excommunicato Capiendo*, 'till he makes Satisfaction to the Church. [See 9 & 10 *W.* 3. *ch.* 32. *ſupra*, Tit. *Blaſphemy.*]

6. *Simony* is a Promiſe, or actual Payment, or receiving of ſome temporal Thing for that which is ſpiritual, or annexed to a Thing that is ſpiritual. Thus it is defined by the *Canoniſts*; but by our *Statute* Law it is thus deſcribed and puniſhed. For,

1 Black.Com. 389, 393. 2 Black.Com. 278. 4 Black.Com. 62. 3 Burn Eccl. 324, to 338.

By 31 El. ch. 6. *If any Perſon, or Body Politick or Corporate, for any Reward, or for any Promiſe or Aſſurance thereof, directly or indirectly, do* preſent *or* collate *any Perſon to a Benefice, Dignity, or Living Eccleſiaſtical; every ſuch Preſentation,* &c. *and every Admiſſion thereunto, ſhall be void, and the King ſhall preſent or collate for that Turn. And every Perſon that ſhall give or take ſuch Reward, or take or make ſuch Promiſe or Aſſurance, ſhall forfeit the double Value of one Year's Profit of ſuch Benefice or Dignity; and the Perſons ſo corruptly taking ſuch Benefice or Dignity, ſhall be incapable to enjoy the ſame.*

Note, [a] That the Statute doth not make the Promiſe or Aſſurance void, but the Preſentment, *&c.* And that if an Uſurper preſents or collates for Reward, *&c.* the King ſhall not preſent, but the rightful Patron. If the Patron only is corrupt, and the Preſentee not privy or conſenting, he is not *incapable* of the ſame Living, though the Preſentation and Benefice is void; for the Perſon *ſo corruptly taking* is only diſabled.

The double Value ſhall be reckoned according to the true Value, and not according to the King's Books.

There is more in this Statute concerning corrupt *Ordaining* or Making of a Miniſter, corrupt *Inſtitution* and *Induction*, corrupt *Reſignations* or *Exchanges* of Benefices, and corrupt *Elections* or *Reſignations* of Scholars, Fellows, *&c.* in any Church Collegiate or Cathedral, College, School,

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[c] 5 Rep. 58.

[d] F. N. B. 269. 3 Inſt. 432. H. P. C. 5.

[a] 3 Inſt. 153, 154.

Hoſpital, Hall, or other Society; but I have taken Notice of theſe Clauſes in other Places[b]; though Sir *Edward Coke* comments upon all theſe Clauſes in his Chapter *Of Simony and corrupt Preſentations*, 3 *Inſt.* 153.

[b] See ante.

4. Offences againſt the *eſtabliſhed Church* are by not uſing the publick *Liturgy*, or by *ridiculing* it, by not receiving the *Sacrament*, by *Abſence* or *Non-conformity* to the eſtabliſhed *Church*.

4 Black. Com. 50. 3 Burn. Eccl. Law, 234, to 238.

1. By *not uſing* the publick *Liturgy*, or by *ridiculing* it.

By 1 El. ch. 2. *If any Parſon or other Miniſter whatſoever, that ought to ſay the* Common Prayer, *or to miniſter the Sacrament, ſhall refuſe to do the ſame in ſuch Church, or other Place, where he ſhould uſe the ſame, or (wilfully or obſtinately ſtanding in the ſame) ſhall uſe any other Form, or ſpeak any Thing in Derogation of the ſaid Book, or any Thing therein contained; he ſhall forfeit for his firſt Offence one Year's Profit of all his Spiritual Promotions, and be ſix Months impriſoned; and for the ſecond Offence ſhall be deprived of all his Spiritual Promotions, and impriſoned for a Year; and for the third Offence ſhall be deprived and impriſoned for Life, and if he has no Spiritual Promotion, he ſhall for the firſt Offence be impriſoned for a Year, and for the ſecond Offence during Life.*

The Juriſdiction of the Eccleſiaſtical Court is ſaved.

If any Perſon ſhall in Plays, Songs, or other open Words, ſpeak any Thing in Derogation of the ſaid Book, or by open Fact or Threatnings compel or procure any Miniſter to ſay any Common Prayer openly, or to adminiſter any Sacrament in other Form, or ſhall interrupt or let any Miniſter to ſay the Common Prayer, he ſhall forfeit an hundred Marks for the firſt Offence, and four hundred for the ſecond (which, if he pay not in ſix Weeks after Conviction, he ſhall ſuffer ſix Months Impriſonment for the firſt Offence, and twelve Months for the ſecond,) and for the third Offence he ſhall forfeit Goods and Chattels, and ſuffer Impriſonment for Life.

The Offender muſt be indicted at the next Aſſizes after the Offence.

2 Burn Eccl. Law, title Lord'sSupper. 2 Ld. Ray. 1354. 1 Str. 585. S. C.

2. By not *receiving* the *Sacrament* of the Lord's Supper.

By 13 Car. 2. St. 2. ch. 1. § 10 & 12. *No Perſon ſhall be choſen to any Office of Magiſtracy, Place of Truſt, or other Employment, relating to the Government of any City, Corporation, Borough, Cinque Port, or Port Town, who ſhall not have received the* Sacrament *of the Lord's Supper, according to the Rites of the Church of* England, *within one Year next before his Election. In Default thereof, every ſuch Election or Place ſhall be void. Moreover, upon the like Penalty every Perſon ſo elected and placed ſhall take the Oaths of Allegiance and Supremacy at the ſame time, to be adminiſtred by the ſame Perſon, when the Oath for the due Execution of the ſaid Office ſhall be adminiſtred.* [See 5 *Geo.* 1. *ch.* 6. For the Repeal of the other *Oath* and the *Declaration*; and that the Proſecution or Removal for not having taken the Sacrament muſt be within ſix Months after the Election, and Proſecution carried on without wilful Delay.]

By 25 Car. 2. ch. 2. *All Officers civil and military (except thoſe that have Offices of Inheritance, where ſufficient Deputies are appointed) and all who have any Salary or Wages, by Reaſon of any Grant from the King (except ſuch as ſhall be granted for valuable Conſideration for Life or Years, and relate not to any Office or Place of Truſt) or have any Employment in the King's Houſhold, ſhall take the Oaths of Allegiance and Supremacy and*

Teſt *or Declaration* in the ſaid Act mentioned, *the next Term after their Admittance, in the* King's Bench, *or* Chancery, *or at the next* Quarter-Seſſions; *and all and every Perſon, ſo to be admitted, ſhall alſo receive the* Sacrament *of the Lord's Supper, according to the Uſage of the Church of* England, *within three Months after his Admittance, in ſome publick Church upon the Lord's Day immediately after Divine Service and Sermon; and in the Court where he ſhall take the ſaid Oaths he ſhall deliver a* Certificate *of his receiving the ſaid Sacrament, under the Hand of the Miniſter, and Churchwarden, and make Proof thereof by two credible Witneſſes, upon Penalty of being* ipſo Facto *adjudged incapable to have the ſaid Office, and every ſuch Place ſhall be void; and if he ſhall execute his Office after the ſaid Times are expired, and neglect or refuſe to qualify as aforeſaid, he ſhall, upon Conviction, be diſabled to ſue, or to be Guardian, Executor, or Adminiſtrator, or to take any Legacy or Deed of Gift, or to bear any Office, and ſhall forfeit* 500 l. *except Feme Coverts, Infants under the Age of eighteen Years, Perſons of* Non ſane *Memory, or on the Seas, or beyond Sea, qualifying within four Months after Diſability removed, or Return (within ſix Months after Return, by* 9 Geo. 2. ch. 26.*) and except High Conſtables, Petty Conſtables, Churchwardens, Overſeers of the Poor, and other like inferior civil Officers, and Keepers of Parks, and other like private Officers.* [But ſee as to the Form of the *Oaths* and the Time of taking them, 1 *Geo.* 1. *St.* 2. *ch.* 13. and 9 *Geo.* 2. *ch.* 26. *& ante.*]

It is made a Queſtion, whether a Parochial Miniſter may refuſe to adminiſter the Sacrament to one that comes to be qualified for an Office, though an ill Liver, Heretick, Schiſmatick, *&c.* But by 1 *Ed.* 6. *ch.* 1. and the *Rubrick* before the Communion-Service in our *Liturgy*, an abſolute Right of Admiſſion to the Sacrament ſeems to be denied to ſuch Perſons; and that an Action of the Caſe will not lie againſt the Miniſter, who refuſes upon good Cauſe, when he has inquired into the Fitneſs of the Perſon, and finds that he comes only to ſerve a Turn. [See 1 *W. & M. St.* 1. *ch.* 18.]

Qu. [a] Whether the Places of thoſe that have Juriſdiction being void, the Acts of one under ſuch Diſability, while he was in the Office may be valid? Many innocent Perſons might ſuffer if they were not valid. Therefore by Reaſon of the Inconveniencies that would follow, the Rule, *Quod fieri non Debuit, Factum Valet,* may here take Place. [But there is commonly an indemnifying Act or Clauſe for Perſons having omitted to qualify themſelves (if their Place is not filled up) provided they qualify by a particular limited Time, paſſed every Year or two. And ſee 1 *Ed.* 6. *ch.* 1. § 7. and alſo 5 *Geo.* 1. *ch.* 6. For quieting Corporations.]

a 2 Lev. 184, 242. Hawk. P. C. B. 1. ch. 10.

3. By *Abſence* or *Non-conformity* to the *eſtabliſhed Church.*

4 Black Com. 51. 425. See 2 Burn. Eccl. law. tit. Diſſenters. per tot.

By 1 El. ch. 2. *Every Perſon, having no lawful or reaſonable Excuſe to be abſent, ſhall reſort to his Pariſh-Church or Chapel upon every* Sunday *and* Holiday, *or upon a reaſonable Let thereof, to ſome uſual Place where the Common Prayer ſhall be uſed, and then and there abide orderly and ſoberly, during the Time of Common Prayer, Preaching, or other Service, upon Pain of Puniſhment by the Cenſures of the Church, and upon Forfeiture of Twelve-pence for every ſuch Offence, to be levied by the Churchwardens for the Uſe of the Poor by Diſtreſs.* [See 3 *Ja.* 1. *ch.* 4. § 27.]

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[a] *Quod fieri non debet, factum valet.* 5 Rep. 38.

Hawk. P. C. B. 1. p. 12. &c.

Here are three three Offences in this Clauſe, 1. Abſenting from Church. 2. Not abiding there till Divine Service and Sermon are ended. 3. Not behaving themſelves orderly and ſoberly while there.

[b] Dalt. ch. 81. p. 183, 184.

[b] He that miſſes either Morning or Evening Prayer is within the Statute; for it ought to be an entire Day and entire Service.

By 23 El. ch. 1. *Every Perſon, above the Age of ſixteen Years, not repairing to Church, according to* 1 El. ch. 2. *ſhall forfeit* 20 l. *upon Conviction, to the King, for every Month they ſo make Default.*

[c] 11 Rep. 63.

[c] This Act is conſiſtent with 1 *El. ch.* 2. and the Forfeiture of Twelvepence and twenty Pounds may ſtand together; for the Twelve-pence is immediately forfeited upon the Abſence of each particular Day.

See ante. 12 Rep. 42.

The Month ſhall be computed, not by the Callendar, but by twenty-eight Days [d]; for the Statute ſpeaks generally of a Month. See 29 *El. ch.* 6. § 4. 3 *Ja.* 1. *ch.* 4. Concerning the Forfeiture of twenty Pounds for every Month after ſuch Conviction, until he ſhall conform and come to Church. Where if the Offender makes Default of Payment, the King ſhall ſeize and enjoy his Goods, and two third Parts of his Hereditaments, Leaſes and Farms, *&c.* But by 3 *Ja.* 1. *ch.* 4. The King may refuſe the Penalty of twenty Pounds a Month tho' it be tendered, and ſeize two third Parts of the Offender's Lands.

Copyhold Lands are not within 29 *El.* nor 3 *Ja.* 1. becauſe it would be prejudicial to the Lord in reſpect of his Services, *&c.*

By 3 Ja. 1. ch. 4. *He that ſhall retain in his Service, or keep in his Houſe, any Servant, Sojourner, or Stranger, (except his Father, Mother, Ward, or Perſon committed to him by Authority) who ſhall not go to ſome Church, but ſhall forbear for a Month together, not having ſome reaſonable Excuſe, ſhall for every Month, that he ſhall keep ſuch Perſon, forfeit ten Pounds.*

The Statutes concerning *Popiſh Recuſants,* ſhewing what *Forfeitures, Diſabilities, and Inconveniencies* they are liable to above all others, are 23 *El. ch.* 1. 35 *El. ch.* 2. 1 *Ja.* 1. *ch.* 4. 3 *Ja.* 1. *ch.* 4. *&* 5. 7 *Ja.* 1. *ch.* 6. 3 *Car.* 1. *ch.* 2. 25 *Car.* 2. *ch.* 2. 30 *Car.* 2. *St.* 2. *ch.* 1. 1 *W. & M. ch.* 9, 15. and 26. 11 *&* 12 *W.* 3. *ch.* 4. 12 *An. ch.* 14. 1 *Geo.* 1. *St.* 2. *ch.* 13. and 55. 3 *Geo.* 1. *ch.* 18. And the Statutes ſhewing by what means they may be *diſcharged* from the Forfeitures, are 23 *El. ch.* 1. 29 *El. ch.* 6. 1 *Ja.* 1. *ch.* 4. 1 *W. & M. ch.* 18 3. *Geo.* 2. *ch.* 29. 6 *Geo.* 2. *ch.* 5. 11 *G.* 2. *ch.* 17. and the other Acts or Clauſes of Indemnity, which are now uſually paſſed every Year or two. See *Nelſon*'s Office of *J. P.* Title *Recuſancy, Burn's Juſtice,* Title *Popery, Hawkins's Pleas of the Crown, B.* 1. *ch.* 12, 13, 14, 15. *and* of *Præmunire, poſt.*]

But as to *PROTESTANT DISSENTERS* from the eſtabliſhed Church, 1 *W. & M. ch.* 18. hath repealed 23 *El. ch.* 1. 29 *El. ch.* 6. and that Clauſe of 1 *El. ch.* 2. whereby all Perſons are required to reſort to their Pariſh-Church, or ſome uſual Place of Common Prayer, *&c.* and alſo 3 *Ja.* 1. *ch.* 4 *&* 5. and all other Statutes made againſt Papiſts (except 25 *Car.* 2. *ch.* 2. 30 *Car.* 2. *St.* 2.)

This Act is commonly called the *Act* of *Toleration,* and is to this Effect. *(viz.)*

That neither the Acts of 23 *&* 29 El. *nor the Clauſe in* 1 El. *whereby all Perſons are required to reſort to their Pariſh-Church,* &c. *nor* 3 Ja. 1. ch. 4. *&* 5. *nor any Statutes made againſt* Papiſts *or Popiſh Recuſants, (except* 25 Car. 2. ch. 2. *and* 30 Car. 2. St. 2. ch. 1.) *ſhall be conſtrued to extend to any Perſon diſſenting from the Church of* England, *that ſhall take*

take the Oaths *of Allegiance and Supremacy, See* 1 W. & M. Seſſ. 1. ch. 1. & 8. *and* 1 Geo. 1. ch. 13.] *and make and ſubſcribe the* Declaration *mentioned in* 30 Car. 2. St. 2. ch. 1. *at the Quarter-Seſſions.*

Provided, That if any Aſſembly of Proteſtant Diſſenters ſhall be had in any Place for Religious Worſhip, or any Preaching be there, with the Doors locked, barred, or bolted, they ſhall have no Benefit of this Law. Nor if the Place of Meeting is not certified to the Biſhop or Archdeacon, or to the Juſtices of Peace in Seſſions.

Diſſenting Teachers, *that ſhall make and ſubſcribe the Declaration, and take the Oaths aforeſaid at the Quarter Seſſions, and ſubſcribe the* Articles *of* Religion, *except the* 34*th*, 35*th*, *and* 36*th*, *Articles, and Part of the* 20*th*, *ſhall not be liable to any Penalties mentioned in* 17 Car. 2. ch. 2. 22 Car. 2. ch. 1. *nor* 13 & 14 Car. 2. ch. 4.

Anabaptiſt Teachers *muſt ſubſcribe the Articles of Religion, except as before excepted, and alſo except Part of the 27th Article touching Infant Baptiſm.*

Quakers *that ſcruple the taking any Oath muſt make and ſubſcribe the* Declaration *aforeſaid, and the Declaration of* Fidelity, *and the* Form *of* Profeſſion *of the Chriſtian Faith,* in the Statute ſet forth. [See 8 *G.* 1 *ch.* 6.]

All the Laws made for frequenting Divine Service on the Lord's Day, ſhall be ſtill in Force againſt all Perſons, except they come *to ſome Aſſembly of* Religious Worſhip *allowed by this Act, and againſt all* Papiſts, *and againſt thoſe that in Preaching or Writing deny the* Trinity.

By 10 An. ch. 2. *If any Diſſenter (not being in Orders, or pretended Orders, nor Preacher or Teacher) who, if he had qualified himſelf, would have been intitled to the Benefit of the* Toleration Act, *is proſecuted on any penal Statute from which Diſſenters are exempted by that Act; if at any Time during ſuch Proſecution he makes and ſubſcribes the ſaid Oaths and Declaration, or being a* Quaker, *makes the Declaration,* &c. *as directed by that Act, or before two Juſtices, he ſhall have the full Benefit of that Act, as if he had qualified within the Time preſcribed, and ſhall be diſcharged of all Penalties incurred by Force of any ſuch penal Statutes. And any Preacher or Teacher, if he be once duly qualified, may officiate in any Congregation in another* County, *ſo as the Place be* certified, &c. *But,* if required, *he muſt produce a Certificate of his having qualified, and alſo make and take the Declaration amd Oaths before one Juſtice of the County or Place where he officiates.*

By 5 Geo. 1. ch. 4. *Magiſtrates muſt not be preſent at any Diſſenting Meeting in their peculiar* Habits, *or attended with their* Enſigns *belonging to their Offices, on Pain of Diſability to hold the ſame or any other Office.*

By 23 El. ch. 1. § 6. *No Corporation, or other Perſon, ſhall keep or maintain a* Schoolmaſter, *which does not conſtantly repair to Church, or is not allowed by the Ordinary; in pain of* 10 l. a *Month; and ſuch Schoolmaſter ſhall be diſabled for ever to teach Youth, and ſuffer a Year's Impriſonment.*

By 1 Ja. 1. ch. 4. § 9. *No Perſon ſhall keep any School, or be a* Schoolmaſter *in any Place out of the Univerſities, except it be in ſome publick or free Grammar School, or ſome Nobleman or Gentleman's Houſe that is no Recuſant, or except the Perſon be ſpecially licenſed thereto by the Ordinary, on Pain, that as well the Schoolmaſter, as the Party that retains him, ſhall each of them for every Day forfeit forty Shillings.*

By 13 & 14 Car. 2. ch. 4. § 11. *Every* Schoolmaſter *keeping any publick or private School, and every Tutor in any private Family, ſhall ſub-*

ſcribe the Declaration, That he will conform to the Liturgy of the Church of *England*, as it is by Law eſtabliſhed; *and unleſs he be licenſed by the Ordinary, and hath ſubſcribed the ſaid Declaration, he ſhall for the firſt Offence ſuffer three Months Impriſonment, and for the ſecond ſuffer the like Impriſonment, and forfeit five Pounds.* [*See* Can. 77, 79.]

By 11 & 12 W. 3. ch. 4. § 3. *If any* Papiſt *ſhall be convicted of keeping* School, *or of taking upon himſelf the Education, or Government, or boarding of Youth, he ſhall be adjudged to perpetual Impriſonment.*

If any Popiſh Parent, *in order to compel a Proteſtant Child to change his Religion, ſhall refuſe to allow ſuch Child a ſufficient Maintenance, the Lord Chancellor upon Complaint may make Order therein.* [*See* 1 *An. St.* 1. *ch.* 30. Concerning *Jewiſh* Parents refuſing Maintenance to a Proteſtant Child, *&c.*]

By 12 W. 3. ch. 2. *Whoſoever ſhall come to the Crown of* England *ſhall join in Communion with the Church of* England.

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Of Offences immediately againſt his Majeſty's Crown and Dignity.

II. Offences immediately *againſt his Majeſty's Crown and Dignity* (that are *Not capital*) are *Miſpriſion* and *Præmunire*.

[a] 3 Inſt. 36. Dalt. ch. 141. p. 334, 335. [b] 2 Inſt. 173. 3 Inſt. 36, 140. H. P. C. 127, 128.

I. [a] *Miſpriſion* (from *Meſpris*, Neglect or Contempt) ſignifies in our Law a Neglect, overſight, or Contempt. [b] Miſpriſion is included in every Treaſon or Felony; and where any one hath committed Treaſon or Felony, the King may order, that he ſhall be indicted for Miſpriſion only. But in legal Underſtanding Miſpriſion is, when one knoweth of any Treaſon or Felony, and concealeth it. In a larger Senſe, it is taken for many great Offences, which are neither Treaſon nor Felony, or that are Not capital, but come very near to it.

A Miſpriſion may be either by *Omiſſion* or *Commiſſion*.

4 Black. Com. 119, 120, 121. 2 Burn. Juſt. 172. 4 Burn. Juſt. 294. [c] 3 Inſt. 138, 140. H. P. C. 127. Kely. 17, 21, 22. See ante.

1. By *Omiſſion*, in the Caſe of *Treaſon* or *Felony*. In the Caſe of *Treaſon*, when one doth know that another hath committed any Sort of Treaſon, and doth not reveal it to the King, or his Privy Council, or to ſome Magiſtrate, That the Offender may be ſecured and brought to Juſtice. This bare Knowledge and Concealment was High Treaſon at Common Law. [c] To know and *aſſent* with any outward Act, that ſhews an Approbation of it, makes it High Treaſon; as where one, having Notice of a Meeting of Conſpirators againſt the Government, goes into their Company, and hears their treaſonable Conſultation, and conceals it. One that is only told in general, that there will be a Riſing without knowing the Perſons, or the Place where, may conceal it.

By 1 & 2 Ph. & M. ch. 10. *A Concealment of any High Treaſon ſhall be only Miſpriſion of Treaſon.*

This then is to be underſtood of a bare Knowledge only and Concealment.

[d] If High Treaſon is diſcover'd to a Clergyman in Confeſſion, he ought to reveal it: But not in Caſe of Felony.

[d] 2 Inſt. 629.

By 13 El. ch. 2. *Concealers of Bulls of Abſolution from* Rome *are guilty of a Miſpriſion of High Treaſon.*

By 14 El. ch. 3. *Thoſe who forge foreign Coin, not current here, ſhall ſuffer (with their Procurers, Aiders, and Abettors) as in Caſe of Miſpriſion of Treaſon.*

[a] Miſpriſion of *Felony* is a Concealment of a Felony or a Procuring of the Concealment thereof, whether Felony by *Common Law*, or by *Statute*, [See *Weſt.* 1. or 3 *Ed.* 1. ch. 9. Concerning the Concealment of Felonies by Sheriffs, Coroners, and Bailiffs, within their Liberties, *&c.* 3 *H.* 7. ch. 1. 33 *H.* 8. ch. 6. For Concealments of Jurors. And ſee of *Theftbote*, *infra*, and of *Judgment*, *B.* 4. *ch.* 5. *poſt.*]

[a] 3 Inſt. 139. H. P. C. 129.

2. By [b] *Commiſſion*; which Miſpriſions ariſe from ſome contemptuous and undutiful Behaviour with regard to the King; being ſome heinous Offences under the Degree of Felony. This is a Miſpriſion in a large Senſe. More particularly, theſe may be committed by contemning the King's *Prerogative*, (*viz.*) by refuſing to *aſſiſt* the King according to Law, by receiving a [c] *Penſion* from a foreign Prince without his Leave; by *Speaking* or *Writing* againſt his Perſon and *Government*. [See 4 *An. ch.* 8. and 6 *An. ch.* 7.] Denying his *Title* to the Crown; refuſing to take the *Oaths* of Allegiance and Supremacy, required by Law. [See 1 *W.* & *M. ch.* 8. 13 & 14 *W.* 3. *ch.* 6. 1 *An. St.* 2. *ch.* 17. 1 *G.* 1. *St.* 2. *ch.* 13.] By Contempt againſt the King's *Palace* or *Courts* of Juſtice.

[b] 3 Inſt. 139, 140.
H. P. C. 131.
Hawk. P. C. B. 1. ch. 21, 22, 23, 24.

[c] 3 Inſt. 144.

By 33 H. 8. ch. 12 *Malicious Striking in the King's* Palace *to* Bloodſhed (*where the King's Royal Perſon reſideth*) *is puniſhable with the Loſs of the Offenders Right Hand, perpetual Impriſonment and Fine at the King's pleaſure.*

A Striking in a Palace [d] where the King is not reſident at the Time, is not within the Intent of the Act, as may be gathered from the *Preamble*.

[d] Haw. P. C. B. 1. p. 57.
3 Inſt. 140. cont.
2 Ld. Ray. 980, &c.

[e] Blood muſt be drawn; for a Striking without Bloodſhed is not to be puniſhed in this Manner.

[e] 2 Inſt. 549.
3 Inſt. 140.
H. P. C. 132.

[f] But *drawing* a Weapon only without ſtriking in *Weſtminſter Hall*, or in any other Place, ſitting the Courts of Chancery, the Exchequer, the King's Bench, the Common Pleas, or before Juſtices of Aſſize, or Juſtices of *Oyer* and *Terminer*, [See 25 *Ed.* 3. *ch.* 2.] upon any Judge or Juſtice, the Offender ſhall loſe his Right Hand, and forfeit his Goods, and Profits of his Lands during Life, and be perpetually impriſoned. So if one doth *ſtrike* a Juror, or any other Perſon [g] *within the View of the ſaid Courts* with Weapon or without, he ſhall have the like Puniſhment [h]. But not if he only maketh an Aſſault.

[f] 2 Inſt. 549.
3 Inſt. 140.
H. P. C. 131, 132.
2 Roll. Abr. 76.

[g] 3 Cro. 373.

[h] See B. 4. ch. 5. § 11. poſt.

The Law makes a great Difference betwixt a Stroke in or before any of the ſaid *Courts* of Juſtice, where the King is repreſentatively preſent, and his *Palaces* where his Royal Perſon reſideth. In the King's Palaces Blood muſt be drawn; but drawing a Weapon only upon a Judge, or Striking only of another Perſon in the King's Courts, is *ſcribe the Declaration*, That he will conform to the Liturgy of the Church of *England*, as it is by Law eſtabliſhed; *and unleſs he be licenſed by the Ordinary, and hath ſubſcribed the ſaid Declaration, he ſhall for the firſt Offence ſuffer three Months Impriſonment, and for the ſecond ſuffer the like Impriſonment, and forfeit five Pounds.* [*See* Can. 77, 79.]

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A Miſpriſion may be either by *Omiſſion* or *Commiſſion.*

4 Black. Com. 119, 120, 121. 2 Burn. Juſt. 172. 4 Burn. Juſt. 294. [c] 3 Inſt. 138, 140. H. P. C. 127. Kely. 17, 21, 22. See ante.

1. By *Omiſſion*, in the Caſe of *Treaſon* or *Felony.* In the Caſe of *Treaſon*, when one doth know that another hath committed any Sort of Treaſon, and doth not reveal it to the King, or his Privy Council, or to ſome Magiſtrate, That the Offender may be ſecured and brought to Juſtice. This bare Knowledge and Concealment was High Treaſon at Common Law. [c] To know and *aſſent* with any outward Act, that ſhews an Approbation of it, makes it High Treaſon; as where one, having Notice of a Meeting of Conſpirators againſt the Government, goes into their Company, and hears their treaſonable Conſultation, and conceals it. One that is only told in general, that there will be a Riſing without knowing the Perſons, or the Place where, may conceal it.

By 1 & 2 Ph. & M. ch. 10. *A Concealment of any High Treaſon ſhall be only Miſpriſion of Treaſon.*

This then is to be underſtood of a bare Knowledge only and Concealment.

[d] If High Treaſon is diſcover'd to a Clergyman in Confeſſion, he ought to reveal it: But not in Caſe of Felony.

[d] 2 Inſt. 629.

By 13 El. ch. 2. *Concealers of Bulls of Abſolution from* Rome *are guilty of a Miſpriſion of High Treaſon.*

By 14 El. ch. 3. *Thoſe who forge foreign Coin, not current here, ſhall ſuffer (with their Procurers, Aiders, and Abettors) as in Caſe of Miſpriſon of Treaſon.*

[a] Miſpriſion of *Felony* is a Concealment of a Felony or a Procuring of the Concealment thereof, whether Felony by *Common Law*, or by *Statute*, [See *Weſt.* 1. or 3 *Ed.* 1. ch. 9. Concerning the Concealment of Felonies by Sheriffs, Coroners, and Bailiffs, within their Liberties, *&c.* 3 *H.* 7. ch. 1. 33 *H.* 8. ch. 6. For Concealments of Jurors. And ſee of *Theftbote*, *infra*, and of *Judgment*, *B.* 4. *ch.* 5. *poſt.*]

[a] 3 Inſt. 139. H. P. C. 129.

2. By [b] *Commiſſion*; which Miſpriſions ariſe from ſome contemptuous and undutiful Behaviour with regard to the King; being ſome heinous Offences under the Degree of Felony. This is a Miſpriſion in a large Senſe. More particularly, theſe may be committed by contemning the King's *Prerogative*, (*viz.*) by refuſing to *aſſiſt* the King according to Law, by receiving a [c] *Penſion* from a foreign Prince without his Leave; by *Speaking* or *Writing* againſt his Perſon and *Government*. [See 4 *An. ch.* 8. and 6 *An. ch.* 7.] Denying his *Title* to the Crown; refuſing to take the *Oaths* of Allegiance and Supremacy, required by Law. [See 1 *W.* & *M. ch.* 8. 13 & 14 *W.* 3. *ch.* 6. 1 *An. St.* 2. *ch.* 17. 1 *G.* 1. *St.* 2. *ch.* 13.] By Contempt againſt the King's *Palace* or *Courts* of Juſtice.

[b] 3 Inſt. 139, 140. H. P. C. 131. Hawk. P. C. B. 1. ch. 21, 22, 23, 24.
[c] 3 Inſt. 144.

By 33 H. 8. ch. 12 *Malicious Striking in the King's* Palace *to* Bloodſhed *(where the King's Royal Perſon reſideth) is puniſhable with the Loſs of the Offenders Right Hand, perpetual Impriſonment and Fine at the King's pleaſure.*

A Striking in a Palace [d] where the King is not reſident at the Time, is not within the Intent of the Act, as may be gathered from the *Preamble.*

[d] Haw. P. C. B. 1. p. 57. 3 Inſt. 140. cont. 2 Ld. Ray. 980, &c.

[e] Blood muſt be drawn; for a Striking without Bloodſhed is not to be puniſhed in this Manner.

[e] 2 Inſt. 549. 3 Inſt. 140. H. P. C. 132.

[f] But *drawing* a Weapon only without ſtriking in *Weſtminſter Hall*, or in any other Place, ſitting the Courts of Chancery, the Exchequer, the King's Bench, the Common Pleas, or before Juſtices of Aſſize, or Juſtices of *Oyer* and *Terminer*, [See 25 *Ed.* 3. *ch.* 2.] upon any Judge or Juſtice, the Offender ſhall loſe his Right Hand, and forfeit his Goods, and Profits of his Lands during Life, and be perpetually impriſoned. So if one doth *ſtrike* a Juror, or any other Perſon [g] *within the View of the ſaid Courts* with Weapon or without, he ſhall have the like Puniſhment [h]. But not if he only maketh an Aſſault.

[f] 2 Inſt. 549. 3 Inſt. 140. H. P. C. 131, 132. 2 Roll. Abr. 76.
[g] 3 Cro. 373.
[h] See B. 4. ch. 5. § 11. poſt.

The Law makes a great Difference betwixt a Stroke in or before any of the ſaid *Courts* of Juſtice, where the King is repreſentatively preſent, and his *Palaces* where his Royal Perſon reſideth. In the King's Palaces Blood muſt be drawn; but drawing a Weapon only upon a Judge, or Striking only of another Perſon in the King's Courts,

[i] 2 Cro. 367.
1 Lev. 106.
[a] 3 Inſt. 141.
H. P. C. 131.

is ſufficient to take away the Right Hand, *&c.* and moreover to forfeit as above; [i] even though the other made the firſt Aſſault.

If any do [a] reſcue a Priſoner in or before any of the ſaid Courts, who was committed by the ſaid Juſtices, without ſtriking a Blow, he and the Priſoner aſſenting to it, ſhall forfeit as above, and be perpetually impriſoned. But the Reſcuer ſhall not loſe a Hand, becauſe no Stroke was given.

[b] 3 Inſt. 142.
H. P. C. 131.
2 Roll. Abr. 76.

[b] Reproachful or threatening Words to a Judge, a Threatening of a Counſellor or Attorney for being employed againſt one, or of a Juror for giving his Verdict againſt one, *&c.* are puniſhable by Fine and Impriſonment.

[c] 1 Cro. 78.
2 Roll. Abr. 78.
[d] 1 Sid. 144.
[e] 1 Cro. 78.
2 Roll. Abr. 78.
1 Sid. 144.
Dalt. ch. 124. p. 295.

He that ſpeaks reproachful Words to a Judge of any inferior Court of Juſtice, while ſitting on the Bench, is immediately [c] finable by the Judge himſelf, or as ſome ſay, [d] the Offender may be indicted. But one cannot be *indicted* for any ſcandalous or reproachful Words ſpoken of or to a Judge or other Officer, [e] not being in a Publick Place of Juſtice, or in the Execution of his Office; tho' he may be committed to Priſon, till he finds Sureties for his good Behaviour.

There is in this large Senſe great Variety of Miſpriſions by *Commiſſion*; for every conſiderable Miſdemeanor, which hath not a certain Name in the Law, is ſometimes ſo called.

1 Inſt. 129. b.
3 Inſt. 120.
4 Black. Com. 102, 421.
4 Burn. Juſt. 30.
[f] 3 Inſt. 120.
Dav. 84, 85. 86.

2. [f] A *Præmunire* (from the Words in the Writ *Præmunire facias* or *Præmonere facias*, ſignifying the *Writ*, and the *Offence*, on which the Writ is grounded) is an Offence, whereby one ſhall incur the ſame puniſhment, which is inflicted upon thoſe that tranſgreſs 16 *Ri.* 2. *ch.* 5. commonly called the Statute of *Præmunire*, and the other Statutes made before that Time. [g] Theſe Statutes were made againſt the intolerable Incroachments of the See of *Rome*, as well as other Statutes ſince that, which is eſpecially called the Statute of *Præmunire*.

Theſe Statutes are chiefly concerning *Papal* Proceſſes, or Inſtruments, and Incroachments, upon the King's *Courts*; *Election* or *Conſecration* of Biſhops; the *Popiſh* Religion; the *Oaths* of *Allegiance* and *Supremacy*; the Authority of the *King* and *Parliament*, and *Liberty* of the *Subject*; *unwarrantable Undertakings* by *publick Subſcriptions*, &c.

1. Concerning *Papal* Proceſſes, or Inſtruments, and Encroachments upon the King's *Courts*.

By 27 Ed. 3. ch. 1. *and* 38 Ed. 3. ch. 3. *If any Subject draw any out of the Realm in Plea, or ſue in any other Court, to defeat the Judgments given in the King's Courts,* &c. *he incurs a* Præmunire.

3 Inſt. 126.

By 16 Ri. 2. ch. 5. *If any purchaſe, or purſue or cauſe to be purchaſed or purſued in the Court of* Rome, *or* Elſewhere, *any Tranſlation, Proceſſes, Sentences of Excommunication, Bulls, Inſtruments,* &c. *which touch the King, or if any do bring them within this Realm, or receive them, they ſhall be put out of the King's Protection, and their Lands, Tenements, Goods and Chattels, forfeited to the King.* [See 28 *H.* 8. *ch.* 16. which is a general, Law, and ſtrictly penn'd againſt pleading any Bull, Diſpenſation, *&c.* from *Rome*, which is not warranted by the Act.]

4 Black. Com. 109, 110.
1 Burn Juſt. 4.
1 Burn Eccl. law. 233.

A *Bull* (from Βȣλὴ, *Conſilium*) is an Inſtrument granted by the Pope containing his Proceſſes, Decrees, *&c.* ſealed with a Seal of Lead.

By the Word *elſewhere* it hath been ſaid that Suits in [a] *Equity*, to relieve againſt a Judgment at Law, and Suits in the *Admiralty*, Suits in the Courts of the *Conſtable* and Marſhal, and *Eccleſiaſtical* Courts, for Matters belonging to the Cognizance of the Common Law, are within the Intention of the Statute. [See 4 *H.* 4. *ch.* 23.] [* But it ſeems to be generally agreed at this Day, that ſuch Suits in Equity are not within the Intention of the Statute; and that as to Suits in the Admiralty and Eccleſiaſtical Courts, if it does not appear by the *Libel* itſelf that the Matter is of temporal Cognizance, it is not within the Statute.]

[a] 2 Inſt. 601. &c, 3 Inſt. 120, 121, 122, 123. 124. 1 Danv. Abr, 764. See of the Chancery, B. 4. ch. 1. poſt. *Hawk. P. C. B. 1. p. 51.

[b] *Out of the King's Protection.* [So that he cannot bring an *Action*; yet he cannot be ſlain by any one, as the King's Enemy, as was anciently held. See 5 *El. ch.* 1.]

[b] Lit. 119. 1 Inſt. 129. b, 130. a.

See 25 *Ed.* 3. *ch.* 22. 25 *Ed.* 3. *St.* 5. *ch.* 22. *De Proviſoribus.* 38 *Ed.* 3. *ch.* 1, 2, 3, 4. 12 *Ri.* 2. *ch.* 15. 13 *Ri.* 2. *St.* 2. *ch.* 2. & 3. 2 *H.* 4. *ch.* 3. & 4. (which Statute concerns Religious or Seculars, who put any Bulls in Execution for Diſcharge of Tithes of their Lands in the Hands of their Farmers) 6 *H.* 4. *ch.* 1. 7 *H.* 4. *ch.* 6. & 8. 9 *H.* 4. *ch.* 8. 3 *H.* 5. *ch.* 4. 23 *H.* 8. *ch.* 21. 28 *H.* 8. *ch.* 16.] Many of theſe Statutes were made againſt *Proviſions*, or the *Providing* of a Biſhop or a Biſhoprick, or other Perſon of an Eccleſiaſtical Living, by the Pope, before the Incumbent was dead. Which, tho' out of Uſe ſince the Supremacy is acknowledged to be in the King, yet may not be improperly here hinted at.

3 Inſt. 126.

By 24 H. 8. ch. 12. *and* 25 H. 8. ch. 19. *To appeal to* Rome *from any of the King's Courts, is made a* Præmunire. *All Appeals from henceforth ſhall be made to the High Court of Chancery.*

By 26. H. 8. ch. 14. Suffragans *ſhall not exerciſe any greater Authority, than what is limited to them by Commiſſion from the Biſhop of the Dioceſe, on Penalty of* Præmunire.

By 5 El. ch. 1. *To defend the pretended Juriſdiction of the* Pope *in this Realm is a* Præmunire *for the firſt Offence, and High Treaſon for the ſecond.*

2. Concerning *Election* and *Conſecration* of *Biſhops.*

By 25 H. 8. ch. 20. *If any* Dean *and* Chapter *refuſe to* elect *the Perſon named in the King's Letters for a Biſhoprick, and to* certify *the Election within twenty Days after the Licence ſhall come to their Hands: Or if any Archbiſhop or Biſhop (after ſuch Election, or the King's Nomination in the Default thereof) refuſe to* confirm *or* conſecrate *the Perſon ſo ſignified to them, within twenty Days after the Signification thereof, they incur a* Præmunire.

4 Black. Com. 115.

3. Concerning the *Popiſh Religion.*

By 13 El. ch. 2. *To bring any* Agnus Dei, *Croſſes, Beads, or ſuch like ſuperſtitious Things, pretended to be hallowed by the Biſhop of* Rome, &c. *and to deliver, or offer the ſame, to be worn or uſed, or if any one ſhall receive the ſame, to ſuch Intent, and not clear himſelf by diſcovering the Offender,* &c. *it is a* Præmunire. *And a Juſtice of Peace ſhall incur the ſaid Penalty, who being informed thereof, ſhall not within fourteen Days declare it to a Privy Counſellor.*

3 Burn Eccl. law. tit. Popery.

By 27 El. ch. 2. *To contribute to the Maintenance of a Popiſh Seminary, is a* Præmunire.

4. Concerning the *Oaths* of *Supremacy*, *Allegiance*, &c.

4 Black. Com. 115. 3 Burn Juſt. 225.

By 1 El. ch. 1. 5 El. ch. 1. *To refuſe the Oath of* Supremacy *is a* Præmunire, &c.

By 3 Ja. 1. ch. 4. *To refuſe the Oath of* Allegiance *upon Tender, is a* Præmunire. [See 7 *Ja.* 1. *ch.* 6.]

By 1 W. & M. Seſſ. 1. ch. 8. *The Oaths of* Supremacy *and* Allegiance, *preſcribed in former Acts are abrogated, and new Oaths and a new Declaration ſubſtituted in their room; which to refuſe upon Tender, makes one liable to the like Penalty of* Præmunire. [And the Forms of theſe Oaths are again altered by 1 *G.* 1. *St.* 2. *ch.* 13. *ant.*]

By 7 & 8 W. 3. ch. 24. *Serjeants at Law, Counſellors, Attornies, Solicitors, Proctors, Clerks, or Notaries, practiſing as ſuch in any Court, without taking the Oaths of Allegiance and Supremacy, and ſubſcribing the Declaration, incur a* Præmunire. [See 9 *G.* 2. *ch.* 36. *ante*]

5. Concerning the *Authority* of *King* and *Parliament*.

By 13 Car. 2. ch. 1. *To affirm maliciouſly or adviſedly by Speaking or Writing, that both or either Houſes of Parliament have a legiſlative Power without the King, is a* Præmunire.

By 6 An. ch. 7. *If any ſhall maliciouſly and directly, by preaching or adviſed ſpeaking, affirm that the pretended* Prince *of* Wales *hath any Title to the Crown, or any other Perſon, than according to* 1 W. & M. ch. 2. *and* 12 W. 3. ch. 2. &c. *or that the Kings or Queens of this Realm with Authority of Parliament, cannot make Laws to limit the Crown and the Deſcent thereof, they ſhall incur a* Præmunire.

Information muſt be given to ſome Juſtice within three Days after the Words ſpoken; and Proſecution within three Months after Information, and Conviction on the Oaths of two credible Witneſſes at leaſt.

6. Concerning the *Liberty* of the *Subject*.

By 31 Car. 2. ch. 2. *No Subject inhabiting within this Realm ſhall be ſent Priſoner out of it into any other Parts,* (except in caſes mentioned in the Act) *in Penalty of* treble Coſts, 500 *l.* Damages, *and* Præmunire.

7. Of *unwarrantable Undertakings by publick Subſcriptions*, &c.

2 Ld. Ray. 1361. 1 Str. 472. S. C.

By 6 Geo. 1. ch. 18. *All unwarrantable Undertakings by publick Subſcriptions, Receipts, Payments, Aſſignments, or Transfers,* &c. *are deemed publick Nuſances, and Offenders therein being convicted in any of the Courts at* Weſtminſter *ſhall incur a* Præmunire.

[a] 1 Inſt. 130. a. 3 Inſt. 125, 126.

[a] 3 Inſt. 23, 24, 163.

Moſt of theſe later Statutes refer the Puniſhment to 16 *Ri.* 2. *ch.* 5. [a] But the Forfeiture of Lands to the King therein mentioned muſt be underſtood only of Lands in Fee for *ever*, and of Lands in Tail but during Life, or of ſuch Eſtate as one may lawfully forfeit. A *Præmunire* lieth as well for the Party grieved as for the King, and both may join in one Writ. But becauſe theſe Laws, making the Offences to be *Præmunire*, are ſo very ſevere, they are ſeldom put in Execution. [a] For it has been always obſerved, that too ſevere Laws are never duly Executed. See of *Judgment* and *Forfeiture*, *B.* 4. *ch.* 5. *poſt.*]

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[a] *Mitius imperanti melius paretur.*
Non minus principi turpia ſunt multa ſupplicia, quam medico multa funera.
Ea ſæpe committuntur, quæ ſæpe vindicantur.

Theſe are the great Offences (*Not capital*) which are immediately and directly levelled againſt his Majeſty's *Crown* and *Dignity*, known by the Name of *Miſpriſion* and *Præmunire*. [See 21 *Ja*. 1. *ch*. 3. 16 *Car*. 1. *ch*. 21. Of *Monopoly*.]

III. Offences that are hurtful to the King's *People*, or againſt the *Commonwealth* in general, are the Offences, 1. Againſt publick *Juſtice*. 2. Againſt the publick *Peace*. 3. Againſt publick *Trade*. 4. Againſt the *Health* and *Eaſe* of the King's People.

Of Offences that are hurtful to the King's People, &c.

1. Of Offences againſt publick *Juſtice*.

Theſe are *Theftbote*, *Perjury*, *Forgery*, *Bribery*, *Extortion*, *Barratry*, *Maintenance*, *Vexatious Informations*, *Conſpiracies*, *Negligence of Officers* entruſted with a particular Adminiſtration of Juſtice.

1. [b] *Theftbote* (*Bote Amends*) is where one not only knows of the Felony, but takes his Goods again, or other Amends, not to proſecute the Felon, to the Intent that the Thief may eſcape. Had he received the Thief himſelf, he had been Acceſſory to the Felony. But if he had taken his own Goods again that were ſtolen, without favouring the Thief, it had been no Offence.

[b] 1 Inſt. 127. a. 3 Inſt. 134, 218. H. P. C. 130. 4 Black Com. 133. 2 Burn Juſt. 172.

The Puniſhment of Theftbote is Fine and Impriſonment.

2. [c] *Perjury* by *Common* and *Statute* Law is a Crime committed by *wilful* and *falſe* Swearing, *abſolutely*, in any *judicial* Proceedings, in a Matter *material* to the Iſſue or Point in Queſtion, (when a *lawful* Oath is adminiſtred by one that hath *Authority* to do it) by the *Subornation* of others, or by his own Act.

[c] 3 Inſt. 164. Hawk. P. C. B. 1. c. 69. 4 Black. Com. 136, 138, 196. 3 Burn. Juſt. tit. Perjury.

[d] An *Oath* (*Sacramentum*, *Juramentum*, *Jusjurandum*) is an Affirmation or Denial by any Chriſtian of any Thing lawful and honeſt, before one that hath Authority to give the ſame for Advancement of Truth, calling God to witneſs that his Teſtimony is true. It is called a *corporal* Oath, becauſe at the ſame Time he toucheth the Scriptures with his Hand.

[d] 3 Inſt. 165. 3 Burn Eccl. Law, 81.

[But this Definition of an Oath ſeems to be too narrow; for a *Jew* [e] may be ſworn on the Old Teſtament; a *Mahommedan* [f] on the *Koran*; or a *Pagan* [g] according to the particular Form preſcribed by the Religion he profeſſes; and therefore it ſeems to follow of Courſe, that theſe may be convicted of Perjury, on Oaths taken according to their own Forms, as well as a *Chriſtian* ſwearing on the New Teſtament.]

[e] 2 Str. 821, 1113.
[f] 2 Str. 1104.
[g] Omichund *v*. Barker, in Chanc. 23 Feb. 1744.

Now then let us peruſe the Parts of the Deſcription of Perjury.]

Perjury muſt be [h] *wilful* and deliberate, not committed through Surprize, Inadvertency, or Miſtake of the Queſtion.

[h] 3 Inſt. 167.

It muſt be [a] *falſe* either in expreſs Words or Intention. For Falſhood in Intention may be puniſhed by the *Common Law*, tho' the Words happen to be true. If one knows not what he ſwears, it is a falſe Oath in him. So that one may ſwear the Truth, and yet be perjured.

[a] 3 Inſt. 166. 2 Roll. Abr. 77.

[b] *Abſolutely* and directly, not as one thinks, believes, or remembers, or to the beſt of his Remembrance. For if he remembered nothing, he can not be puniſhed for Perjury.

[b] 3 Inſt. 166.

In any judicial Proceedings. [c] For if it is not in a judicial Proceeding, but in a private Affair, as in Trading, it is not puniſhable as Perjury, either by the Common Law, or by Statute. The Perjury may be committed,

[c] 3 Inſt. 166. 2 Roll. Abr. 257. 11 Rep. 98.

mitted, not only in a Court of Record, but in any other lawful Court; and in any Matter judicially depending there; or in a Court of Equity, or Eccleſiaſtical Court. And not only in open Court, but before Perſons in the Country authorized by the Court, [See 29 *Car.* 2. *ch.* 5.] or before any that have Adminiſtration of Juſtice. It may be committed by taking a falſe Oath as a *Witneſs* in an Anſwer to Queſtions put in a Court of Law or Equity; in an Anſwer as *Defendant* in a Court of Equity, or in the Spiritual Court, or by making a falſe Affidavit. This is to be underſtood of *aſſertory* Oaths, or where ſome Matter of Fact is falſely affirmed or denied. Therefore if *promiſſory* Oaths of Officers are broken, they are not puniſhable as Perjuries; tho' their Offences ought to be puniſhed with a ſevere Fine, in reſpect of the Breach of their Oaths. The Breach of Oath ſhall aggravate the Offence. If one calleth another [d] *perjured* Man, he ſhall have his Action on the Caſe, becauſe it ſhall be *intended* contrary to his Oath in a judicial Proceeding; not for calling one a *forſworn* Man, becauſe the Forſwearing may be extrajudicially; unleſs he ſays, that he was forſworn in a Court of Record.

3 Inſt. 166.
4 Rep. 15.
1 Roll. Abr. 39, 40.

In a Matter material to the Iſſue or Point in Queſtion. [e] For if it is not of any Conſquence in the Deciſion of the Cauſe, tho' it is a falſe Oath, it is not to be puniſhed as Perjury, there being no malicious Deſign to be preſumed. But if a falſe Oath is in Circumſtances, aggravating or extenuating the Damages, and the Party pretends to give a particular and diſtinct Account of the Circumſtances, and makes them Reaſons of his Remembrance, to ſtrengthen the ſubſtantial Parts of his Evidence or Anſwer, or gains the more Credit by ſuch a particular Account of the Circumſtances, he may be guilty of Perjury. (*Qu.*)

[e] 3 Inſt. 167.
1 Roll. Abr. 41, 78.
1 Cro. 428, 500.
Hawk. P. C. B. 1. p. 175.
1 Ld. Ray. 257, &c.
2 Ld. Ray. 889.

When a LAWFUL Oath is adminiſtred by one that hath AUTHORITY. [f] The Oath muſt be *lawful*, allowed by the Common Law, or ſome Act of Parliament. And it muſt be taken before one that hath *Authority*, not before a Perſon acting in a private Capacity, or pretending to have Authority, where he hath none; or by one that goes beyond the Authority which was granted. For ſuch falſe Oaths cannot amount to Perjury in Law, becauſe ſuch Oaths are of no Validity or Force, being *Coram non Judice*. Beſides, it is a high Contempt to adminiſter an Oath without Warrant of Law, and puniſhable by Fine and Impriſonment. [See 13 *Car.* 2. *St.* 1. *ch.* 12.]

[f] 3 Inſt. 165.
4 Inſt. 278, 279.
2 Roll. Abr. 257.

There is alſo a *Subornation* (*Subornare*, [g] to prepare underhand) of Perjury in the *Common Law*, which is an Offence in procuring one to take a falſe Oath amounting to Perjury. [h] But if he doth not take it, the Perſon who encouraged him to do it, is not guilty of Subornation of Perjury, tho' he is puniſhable by Fine, *&c.*

[g] 3 Inſt. 167.
4 Black. Com. 137.
3 Burn Juſt. tit. Perjury.
[h] 1 Roll. Abr. 79.
2 Cro. 158.

Thus of *Perjury* and *Subornation* of Perjury at *Common Law*, which may be [a] puniſhed with Fine, Impriſonment, Pillory, *&c.* the Offender being ever after incapable to be a Witneſs.

[a] 3 Inſt. 163.

Let us ſee now what is Perjury by *Statute-Law*, and how puniſhed.

By 5 El. ch. 9. *If any Perſon ſhall unlawfully and corruptly* procure *any Witneſs, to commit any wilful and corrupt Perjury, in any Matter or Cauſe depending by any Writ, Action, Bill, Complaint, or Information, concerning Lands, Tenements, or Hereditaments, or Goods, Debts, or Damages, in any of the King's Courts of Chancery, or in any of his Courts of Record, or in any Leet, View of Frankpledge or Law Day, Ancient Demeſne-Court,* *meſne-Court, Hundred Court, Court-Baron, or of the Stannary, or ſhall unlawfully or corruptly procure any Witneſs to teſtify* in perpetuam Rei Memoriam, *every ſuch Offender ſhall forfeit forty Pounds. And if any ſuch Offender ſo attainted ſhall not have any Lands or Goods to the Value of forty Pounds, he ſhall ſuffer Impriſonment for half a Year, and ſtand upon the Pillory an Hour in ſome Market-Town, and ſhall not be received as a Witneſs in any Court of* Record, *till ſuch Judgment be reverſed*, &c.

And if any Perſon, either by Subornation, or by his own Act, ſhall wilfully and corruptly commit Perjury by his Depoſition *in any of the Courts above-mentioned, or being examined* ad perpetuam Rei Memoriam; *then every ſuch Perſon ſhall loſe twenty Pounds, and be impriſoned by the Space of ſix Months, and his Oath ſhall not be received in any Court of* Record *until the Judgment ſhall be reverſed. And if ſuch Offender ſhall not have Goods or Chattels to the Value of twenty Pounds, he ſhall be ſet on the Pillory in ſome Market-Place within the County, City, or Borough, where*, &c. *and there have both Ears nailed, and be diſabled to be ſworn as aforeſaid. The one Moiety of the ſaid Forfeitures to the King, the other Moiety to ſuch Perſon as ſhall be grieved.*

This Act ſhall not extend to any Eccleſiaſtical Court, but ſuch Offender ſhall be puniſhed by the Laws uſed in the ſaid Courts; nor ſhall it reſtrain the Authority of any Judge, having abſolute Power to puniſh Perjury before the making this Act.

Obſerve, that the *firſt* Part of this Act extends only to the Perſon that *procures* and *ſuborns*, and the *ſecond* Part to him that *ſwears* falſely by Subornation, or of his own Accord; [b] ſo that you muſt declare in Certainty within which Clauſe the Defendant was perjured. (*Qu.*) [But it ſeems to be the better Opinion that it is not neceſſary to ſet out whether the Party took the falſe Oath of his own Head, or through the Subornation of another.]

[b] 3 Inſt. 167. 3 Bulſt. 147. Contra.

The Words [c] *wilfully* and *corruptly* muſt be expreſsly ſet down in a Proſecution for Perjury, or Action upon the Statute.

[c] 3 Inſt. 167. 1 Cro. 147.

Falſhood [d] in expreſs Words is only within this Statute, not Falſhood in Knowledge or Intention, which is only puniſhable by Common Law.

[d] 3 Inſt. 166.

As that Part of the Statute, which concerns the Subornation of Perjury, extends only to Matters depending in Suit by *Writ*, *Action*, *Bill*, *Plaint*, or *Information*, in anywiſe concerning Lands, Tenements, or Hereditaments, or Goods, Chattels, Debts, or Damages, *&c.* [e] So the Clauſe concerning Perjury itſelf muſt be reſtrained to the ſame Meaning. Therefore Subornation of Perjury, or Perjury upon an [f] *Indictment*, is not within the Statute; but it is puniſhable by Indictment at Common Law. Hence it appears that Perjury committed in an Information [*Qu.* in a *criminal* [a] Information] exhibited by the King's Attorney General, or any other, for the King, by any Witneſs produced on the Behalf of the King (tho' it is the King's own Witneſs) is puniſhable by this Act, or at Common Law.

[e] 5 Rep. 99. 3 Inſt. 167.

[f] 3 Inſt. 164.

[a] 2 Cro. 120, 212. Contra.

This Statute alſo extends to no other Perjury than that of a [b] *Witneſs*; not if a Defendant commits Perjury in his *Anſwer* in the Chancery, Exchequer-Chamber, *&c.* in an *Affidavit* [*Qu.*] See 29 *Car.* 2. *ch.* 5. by Swearing the Peace againſt another, *&c.* but he may be puniſhed for that Perjury at *Common Law*; which, after all that hath been ſaid, is the ſafeſt Way to proſecute for Perjury, or Subornation of Perjury.

[b] 3 Inſt. 166. 2 Roll. Abr. 77.

No falſe Oath is within the Meaning of the Statute, that is not prejudicial to ſome Perſon in his Cauſe, and gives him a juſt Cauſe of Complaint, that he was grieved and moleſted by the Depoſition of the Witneſs.

[c] 5 Rep. 99. 3 Inſt. 167. [c] A greater Penalty is inflicted on Subornation of Perjury, than on the Perjury itſelf. For the Author ſins more than the Actor.

As the Act does not extend to any Eccleſiaſtical Court; ſo ſuch Offenders may be puniſhed by the Eccleſiaſtical Law by the Words of the Act, if the Matter is [d] ſpiritual, and not temporal; or they may be proſecuted for falſe Oaths, either in an Anſwer or Depoſition, at Common Law [e]. [*Qu.*]

[d] 3 Inſt. 164.

[e] 1 Ld. Ray. 451.

By 7 & 8 W. 3. ch. 34. *and* 8 G. 1. ch. 6. *If any* Quaker *ſhall be lawfully convicted, to have wilfully, falſely, and corruptly made his ſolemn* Affirmation *and* Declaration allowed by theſe Acts, *he ſhall incur the ſame Penalty as Perſons convict of wilful Perjury.* [See 22 G. 2. *ch.* 46.]

[*By* 2 Geo. ch. 25. *Perſons convicted of Perjury or Subornation, (beſides the Puniſhment already inflicted by Law) may be ſent to the Houſe of Correction, there to be kept to hard Labour, for any Term not exceeding ſeven Years, or may be tranſported for ſeven Years, and returning is Felony without Clergy. And by* 2 Geo. 2. ch. 24. *are rendered incapable of voting at any Election of Members of Parliament.*]

By 23 Geo. 2. ch. 11. *In an Information or Indictment for Perjury it ſhall be ſufficient to ſet forth the Subſtance of the Offence, and by what Court, and before whom, the Oath was taken, (averring the Court or Perſon to have competent Authority to adminiſter the ſame) together with proper Averment to falſify the Matter wherein the Perjury is aſſigned, without ſetting forth the Bill, Anſwer,* &c. *or any Part of the Record or Proceedings, other than as aforeſaid, and without ſetting forth the Commiſſion or Authority of the Court, or Perſon before whom the Perjury was committed: And for Subornation of Perjury, it ſhall be ſufficient to ſet forth the Subſtance of the Offence, without ſetting forth the Bill,* &c.

Juſtices of Aſſize, Niſi Prius, *Goal Delivery, of the great Seſſons in* Wales, *or of the Counties Palatine, may (ſitting the Court, or within twenty-four Hours after) direct any Perſon, examined as a Witneſs upon any Trial before them, to be proſecuted for Perjury, in caſe there ſhall appear a reaſonable Cauſe, and to aſſign the Party injured, or Perſon undertaking the Proſecution, Counſel to do their Duty, without Fee; ſuch Proſecution to be carried on without Payment of any Tax, Duty, or Fees in Court, or to any Officer; and the proper Officer of the Court ſhall, without Fee, give the Party injured, or Perſon undertaking the Proſecution, a Certificate of the ſame being directed with the Names of the Counſel aſſigned; which Certificate ſhall in all Caſes be deemed a ſufficient Proof of ſuch Proſecution having been directed; provided that ſuch Direction or Certificate ſhall not be given in Evidence upon any Trial to be had againſt any Perſon upon a Proſecution ſo directed as aforeſaid.*

Deut. xix. v. 21. Perjury is ſo odious, that by the Law of God it is not to be pardoned.

[There are ſome Species of Perjury which are made capital by Statute. As,

By 31 G. 2. ch. 10. *Wilfully and knowingly taking a falſe Oath to obtain Probate of any Will or Letter of Adminiſtration, in order to receive the Wages, Money, or Prize Money of any Officer, Seaman, or other, who*

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[c] *Plus peccat author quam actor.* 5 Rep. 99. 3 Inſt. 167.

had or is ſuppoſed to have any due to him on account of his Service on board any of the King's Ships. And,

By 1 G. 3. ch. 17. *and the former Acts for Relief of Inſolvent Debtors, wilful Perjury by any Priſoner or other Perſon enabled to take the Benefit of thoſe Acts.*]

5. [a] *Forgery* (from *Forger*, to beat on an Anvil like a Smith) by the *Common Law* is a fraudulent making or altering of a Writing to the Prejudice of another Man's Right, whether it be Matter of Record, or any publick Writing, Deed or Will.

[b] If a Man alters a Writing to his own Damage only, it is no Offence. But on an Indictment at Common Law, or on [c] 5 *El. ch.* 14. [See *Infra*.] it need not be ſhewn, that the third Party was prejudiced.

By a publick Writing, I mean a Probate of a Will, Certificate of Holy Orders, a Protection from a Member of Parliament, or the like. As for Writings of an inferior Nature (as private Letters,) the Counterfeiting of them is not properly Forgery. Therefore in ſome Caſes it may be more ſafe to proſecute ſuch Offenders for a Miſdemeanor as Cheats. For by Reaſon of the Uncertainty of Opinions concerning proper Forgeries at Common Law, Indictments are generally brought upon the following Statute, and very few at Common Law. But if the Indictment is at Common Law, and the Offender is convicted, he may be ordered to ſtand in the Pillory, to pay a Fine, and to be impriſoned. The *Latin* Word to Forge is *Falſare* or *Fabricare*. [Forging any Voucher that is not under Seal, is an Offence at Common Law [d].]

[a] Terms of the Law, v. Forger, &c. 3 Inſt. 169. 1 Roll. Abr. 65, 66. 1 Hawk. P C. B 1 ch. 70.
[b] 1 Ld. Ray. 530, 737.
[c] 2 Str. 901. 4 Black. Com. 245.
[d] 5 Mod. 137. 1 Salk. 342. 2 Str. 747. 2 Burn. Juſt. 206. 2 Ld. Ray. 1461. 2 Str. 1145.

I come to ſhew what is Forgery by *Statute*-Law.

By 5 El. ch. 14 *If any one alone, or with others, ſhall falſely forge or make, or cauſe to be forged and made, or aſſent to the Forging or Making of any falſe* Deed, Charter, *or* Writing *ſealed,* Court-Roll, *or* Will *in Writing, to the Intent, that the* Freehold *or* Inheritance *of Lands or Tenements, Freehold or Copyhold, or the Right, Title, or Intereſt of any Perſon therein may be moleſted, troubled, defeated, recovered, or charged; or ſhall pronounce, publiſh, or ſhew forth in Evidence, any ſuch forged Deed,* &c. *as true, knowing the ſame to be forged, to the Intent above, (except being an Attorney, Lawyer, or Counſellor, he ſhall for his Client plead, ſhew forth, or give in Evidence ſuch forged Deed,* &c. *to the Forging whereof he was not Party or Privy) and ſhall be convicted thereof upon an Action founded upon this Statute, or* otherwiſe *by Bill in the King's Bench or Exchequer; he ſhall pay to the Party grieved his double Coſts and Damages, and alſo ſhall be ſet upon the Pillory in ſome open Place, and have both his Ears cut off, his Noſtrils ſlit, and ſhall forfeit to the King the Iſſues and Profits of his Lands and Tenements for Life, and ſuffer perpetual Impriſonment.*

If any one (prout ſupra) *ſhall forge, or make, cauſe or aſſent to be made and forged, any Charter, Deed, or Writing, that one may claim a* Leaſe for Years *of Lands or Tenements (not Copyhold) or an* Annuity, *or ſhall forge,* &c. *any* Obligation *or* Bill obligatory, Acquittance, Releaſe, *or other* Diſcharge *of any Debt, Account, Action, Suit, Demand, or other Things perſonal; or publiſh or give in Evidence the ſame as true, knowing it to be forged* (except as above) *the Offender ſhall upon Conviction as aforeſaid, pay double Coſts and Damages to the Party grieved; and alſo ſhall be ſet upon the Pillory, loſe one of his Ears, and ſuffer a Year's Impriſonment. The ſecond Offence is Felony, but without Corruption of Blood, loſs of Dower, or Diſheriſon of the Heir.*

By this Statute all other Statutes made againſt Forgery are repealed.

[a] 3 Inſt. 169, 170.
[b] 1 Str. 19.

To [a] *make*, *&c.* are larger Words than to forge. For one may make a falſe Writing within this Act, tho' it be not forged in the Name of another, nor his Seal or Hand counterfeited, as by altering a true Deed. [But it ſhould ſeem that [b] Altering is Forging according to the above Definition of Forgery.] The Deed, Charter, or Writing, muſt be ſealed (*i. e.*) there muſt be ſome Impreſſion on the Wax. A Court-Roll or Will need not be ſealed.

It is Forgery to put more in a Will than is directed.

[c] 3 Inſt. 172.

[c] This *Act* mentions *four* Kinds of Offences, 1. A *Moleſtation* of a Freehold or Inheritance. 2. A Publication of the ſame to other Perſons, by Words or Writing, that it is true. 3. A Moleſtation by Claim of a forged Term for Years, Annuity, or Releaſe of Demands perſonal. 4. A Publication of the ſame knowingly.

Where there is a Penalty in a Bond or Recognizance, the Party grieved by a forged Releaſe, *&c.* ſhall recover double the Penalty, not of the Debt appearing in the Condition.

[d] 3 Inſt. 171.
5 Rep. 50.

[d] The King may pardon the corporal Puniſhment which tendeth to common Example; but the Plaintiff cannot releaſe it.

[e] 3 Inſt. 170.
Hawk. P. C. B. 1. p. 186.

Forging an *Aſſignment* of a Leaſe is not within the Statute; becauſe it does not charge the Lands, but only *transfers* an Intereſt in Being: [[e] But this ſeems to be a Miſtake, for if it is not within the firſt Branch of the Statute, it comes within the ſecond.]

[f] 2 Roll. Abr. 466.
Contra.
3 Inſt. 171.

[f] If one acknowledges a Statute-Merchant, or Recognizance in the Nature of a Statute-Staple, in the Name of another; Theſe are Obligations within the Act, for each of them hath the Seal of the Party. But it is otherwiſe of a Statute-Staple, becauſe it hath not the Seal of the Party.

[a] Pult de Pace, &c. 46. b.

[a] One ſealeth a Deed for another by his Commandment and Direction, it is no Forgery.

A Forgery of a Deed of Gift of mere perſonal Chattels is not within the Words of the Statute; the Words are *Obligation*, *Bill obligatory*, *Acquittance*, *Releaſe*, or other *Diſcharge*.

[See 33 *H.* 8. *ch.* 1. Concerning counterfeit Letters and falſe Tokens, *&c.* 5 *El. ch.* 7. Concerning Servants with falſe or forged Teſtimonials. 9 & 10 *W.* 3. *ch.* 51. Of perſonating the Wives, Relations, or Creditors of Seamen, and concerning forged Letters of Attorney, Bills of Sale, Aſſignments, and laſt Wills for the Receipt of Wages due to Seamen; and of Forgeries made Capital by *Statutes* in *ch.* 1. *ante.*]

By 12 Geo. 1. ch. 29. *If any Perſon convicted of Forgery, Perjury, Subornation, or Barretry, practice as an Attorney, the Judges ſhall cauſe him to be tranſported.*]

The Quarter-Seſſions have no Authority to take an Indictment of Forgery.

[b] Forteſcue, &c. 51.
1 Burn Juſt. 149.
3 Inſt. 145, 223, 224.
Deut. xvi. 19.
1 Black. Com. 179.
4 Black. Com. 139.

4. [b] *Bribery* (from *Briber*, to devour) is when one in judicial Place takes any Gift or Reward of any Perſon (who hath Buſineſs before him) for doing his Office, or by Colour of his Office, except of the King only, unleſs it be of Meat and Drink, and that of ſmall Value. This is Bribery in a ſtrict Senſe. But largely taken, it may relate to the Receiving any undue Reward, by any Perſon concerned in the Adminiſtration of publick Juſtice, to act contrary to his Duty. And ſometimes it ſignifies the Taking or Giving a Reward for publick Offices.

[c] *In a judicial Place*, either Eccleſiaſtical or Temporal. This makes Bribery different from Extortion; for Extortion may be committed by one that hath a judicial or miniſterial Office.

[c] 3 Inſt. 147.

Takes any Gift. If a Judge refuſes a Gift offered to him, yet he that offers the Bribe is puniſhable.

[d] *Who hath Buſineſs before him.* Not only when a Suit dependeth before him, but alſo when it is by Virtue of his Office, when there is no Suit at all.

[d] 3 Inſt. 147, 148.

Unleſs it be of Meat and Drink. But if it is in Money, though the Bribe be ſmall, yet the Fault is great and puniſhable.

This Offence is puniſhable by Fine and Impriſonment; whether in a judicial or miniſterial Officer, if we take Bribery in the largeſt Senſe.

A Judge's, *&c.* [e] Servant may be puniſhed for receiving a Bribe.

[e] 3 Inſt. 147.

[*By* 9 G. 2. ch. 35. § 2. *If any Perſon ſhall offer any Bribe to any Officer of the Cuſtoms or Exciſe to connive at the Running or falſe Entry of any Goods, or to do any other Act whereby his Majeſty may be defrauded in the ſaid Revenues, he ſhall forfeit fifty Pounds.*]

[See 20 *Ed.* 3. *ch.* 1. and 12 *Ri.* 2. *ch.* 2. 5 & 6 *Ed.* 6. *ch.* 16. 1 *W.* & *M. Seſſ.* 1. *ch.* 21. Concerning the Sale of Offices, and ſee of *Offices*, *B.* 2. *ch.* 2. *ante*, and ſee 2 *G.* 2. *ch.* 24. For preventing Bribery in Elections of Members of Parliament, under Title *Parliament*, in *B.* 4. *ch.* 1. *poſt.*]

5. [a] *Extortion* (from *Extorqueo*, to wreſt away) is an unlawful Taking by any Officer, by Colour of his Office, any Money, or valuable Thing, of or from any Man, either that is not due, or more than is due, or before it is due. In a large Senſe it is taken for any Oppreſſion by Power or Pretence of Right [b]. To take by [c] *Colour* of an Office, implies an ill Action; but to take by *Virtue* of an Office, implies the Act to be lawful. [d] If the taking is for *Expedition*, it is Extortion by Colour of one's Office. Extortion is more odious than Robbery, becauſe it carries an Appearance of Truth. But if ſuch reaſonable Fees are taken, as have been allowed by the Courts of Juſtice in ancient Time to inferior Miniſters and Attendants, it is no Extortion. [e] A Promiſe to pay Money to an Officer for the doing of a Thing, for which the Law will not ſuffer him to take any Thing, is merely void.

[a] 1 Inſt. 368. b. 2 Inſt. 467. 10 Rep. 102. 1 Str. 73. 4 Black. Com. 141.

[b] 1 Ld. Ray. 149.

[c] 2 Inſt. 206.

[d] 1 Inſt. 368. b. 2 Burn Juſt. 165. to 168.

[e] 1 Roll. Abr. 16.

This Offence at Common Law is puniſhable by Fine and Impriſonment.

It is often accompanied with Perjury, in breaking the Oath which an Officer takes upon his Admiſſion into his Office.

By 25 Ed. 3. St. 3. ch. 9. Ordinaries, *or their Miniſters are not to be impeach'd upon Indictments of general Extortion.*

1 Str. 74.

By 21 H. 8. ch. 5. *If* Ordinaries, *or their* Regiſters *or* Miniſters *take more than their due Fees, they ſhall forfeit the Exceſs to the Party grieved, and ten Pounds to the King and the Party grieved.* See 9 & 10. *W.* 3. *ch.* 41.]

The 23 *H.* 6. *ch.* 9. Concerns the Fees of *Sheriffs*, *Under-Sheriffs*, *Bailiffs*, *Gaolers*, *&c.* [See *Weſt.* 1. *ch.* 26. *Weſt.* 2. *ch.* 44. 29 *El.* *ch.* 4. 3 *G.* 1. *ch.* 15.] [f] The Statute of *Weſt.* 1. ſtill ſtands in Force. And therefore ſuch like Officers cannot take any Thing but what is allowed by ſubſequent Acts.

[f] 1 Inſt. 368. b. 2 Inſt 176, 209, 210, 467. 4 Inſt. 274.

The 3 *Ja.* 1. *ch.* 7. 2 *G.* 2. *ch.* 23. Relate to the Fees of *Attorneys*, *Solicitors*, *&c.* and it is ſaid, [g] that they are within all the Statutes of Extortion.

[g] 1 Mod. 5.

The 10 & 11 *W.* 3. *ch.* 23. Reſtrains the Fees of the *Clerk* of *Aſſize*, *Clerk* of the *Peace*, &*c.* See 2 *H.* 4. *ch.* 8. and 10. 33 *H.* 8. *ch.* 39.

[h] 1 Inſt. 368. a. & b. 8 Rep. 36 37. 2 Cro. 527. Dalt. ch. 10. p. 38. 4 Black. Com. 133. 1 Burn. Juſt. 173. to 175.

6. [h] *Barretry* (from *Barret*, a wrangling Suit or Quarrel) is an Offence at Common Law, and is committed by one that is a Common Mover, Exciter or Maintainer of Suits or Quarrels, either in Courts or in the Country.

Common Mover. Therefore no one can be a Barretor in reſpect of one or two Acts only. The Indictment muſt charge that he is *Communis Barrectator*, a common Barretor.

In Courts. Whether of Record or not.

Or in the Country. Which may be in *three* Manners. 1. In Diſturbance of the Peace. 2. By ſpreading falſe Rumours and Calumnies, to raiſe Diſcord among Neighbours. 3. In taking or keeping of the Poſſeſſion of Lands in Controverſy by Force, or Subtlety and Deceit, and moſt commonly in Suppreſſion of Truth and Right.

One may be a Barreter by bringing many groundleſs and vexatious Actions to oppreſs others, as well as by ſtirring up others to bring them.

5 Mod. 18. Hawk. P. C. B. 1. p 244. 1 Ld. Ray. 490.

Upon Indictment, the Proſecutor ought to give the Defendant a Note of the particular Matters, which he intends to inſiſt on, and prove againſt him. This may be order'd upon Motion by Rule of Court.

The Puniſhment for this Offence is Fine and Impriſonment, and to be bound to the good Behaviour. [See 34 *Ed.* 3. *ch.* 1.]

[a] 1 Inſt, 368. b. 2 Inſt. 212. 213. 2 Roll. Abr. 115. 1 Black. Com. 428. 4 Black. Com. 134. 3 Burn Juſt. 113 to 118.

7. [a] *Maintenance* (*Manutentio*, from *Manu Tenere*, a Taking in Hand or Upholding) in general is an unlawful Upholding of Quarrels againſt Juſtice. It may be committed in the *Country* by taking or keeping Poſſeſſion of Lands for others, or by maintaining Quarrels or Suits in the Country. This is puniſhable only at the Suit of the King. It is committed in *Courts* by upholding the Plaintiff or Defendant in a Cauſe or Suit depending in Court, which noway belongs to one, either by aſſiſting the Party by Words, Writing, Countenance or Deed.

This Maintenance in Court is *threefold.*

Hawk. P. C. B. 1. ch. 83.

[b] 2 Roll. Abr. 115, 116, 117. 1 Inſt. 368. b. 369. a. 2 Inſt. 564.

1. When one maintaineth a Side without any Contract to have Part of the Thing in Suit; as by aſſiſting one with Money to carry on his Cauſe, by endeavouring to perſuade an Attorney or Counſel to manage it for him *gratis.* [b] But if a Man hath an Intereſt in the Thing in Diſpute, though only a contingent or poſſible or equitable Intereſt, he may lawfully maintain an Action relating to it. So by Reaſon of *Conſanguinity* or *Affinity* ſome Acts of this kind are juſtifiable; as alſo by Reaſon of *other Relation.* Thus the Lord may maintain the Action of his Tenant with Money in reſpect of the Lands holden of him; a Maſter may go along with his Servant to retain Counſel, and ſtand by him and aſſiſt him, while his Cauſe is tried. A Servant may ſolicit in his Maſter's Cauſe; but he cannot lay out his Money to aſſiſt his Maſter. One Neighbour may lawfully go with another to his Counſel. And one may lawfully, out of Charity, give Money to a poor Man, to carry on his Suit. An

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[a] *Culpa eſt immiſcere ſe rei ad ſe non pertinenti.* 1 Inſt. 368. b. 2 Inſt. 208. 3 Inſt. 91.

Attorney may lay out his own Money in Behalf of his Client, to be repaid again. But he cannot carry on a Cauſe for another at his own Expence, with a Promiſe that he never will expect a Repayment unleſs he carries the Cauſe, or upon no Purchaſe no Pay.

A Counſellor, or a Solicitor (*Qu.*) who is no Attorney, cannot lay out Money to carry on another Man's Suit. [See the Statutes for Regulation of Attorneys and Solicitors, *B.* 4. *ch.* 1. *poſt.*]

Offenders of this Kind are liable to an [c] *Action* of Maintenance at the Suit of the Party grieved, and they may be *indicted* at *Common Law* as Offenders againſt publick Juſtice, and may be fined and impriſoned.

[c] 2 Inſt. 208, 212. 2 Roll. Abr. 114.

For *Statutes* reſtraining it, See *Weſt.* 1. or 3 *Ed.* 1. *ch.* 28. 1 *Ed.* 3. *ch.* 14. 20 *Ed.* 3. *ch.* 4. 1 *Ri.* 2. *ch.* 4 & 9.

By 32 H. 8. ch. 9. *None ſhall obtain or buy any pretended* Right *or* Title *to any* Land, *unleſs the Giver or Seller or his Anceſtor hath been in Poſſeſſion of the ſame, or of the Reverſion or Remainder thereof; or hath taken the Profits thereof, for one Year next before ſuch Bargain; upon Forfeit of the Value of the ſame Land, to be divided betwixt the King and the Proſecutor, &c. Howbeit, purchaſing a pretended Title by him that is already lawfully poſſeſſed of the Thing whereunto Title is made, is lawful.*

1 Inſt. 369. a. & b. Hawk. P. C. B. 1. ch. 86.

None ſhall unlawfully maintain any Suit or Action concerning Lands in any of the King's Courts, where any Perſon ſhall have Authority to hold Plea of Lands. Neither ſhall any Perſon unlawfully retain, for Maintenance of any Suit, any Perſon, or embrace any Jurors, *or ſuborn any Witneſſes, to the Hindrance of Juſtice, or Procurement of Perjury; in Pain of ten Pounds, to be divided betwixt the King and Proſecutor.*

The Offenders againſt this Act ſhall be proſecuted within a Year.

Maintenance of a Suit in the [a] *Spiritual* Court is not within the Statutes concerning Maintenance. Neither doth any Action lie at Common Law.

[a] 1 Cro. 594.

[b] The Law will not ſuffer any Thing in Action, Entry, or Re-entry, to be granted over; that pretended Titles might not be granted to great Men, to oppreſs the meaner Sort.

[b] 1 Inſt. 214. a.

2. The *ſecond Species* of Maintenance is *Champerty*, from [c] *Campus*, a Field, and *Partitio* a Dividing; becauſe the Parties agreed to divide the Thing in diſpute. [d] *Champerty* therefore is a Bargain with the Plaintiff or Defendant, to have Part of the Land, or any Thing out of the Land, or Part of a Debt or other Thing in Suit carried on at his own proper Coſt, if he prevails. A Grant made to have Part of a Thing in Demand when recovered, to ſatiſfy a juſt Debt, &c. is not Champerty.

[c] 2 Inſt. 208. Hawk. P. C. B. 1. ch. 84.
[d] 1 Inſt. 368. b. 2 Inſt. 208, 217, 218. 4 Black. Com. 134. 3 Burn. Juſt. 116.

All Champerty is Maintenance, but all Maintenance is not Champerty. But as Maintenance in general is puniſhable by *Common Law*, ſo is Champerty too.

Champerty alſo is particularly reſtrained by *Statutes*. [See *Weſt.* 1. or 3 *Ed.* 1. *ch.* 25. *Weſt.* 2. or 13 *Ed.* 1. *ch.* 49. and for the Expoſition thereof, 2 *Inſt.* 207, 208, 209, 484, 485. *Articuli ſuper chartas, or* 28 *Ed.* 1. *ch.* 11. and 2 *Inſt.* 563. 33 *Ed.* 3. *St.* 3. 1 *Ri.* 2. *ch.* 9.]

3. The *third Kind* of Maintenance is *Embracery*. Now [e] *Embracery* is an Attempt to influence a Juror to appear, or to inſtruct a Jury, or any way to incline them to be more favourable to the one Side than the

[e] Terms of the Law, v. Embraceor. 1 Inſt. 369. a. Hob. 294. Hawk. P. C. B. 1. ch. 85. 4 Black. Com. 140. 3 Burn Juſt. 117, 118.

the other, by Promiſes, Threatnings, Letters, Money, Treats, *&c.* Whether the Jurors on whom any ſuch Attempt is made, give any Verdict or no, or whether the Verdict paſs on his Side, ſuch a one is called an *Embraceor*; and he is ſubject to an *Action* or *Indictment* at *Common Law*, as for other Kinds of unlawful Maintenance. The Party himſelf may labour a Juror to appear, and diſcharge his Conſcience; but if a Stranger does it, he is an *Embraceor*. Juries may be allowed their Expences for Travelling, *&c.* by him that prevails in the Suit.

All indirect Practices to procure one's ſelf, or others, to be ſworn on the [a] *Tales*, in order to ſerve one Side, is puniſhable in like Manner.

For *Statutes* that reſtrain this Offence, [See 5 *Ed.* 3. *ch.* 10. 34 *Ed.* 3. *ch.* 8. 38 *Ed.* 3. *ch.* 12. and ſee again 32 *H.* 8. *ch.* 9. And ſee of the *Verdict*, *B.* 4. *ch.* 4. *poſt.*]

[a] 1 Sand. 301.

8. *Vexatious* [b] *Informations* upon penal Statutes are Offences againſt publick Juſtice, ſuch Informers being reſtrained by ſeveral *Statutes*, (*viz.*) by 18 *El. ch.* 5. 29 *El. ch.* 5. 31 *El. ch.* 5. 21 *Ja.* 1. *ch.* 4. 4 & 5 *W.* & *M. ch.* 18. [See of *Informations*, *B.* 4. *ch.* 5. *poſt.*]

[b] 3 Inſt. 191.

9. A [c] *Conſpiracy* (ſtrictly taken) is an Agreement betwixt two or more, to appeal or indict an innocent Man of *Felony*, falſely and maliciouſly, who is accordingly appealed or indicted, and afterwards lawfully acquitted by twelve Men, or by Verdict. [See the Definition of ſuch Conſpirators in 21 or 33 of *Ed.* 1. *St.* 2.] Here the Party grieved hath two Ways to puniſh the Offenders. 1. By *Writ* of *Conſpiracy* (which is a civil Action) at his own Suit, where the Judgment ſhall be Fine and Impriſonment, and Damages to the Party. But a [d] general Action on the Caſe, in the Nature of a Writ of Conſpiracy, doth lie againſt one Perſon, where, if there were two or more joined with him, a Writ of Conſpiracy would lie according to its ſtrict Form. But an Action will not lie for the greateſt Conſpiracy imaginable, if nothing be put in Execution: [So that the Party be not damaged.] [e] But in ſuch Caſe a Conſpiracy, without further Act is indictable. Yet an Action of the Caſe will lie for a falſe and malicious Accuſation of any Crime, whether Capital or not Capital (even of High Treaſon) tho' the Bill of Indictment is found *Ignoramus*, or tho' it does not go ſo far as an actual Appeal or Indictment; and the ſame Damages may be recovered in ſuch an Action of the Caſe, as in a Writ of Conſpiracy, where the Party is lawfully acquitted by Verdict. If one does falſely and maliciouſly proſecute another in the Eccleſiaſtical Court, or procure another to be arreſted and brought before a Juſtice of the Peace, to be examined concerning a Felony or Miſdemeanor, on purpoſe to vex and diſgrace him, and to put him to Charge and Trouble, tho' he is not indicted for the ſame, yet he may have an Action of the Caſe; in which he need not aver, that he was lawfully acquitted, as he ought to do in a Writ of Conſpiracy. But he muſt aver, that the Accuſation or Proſecution was [f] *falſe* and *malicious*; and it muſt appear that there was no Ground for it. This *Action* of the *Caſe* is more frequently brought. 2. By *Indictment* at the Suit of the King. If the Parties are found guilty of the Conſpiracy, the Judgment is very [g] *terrible*, being called a villanous Judgment. I ſuppoſe that there are but few Precedents of ſuch Judgments, therefore I need not repeat it.

[c] F. N. B. 114, &c. 2 Inſt. 562, 638. 3 Inſt. 143. 222. 9 Rep. 56, 57. Hawk. P. C. B. 1. ch. 72. 4 Black Com. 136. 1 Burn. Juſt. 355, &c.

[d] 1 Roll. Abr. 111, 112, 114. 2 Roll. Abr. 77. 1 Cro. 70, 134. 2 Cro. 130, 357. 3 Cro. 15. 9 Rep. 56, 57. 2 Inſt. 562, 638. W. Jones, 93. 1 Ld. Ray. 378

[e] 2 Ld. Ray. 1169 1 Str. 193.

3 Black. Com. 136.

[f] S. P. C. 172. b. 1 Roll. Abr. 111, 113.

[g] 2 Inſt. 384. 3 Inſt. 143, 222.

But at Common Law, one may prefer an *Indictment* againſt Conſpirators, [h] tho' they do nothing but conſpire together, and tho' nothing is put in Execution. The [i] *Common Law* puniſheth the Confederacy: But the Confederacy ought to be declared by ſome Manner of Proſecution; as by Promiſes to ſtand by one another Right or Wrong, by entering into Bonds for that Purpoſe, or the like. And as the Conſpiracy ought to be declared by ſome Act, it ought to be laid, that the Matter of the Confederacy was *falſe*, and the Conſpiracy *malicious*, and muſt be made out to be ſo by the Innocency of the Party, and Purpoſe of the Conſpirators.

But if the Defendants can ſhew any Foundation or probable Cauſe of Suſpicion, they ſhall be diſcharged. The Confederacy ought alſo to be voluntary out of Court; for if upon Trial it doth appear, that the Proſecution was ordered in a Courſe of Juſtice, as that the Witneſſes were forced to appear, there ought to be no Puniſhment. If the Defendants acted only as [a] *Jurors* in a criminal Matter, or as *Judges* in open Court, there is no Ground for Proſecution. [b] Judges of Courts of Record are exempted from all Proſecutions whatſoever, as *Judges*, except in the Parliament. [But ſee *Habeas Corpus* Act, 31 *Car.* 2. *ch.* 2. § 12.]

A *bare* Conſpiracy will not maintain a *Writ* of Conſpiracy at the Suit of the Party grieved, becauſe he is not damaged by it; tho' it is a Ground for an *Indictment*.

One Perſon alone cannot be *indicted* for a Conſpiracy; [c] ſo that if all the Defendants are acquitted but one, that one muſt be acquitted too: [*Qu.*] Otherwiſe in an Action of the Caſe. Huſband and Wife are but one Perſon, and therefore they cannot be indicted for a Conſpiracy. [See 4 *Ed.* 3. *ch.* 11.]

The Puniſhment upon ſuch an Indictment is Fine and Impriſonment.

10. *Officers* intruſted with a particular Adminiſtration of Juſtice, (as Sheriffs, Coroners, Gaolers, Keepers of Houſes of Correction, Conſtables, Overſeers of the Poor, Surveyors of the Highways, *&c.*) neglecting any Part of their Duty, may be fined and impriſoned.

Theſe are Offences in reſpect of *publick Juſtice*.

2. Of Offences againſt the *publick Peace*.

Before I come to the ſeveral Kinds of Offences againſt the *publick Peace*, it may not be improper to ſhew how the Breach of the publick Peace may be *prevented*. This may be done, 1. By Security for keeping the *Peace*. 2. By Security for the *good Behaviour*. For thoſe who are of ill Fame, or do any Thing tending to the Breach of the *Peace*, or of their good *Behaviour*, may be required to enter into a Recognizance, with Sureties or without them, according to the Diſcretion of the Judge or Juſtice, to keep the Peace, or to be of good Behaviour. Therefore.

[d] 1. A Surety for the *Peace* is the Acknowledging of a Recognizance (or Bond) to the King, taken by a competent Judge of Record, for the Keeping of the Peace.

A Juſtice of the Peace may *demand* it *ex Officio*, according to his Diſcretion, where he ſees Cauſe, or at the *Requeſt* of any Subject or Perſon under the King's Protection. His Warrant alſo may be granted when he is *commanded* to do it by *Writ* of *Supplicavit* out of Chancery or the King's Bench. Here the Juſtice is to act as a Miniſter, and muſt make a Return to the Writ under his Hand and Seal. But this Writ is ſeldom made uſe of. It may be granted [e] *againſt* any Perſon whatſoever, whether he be a *Magiſtrate*, even againſt a Fellow-Juſtice of the Peace, or a *private* Perſon, under Age, or of full Age. But it may be the ſafeſt Way to proceed againſt a *Peer* [a], Dutcheſs, Counteſs, or Baroneſs, in the Court of *Chancery* or *King's Bench*; and they may be bound there to keep the Peace. The Warrant of the Juſtice to keep the Peace may be granted againſt Infants, Feme Coverts, againſt the Wife at the Requeſt of the Huſband [b], againſt the Huſband at the Requeſt of the Wife [c].

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[h] 1 Str. 193.

[i] 9 Rep. 56, 57. 2 Roll. Abr. 77.

[a] S. P. C. 173. a. Vaugh. 135.

[b] S. P. C. 173. a. 12 Rep. 24. 2 Ld. Ray. 767.

[c] S. P. C. 173, 174. 2 Roll. Abr. 708. 1 Roll. Abr. 112, 113. Contra. 1 Str. 193. 2 Str. 1227.

[d] Dalt. ch. 116. p. 263. Pulton 18, &c. Hawk. P. C. B. 1. ch. 60. 4 Black Com. 248, 251. 4 Burn Juſt. tit. Surety of the Peace.

But *Eccleſiaſtical Perſons* that are performing Divine Service in the Church, Churchyard, or other Place dedicated to God, may not be arreſted. If Surety of the Peace is demanded againſt a *Juror* at the Seſſions, it is grantable after the Seſſions is ended. Surety ſhall not be granted againſt a *Non Compos*, nor *to* him upon his Requeſt; otherwiſe concerning a Lunatick that has ſometimes lucid Intervals. The Surety of the Peace may be granted to or againſt one *attainted* of Treaſon or Felony; and, in a Word, [d] againſt all Perſons that are ſuſpected to break the Peace, or that do break the Peace by Affrays, Aſſaults, Battery, Wounding, hot Words in the Preſence of a Juſtice, Fighting, Quarrelling, threatening to beat or kill another, or to burn his Houſe, Barretors, Rioters, *&c.* and in all Caſes where there is a preſent Danger, or Fear of future Danger. [e] Now Security for the Peace being given to the King by Recognizance, with Sureties or without, in a Penalty of a Sum of Money, according to the Nature of the Caſe; [f] then if the Peace is broken afterwards by ſuch Act, before the Recognizance is releaſed or diſcharged, as by Affray, Aſſault, Battery, *&c.* The Recognizance being brought to the next Seſſions of Peace by the Juſtice, [See 3 *H.* 7. *ch.* 1] [g] the Juſtices in Seſſions may certify the Recognizance, with the Cauſe of the *Forfeiture* into the Chancery, King's Bench, or Exchequer, from whence Proceſs of *Scire Facias* ſhall go out againſt the Party.

[h] The *Act*, that ſhall amount to a Forfeiture of ſuch Recognizance, muſt be intended or done to the *Perſon*, or to the *Terror* of the *People*; not to one's Lands or Goods. For tho' theſe may be Breaches of the Peace, yet they are not within the Meaning of the Recognizance.

2. [i] Surety for the *good Behaviour* or good Abearing is granted, taken, *&c.* as Surety for the Peace; and by ſome Opinions it differeth little or nothing from it. But the Party bound to the good Behaviour may ſooner fall into the Danger of forfeiting his Recognizance. Surety for the good Behaviour doth include Surety for the Peace. For Surety of the good Behaviour conſiſteth chiefly in this, that one ſhall demean himſelf quietly, doing nothing that ſhall be the *Cauſe* of the Breach of the Peace, or of putting the People in Fear or Trouble.

By 34 Ed. 3 ch. 1. *Juſtices of the Peace are empowered to arreſt and chaſtiſe Rioters, Barretors, and to cauſe them to be impriſoned and puniſhed, and to take of all Perſons, that be not of good Fame, ſufficient Surety for their* good Behaviour *towards the King and his People.*

Juſtices of the Peace have alſo this Power by their Commiſſion.

[e] Dalt. ch. 117. p. 267, 268, 269.

[a] See ante.

[b] 2 Str. 1207.

[c] 2 Str. 1202, 1231.

[d] Dalt. ch. 116. p. 263, 264, 265.

[e] Dalt. ch. 119. p. 275, 276.

[f] Dalt. ch. 121. p 281, 282, 283. 4 Inſt. 180.

[g] Dalt. ch. 119. p. 277, 278.

[h] Dalt. ch. 121. p. 285, 286. 4 Inſt. 180, 181.

4 Burn Juſt. tit. Surety for good Behaviour.

[i] Dalt. ch. 123. p. 290. 4 Inſt. 180, 181. Hawk. P. C. B. 1. ch. 61.

4 Inſt. 181.

[k] One may be bound to his good Behaviour for a ſcandalous Way of Living; as for keeping Houſes ſuſpected to be Houſes of Bawdry, for haunting ſuch Houſes, or Taverns, Alehouſes, Gaming-houſes, for ſpeaking Words of Contempt of a Juſtice of Peace[a], abuſing his Warrant. It is ſaid that the *Statute* does not extend to Miſbehaviours that do not relate to the [b] publick Peace. Certainly it ought not to be demanded for calling one [c] Rogue, Knave, Fool, Drunkard, Bankrupt: But it is generally allowed, that the Juſtice hath a diſcretionary Power, to take Surety of all thoſe that are ſuſpected to be *dangerous*, *quarrelſome*, or *ſcandalous*; [d] and of Night-walkers, Eaves-droppers, common Drunkards, common Whoremongers, putative Fathers of Baſtard Children, common Whores, of thoſe that live idly and fare well, having nothing to live upon, of Cheats, or Libellers, of thoſe that take Gates off the Hinges, or caſt them into Ditches.

[e] One Juſtice alone out of Seſſions may demand this Security, either by his own Diſcretion, or upon the Complaint of others: And may commit the Perſon to Gaol, if he refuſes to be bound. He is alſo empowered to bind ſeveral Offenders to the good Behaviour by ſeveral *Statutes*, as well as by the *Common Law*.

If one enters into Recognizance for his good Behaviour, he may [f] *forfeit* his Recognizance by being drunk, (*Qu.*) by going armed in an unuſual Manner, and above his Degree, by uſing threatning Words, [g] immediately tending or inciting to the Breach of the Peace; as to threaten to beat one, challenge one to fight; or by doing any other Thing, which ſhall immediately tend to the Breach of the Peace, or put the People in fear, although there be no actual Breach of the Peace. Not for abuſive Language, as calling one Liar, Rogue, Raſcal, (for this is only a Motive or diſtant Provocation to the Breach of the Peace) nor for a Treſpaſs on Land. It muſt relate to the Perſon of a Man.

The Surety of the Peace or good Behaviour may be [h] *releaſed*, either by the Juſtice himſelf that took it, or by the Party upon whoſe Complaint it was granted. (*Qu.*)

[See 21 *Ja.* 1. *ch.* 8. To prevent Abuſes in procuring *Proceſs* and *Superſedeas* of the *Peace* and *good Behaviour* out of his Majeſty's Courts at *Weſtminſter*, by forbidding them to be granted but upon Motion in open Court.]

Having now ſhewn how Breaches of the Peace may be in a great Meaſure *prevented*; I come now to ſpeak of actual Diſturbances of the publick Peace, and how they may be *puniſhed* when committed.

Offences againſt the *publick Peace* are *Aſſaults*, *Batteries*, *Affrays*, *taking away Maidens*, *Kidnapping*, *forcible Entries* and *forcible Detainers*, *unlawful Aſſemblies*, *Routs*, *Riots*, *Riding* or *going armed*, *Libels*, *falſe* and *ſlanderous Tales*, *falſe Prophecies*.

1. An [i] *Aſſault* (*Aſſaultus*, *Inſultus*,) is an Attempt or Offer to do a Hurt to one's Perſon; as by an Offer to ſtrike one, holding up the Fiſt in a threatning Manner, or by preſenting a Piſtol towards and near one, tho' no Hurt actually done. Words cannot amount to an Aſſault, tho' there are ſome Opinions to the contrary.

The Offender is liable to an *Action*, at the Suit of the Party aſſaulted for Damages, and to an *Indictment*, upon which he ſhall be fined, and impriſoned 'till paid. [See 5 & 6 *Ed.* 6. *ch.* 4. *infra.*]

[k] Dalt. ch. 124. p. 292, 293. 1 Cro. 78.

[a] 2 Ld. Ray. 778, 1030.

[b] 4 Inſt. 181.

[c] Dalt. ch. 124. p. 296. 1 Cro. 78.

[d] Dalt. ch. 124. p. 293, 294.

[e] Dalt. ch. 123. p. 191. ch. 224. p. 295.

[f] Dalt. ch. 124. p. 296. 4 Inſt. 180, 181.

[g] 3 Cro. 498, 499. 4 Inſt. 181.

[h] Dalt. ch. 124. p. 296, 697. Hawk. P. C. B. 1. p. 129. Contra.

[i] Finch, ch. 9. p. 202. Dalt. ch. 121. p. 282. Pult. 4. a. 2 Roll. Abr. 545. 3 Black. Com. 120, 400. 4 Black. Com. 145, 216. 1 Burn Juſt. 104, to 107.

a Finch. ch. 11. p. 203. Pult. 3, 5. Dalt ch 121. p. 282.
b Lutw. 929.

2. A [a] *Battery* (from *Battre*, to ſtrike), is an Injury done to the Perſon of another in a rude or angry Manner; as by ſtriking, puſhing, joſtling, catching by the Arm, fillipping upon the Noſe, ſpitting in the Face, pulling off a Button in a rude and inſolent Manner, *&c.* But it is [b] no Battery to lay one's Hands gently upon another that is going to ſtrike one.

c 2 Inſt. 236. 2 Ld. Ray. 1208.

This Offence is puniſhable by *Action* and *Indictment* in the ſame Manner as an Aſſault. [c] If the Huſband and Wife bring an Action of Battery for the Beating of himſelf and his Wife, the Writ ſhall abate, becauſe the Wife cannot join for the Battery of the Huſband, and the Huſband cannot have Judgment alone, becauſe his Wife is joined with him in the Original. And ſo it is in like Caſes.

d Terms of the Law, v. Battery.

A Man may *juſtify* the Beating of another who firſt aſſaults him, in his own Defence, by a ſpecial *Pleading* in an *Action*, *De Son Aſſault Demeſne*, or that the Battery was occaſioned by his own Aſſault; or he may give that in *Evidence* upon *Not guilty* to an *Indictment*. [d] And the Record of the Conviction of the Party by Indictment may ſerve afterwards for Evidence in the Action of Treſpaſs for the ſame Aſſault and Battery. [*Qu.*]

e Terms of the Law, v. Battery. 2 Roll. Abr. 546, 547, 548, 549. Dalt. ch. 121. p 283, 284, 285, 308. Kely. 64. 1 Ld. Ray. 62. See ante.
f 1 Ld. Ray. 62.
g 2 Str. 1049. 1 Ld. Ray. 231.

[e] One may alſo *juſtify* the Beating of another, who aſſaults his Wife, Father, or Mother, or his Child, or Servant [*Qu.*]; and ſo on the contrary, the Wife, Father, Mother, Child, Servant may juſtify a Beating, where thoſe that are ſo nearly related to them are aſſaulted. Alſo the Law doth allow a Man to beat another in the neceſſary Defence of his *Goods*; but if he kills him, it is Felony. Thus one may beat another in Defence of his Poſſeſſion of his Eſtate, if upon a Diſturbance one pretends to aſſault or beat him. [But in this Caſe it ſeems to be rather in Defence of his Perſon; for *merely* [f] in Defence of his Poſſeſſion an Aſſault is not juſtifiable.] Thoſe that have a *natural* or *civil* Authority over others, may chaſtiſe them for their Offences. And therefore a Huſband may correct his Wife, [*Qu.*] a Parent may juſtify the Chaſtiſing of his Child within Age with Moderation; a Maſter his Servant, or Apprentice, [See 33 *H* 8. *ch.* 12] A Schoolmaſter his Scholars, a Gaoler or his Servant, his unruly Priſoners, an Officer [g] thoſe that *reſiſt* his Arreſt. So one may chaſtiſe his Kinſman that is mad, chain him up and beat him with Rods, to keep him from doing Hurt.

If the Life of any one is in Danger by beating, or otherwiſe, any Perſon may beat him that offereth the Violence, to make him quiet.

See 5 *H.* 4. *ch.* 6. For the Penalty for Aſſaulting of a *Servant* of a Knight or Burgeſs in Parliament. The 11 *H.* 6. *ch.* 11. For the Puniſhment of thoſe as do make an Aſſault upon any that come to *Parliament*, or to the King's *Council*. The 9 *An. ch.* 16. concerning an Aſſault on a *Privy Counſellor* in the Execution of his Office. 9 *An. ch.* 14. concerning an Aſſault, Beating, or Challenging to fight, upon Account of Money won by Gaming. 6 *Geo.* 1. *ch.* 21. § 34. For the Puniſhment of Aſſaulting, Beating, or Wounding an Officer of the Cuſtoms in the Execution of his Office, *&c.* 6 *G.* 1. *ch.* 23. § 11. For aſſaulting any Perſon in the Streets or Highways with Intent to tear his Clothes, and 7 *G.* 2. *ch.* 21. For aſſaulting with Intent to rob.

See ante.

Aſſault and *Battery* are often confounded, though in Law diſtinct Offences; for in Treſpaſs for Aſſault and Battery, one may be found guilty of the Aſſault and not guilty of the Battery.

Hawk. P. C. B. 1. p. 139.

By 5 & 6 Ed. 6. ch. 4. *None ſhall uſe any chiding* Words *in Church, or Church-yard, in pain of Suſpenſion of a Layman,* ab Ingreſſu Eccleſiæ, *and of a Clerk from the Miniſtration of his* Office. *He that ſhall* ſmite *or lay violent Hands there upon any other, is thereby excommunicated* ipſo facto. *He that is convicted of maliciouſly* Striking *with a* Weapon *in any Church or Church-yard, or of drawing any Weapon there, with Intent to ſtrike another with the ſame Weapon, by Verdict, Confeſſion, or two lawful Witneſſes, at the Aſſizes or Seſſions, ſhall have one of his Ears cut off,* &c. *and ſhall ſtand excommunicate* ipſo facto.

[a] Churchwardens, *&c.* who whip or ſtrike Boys for playing in the Church, or pull off the Hats of thoſe who ſit there with their Hats on, or gently lay their Hands on one that is excommunicated, to turn him out of the Church, are not within the Statute.

[a] 1 Saund. 13, 14. 1 Sid. 301.

3. An [b] *Affray* (from *Effrayer*, to terrify) is a Fighting of two or more to the Terror of the King's Subjects. There muſt be a Stroke given, or offered, or a Weapon drawn. If the Stroke is offered on one Side only, or in a private Place out of the Hearing of any, it is an Aſſault, though Aſſault and Affray are ſometimes confounded.

A *Menace* to beat or kill is no Affray. To challenge another either by Word or Letter to fight a Duel, or to be a Meſſenger of ſuch a Challenge, is an high Offence, and the Combat, though no Blood is drawn, is an Affray. Any *private* Perſon who ſees others fighting, may lawfully part them till the Heat is over, and deliver them to the Conſtable; and the Law doth encourage him to it. For if he receives any Harm by the Affrayers, he is allowed his Remedy by Action againſt them. * And if any private Perſon is commanded by the Sheriff, Juſtice of the Peace, or Conſtable, to aſſiſt in parting the Affrayers, and he refuſes or neglects to do it, he is puniſhable by Fine and Impriſonment. And ſo is the *Conſtable* [c], or other Conſervator of the Peace, if he neglects his Duty.

All Affrays are puniſhable by Fine and Impriſonment.

[b] 3 Inſt. 258. Dalt. ch. 8. p. 35 H. P. C. 135. 136 Hawk. P. C. B. 1. ch. 63. 4 Black. Com. 145. 1 Burn Juſt. 16, to 20.

[c] See ante.

4. [d] *The Taking away Maidens* or Women Children under the Age of ſixteen Years without Conſent of their Parents, is againſt the *publick Peace.* Therefore,

By 4 & 5 Ph. & M. ch. 8. *None ſhall take away or cauſe to be taken away, any Maid, or Woman Child, unmarried, within the Age of ſixteen Years (though it be not againſt her Will) from the Poſſeſſion and againſt the Will of the Father or Mother of ſuch Maid, or of the Perſon appointed to be Governor or Guardian by the Father in his Lifetime, or by Will after his Death, upon Penalty of* two *Years Impriſonment. And if any ſuch Maid is ſo taken away and deflowered, or married againſt the Will of the Father, if he is living, or againſt the Will of the Mother, having the Cuſtody of ſuch Maiden, if the Father is dead, the Offender ſhall ſuffer* five Years *Impriſonment.*

And if any ſuch Child above the Age of twelve Years, and under the Age of ſixteen, do conſent to ſuch Marriage, the next of Kin of the ſaid Woman Child, to whom the Inheritance ſhould deſcend or come after the Deceaſe of the ſaid Woman Child, ſhall from the Time of ſuch Aſſent or Agreement

[d] 3 Inſt. 62. 2 Str. 1162.

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* *Qui non prohibet, cum prohibere poteſt, in culpa eſt.* 3 Inſt. 158.
Idem eſt facere, et nolle prohibere, cum poſſis. Ibid.
Qui non prohibet, quod prohibere poteſt, aſſentire videtur. 2 Inſt. 305.
Qui non obſtat, quod obſtare poteſt, facere videtur. 2 Inſt. 146.

enjoy all ſuch Lands, Tenements, and Hereditaments, as the ſaid Woman Child had in Poſſeſſion, Reverſion, or Remainder, at the Time of the Aſſent, during the Life of ſuch Woman Child.

Provided this Act ſhall not be prejudicial to any Cuſtom concerning Orphans in London, *or other City or Town.*

a See ante.

It is required here, that the Maid ſhould have Lands or Goods, *&c.* as by 3 *H.* 7. *ch.* 2[a]. Concerning *forcible Marriage* or *Defilement* of Women of Eſtate. [See 3 *Ja.* 1. *ch.* 5. § 13. Concerning Forfeiture for a *Popiſh Marriage.*]

b Raym. 474. 4 Black. Com. 219.

5. [b] *Kidnapping* is a ſtealing away of a Man, Woman, or Child. It is an Offence at Common Law, and puniſhable by Fine, Pillory, *&c.*

By 11 & 12 W. 3. ch. 7. *If a Maſter of a Merchant Ship ſhall, during his being abroad, force any Man aſhore, or wilfully leave him behind, &c. he ſhall ſuffer three Months Impriſonment.* [See 4 *Geo.* 1. *ch.* 11. Concerning Tranſportation upon Contract, *&c.*]

3 Black. Com. 179. c Dalt. ch. 126. p. 299, 300. 4 Black. Com. 147. H. P. C. 138. 1 Inſt. 257. b. 2 Burn Juſt. 175, to 191. d Dalt. ch. 126. p. 300, 301. H. P. C. 139. 1 Inſt. 257. b.

6. A *forcible Entry* is, when one or more Perſons furniſhed with unuſual Weapons, do violently enter the Houſe or Land of another, or do uſe violent and threatning Words to the Terror of another, and by that Means gain the Poſſeſſion; or if one or more do enter peaceably, and then forcibly put another out of his Poſſeſſion.

A *forcible* [d] *Detainer* is when one or more have entered peaceably, and detain the Poſſeſſion with Force, with Arms, or with an unuſual Number of People, or with Threatnings to defend it.

This was no Crime at *Common Law* where one had a Title, and Entry was lawful. But now this is made an Offence by *Statutes.* For,

By 5 Ri. 2. St. 1. ch. 7. *None ſhall enter into Lands or Tenements, but where Entry is given by Law, and in a peaceable Manner; upon pain of Impriſonment and Ranſom at the King's Will.*

e Dalt. ch. 126. p. 297.

[e] Here was no Remedy but upon a general Inquiry in the Quarter-Seſſions, or by Indictment, or Action. Therefore,

By 15 Ri. 2. ch. 2. *When a forcible Entry is made into any Lands, Tenements, or other Poſſeſſions, or into Benefices or Offices of the Church, one or more Juſtices of the County, taking ſufficient Power, and going to the Place ſo kept by Force, and finding any that hold ſuch Place, forcibly, after ſuch Entry made, may commit the Offender to the next Gaol, there to remain Convict by the Record of the Juſtice, till he hath made Fine and Ranſom to the King. And all People of the County ſhall be aſſiſting to the Juſtice, to arreſt ſuch Offender, upon Pain of Fine and Impriſonment.*

a 2 Ld. Ray. 1514. 2 Str. 794. S. C.

The *ſame* Juſtice may [muſt[a]] aſſeſs the Fine for this Offence.

But neither of theſe Statutes extended to thoſe that entered peaceably and detained with Force, nor gave any Remedy if the Parties, who made the Entry with Force, removed before the Coming of the Juſtices; nor did they give the Juſtices any Power to reſtore the Party ejected; nor ordain'd any Penalty againſt the Sheriff, if he did not obey the Precepts of the Juſtices, in the Execution of the ſaid Statutes. Wherefore,

By 8 H. 6. ch. 9. *Upon Complaint made to the Juſtices of the County, or one of them, of a forcible Entry or Detainer, by the Party grieved,* *they or one of them ſhall cauſe the Statute of* 15 Ri. 2. ch. 2. *to be duly executed at the Coſts of the Party grieved.*

And when Complaint is made of any ſuch Entry or Detainer to any Juſtice or Juſtices, he or they, by Warrant or Precept, ſhall command the Sheriff *to ſummon a ſufficient Jury, to inquire of the Force committed. And upon Force found, the Juſtice or Juſtices ſhall cauſe the Lands,* &c. *to be re-ſeiſed, and ſhall put the Party diſſeiſed in Poſſeſſion* [b], *in the Abſence as well as Preſence of the Party offending.*

[c] The Juſtices are to reſtore the Poſſeſſion, and not to inquire into the Title of either of the Parties.

Provided that this Statute ſhall not endamage any, where they or their Anceſtors have continued their Poſſeſſions of the ſame for three *Years.*

[d] But if the Diſſeiſee within the three Years makes lawful Claim, this is an Interruption of the Poſſeſſion.

By 31 El. ch. 11. *There ſhall be no Reſtitution upon an* Indictment *of forcible Entry or forcible Detainer, where the Defendant hath been in quiet Poſſeſſion for* three *whole Years together next before the Day of ſuch Indictment ſo found, and his Eſtate therein not ended; which the Party indicted may alledge for ſtay of Reſtitution; and Reſtitution is to ſtay, till that be tried, if the other will traverſe the ſame; and if upon Trial it be found againſt him, he ſhall pay Coſts and Damages.*

By 21 Ja. 1. ch. 15. *Upon forcible Entry or Detainer, a Juſtice,* &c. *hath like Power, upon* Indictment *found, to give Reſtitution of Poſſeſſion to Tenants for Years, by* Elegit, *Statute-Merchant or Staple, Tenant by Copy of Court-Roll, as thoſe that claim Freehold, by Virtue of former Statutes.*

So that now a [e] complete Remedy is given againſt thoſe who enter with Force, and continue the Poſſeſſion peaceably; againſt thoſe who enter peaceably, and detain or hold out with Force; and againſt thoſe who both enter by Force, and detain by Force.

The Indictment muſt ſet forth, that the Entry was [f] *Manu Forti.* Thoſe are peculiar Words for this Offence, to diſtinguiſh it from all other Treſpaſſes *Vi & Armis.* There are many Niceties to be obſerved in drawing the indictment [g].

To remove a Force out of a Pariſh-Church, or Parſonage-houſe, there is another Remedy by a Writ [a] *De Vi Laicâ Removendâ.*

There is a Force *implied* in Law, as in every Treſpaſs, *Vi & Armis.* [But this is not a Force within the Meaning of the above Statutes.]

7. [b] An *unlawful Aſſembly* is, where three or more aſſemble themſelves together, to do an unlawful Act, and part without doing the ſame, or without making any Motion towards the Execution of it. The Meeting only to do an unlawful Act is puniſhable. If there was no ill Intent, and the Meeting was for Sport and Merriment, it is not puniſhable.

[c] One for Safeguard of his *Houſe,* and for the Defence of the Poſſeſſion thereof, may aſſemble his Friends againſt thoſe that threaten to make an unlawful Entry into it; but he cannot aſſemble his Friends for the Defence of his *Perſon,* againſt thoſe that threaten to beat him, while he is out of his Houſe.

8. A [d] *Rout (Rout, Turba)* is when three or more do any unlawful Act upon a common Quarrel; as when the Inhabitants of a Town break down Incloſures, pretending to have Right of Common or a Way there.

[b] 1 Ld. Ray. 440, 482.

[c] Dalt. ch. 130 p. 312.

[d] H.P.C. 139.

2 Ld. Ray. 1011, 1036.

[e] Dalt. ch. 125. p. 298.

[f] 1 Cro. 461, Dalt ch. 126; p. 298.

[g] Hawk. P. C. B. 1 ch. 64.

[a] See of Writs, B. 4. ch. 4. poſt. F. N. B. 54, 55.

[b] 3 Inſt. 176. H. P. C. 137, Dalt ch. 135, 136. p. 320, 321. Hawk. P. C. B. 1. p. 158. 4 Black. Com. 146.

[c] Dalt. ch. 127. p. 338. H. P. C. 137. 5 Rep. 91. 3 Burn Juſt. title Riot Rout and unlawful Aſſembly.

[d] 3 Inſt. 176, Pult. 25. Hawk. P. C. B. 1. p. 158.

[e] Dalt. ch. 136. p. 321. 4 Black. Com. 146.

[e] But others ſay, that a Rout is, where three or more have met to do an unlawful Act, and have moved forward in order to do it, but part without doing it. This is puniſhable tho' the Act is not executed. The firſt Deſcription of a Rout agrees almoſt with the Notion of a Riot. For,

[f] 3 Inſt. 176, H. P. C. 137. 1 Ld. Ray. 384. Hawk. P. C. B. 1. ch. 65. 4 Black. Com. 125, 142, 146.

9. A [f] *Riot* (from *Rioter*, *Rixari*) is where three Perſons at leaſt do an unlawful Act, of a private Nature, with Force; as when they beat a Man, hunt in his Park, Chaſe or Warren, cut or deſtroy his Corn, Graſs, or other Profit, enter or take Poſſeſſion of Land, *&c.* all who are concerned therein are Rioters. And if one ſeeing others engaged in a Riot, do aſſiſt them therein, he is as much a Rioter, as if he had firſt aſſembled with them for that Intent.

[g] Dalt. ch. 136. p. 322.

In every Riot there muſt be ſome Intention of *Force* or *Violence.* [g] Therefore Aſſemblies for Wreſtling, playing at Cudgels, Cards and Dice, Drinking, Dancing, *&c.* are not Riots. And this Force muſt relate to ſome *private* Quarrel only. For if the Intention of ſuch Aſſemblies is to redreſs [h] publick Grievances, and ſuch Intention is executed, this is Levying War againſt the King, and amounts to *High Treaſon.*

[h] 3 Inſt. 9, 10. See ante.

[i] Dalt. ch. 136, 138. p. 321, 322, 323, 324. 1 Ld. Ray. 384. 2 Ld. Ray. 965, 1210. 2 Salk. 594, 595.

In Riots, Routs, and unlawful Aſſemblies, [i] we muſt conſider the *Number* of the Perſons, which muſt be three at leaſt; The *Intent* and Purpoſe of their Meeting, which muſt be to do ſome unlawful Act with Violence or Force, and muſt not be falling out upon a ſudden Quarrel after a lawful Meeting; the *Lawfulneſs* or *Unlawfulneſs* of the Act; the *Manner* and *Circumſtances* of doing it; for the Manner of doing a lawful Thing may make it unlawful; as if a Nuſance is removed in a violent and tumultuous Manner, *&c.*

By the *Common Law* Offences of this Nature are puniſhable by Fine and Impriſonment, and, if enormous, by Pillory.

[a] 3 Cro. 252. Dalt. ch. 82. p. 204. ch. 139. p. 326.

[a] If a Mayor and Aldermen, *&c.* are guilty of a Riot, they are puniſhable only in their natural Capacities. Yet the Liberties of Corporations have been ſeiſed, or the Corporation fined, where the Governors have countenanced a dangerous Riot within their Precincts.

[b] Dalt. ch. 139. p. 325.

[b] Women are puniſhable as Rioters, but Infants under the Age of Diſcretion, or fourteen, are not puniſhable.

Theſe Offences are alſo puniſhable by *Statute*, For,

By 34 Ed. 3. ch. 1. *The Juſtices of the Peace have Power to reſtrain Offenders, Rioters,* &c. *and to arreſt and chaſtiſe them according to their Offence; and to cauſe them to be impriſoned, and duly puniſhed.*

By 17 R. 2 ch. 8. *As ſoon as the Sheriff and other the King's Miniſters ſhall hear of a Riot, Rout, or other Aſſembly againſt the Peace, they, with the Power of the County, ſhall apprehend ſuch Offenders, and put them in Priſon, until delivered by Law.*

By 13 H. 4. ch. 7. *Two Juſtices of the Peace, dwelling near the Place, where ſuch Offences ſhall be committed, together with the Sheriff or Under-Sheriff, ſhall by the Power of the County (if need be) ſuppreſs Riots, Routs, and unlawful Aſſemblies, arreſt the Offenders, and record what ſhall be done; by which Record the Offenders ſhall ſtand Convict, as by the Statute of* 15 Ri. 2. ch. 2. *in caſe of forcible Entries. And if the Offenders are departed, the ſaid Juſtices,* &c. *ſhall, within a Month after, make inquiry thereof, and* hear *and* determine *the ſame, in Pain of* 100 l.

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[g] *Multitudinem decem faciunt.* (*Qu.*) 1 Inſt. 257. a.

When a Riot is ſuppreſſed by the Juſtices together with the Sheriff, and they convict the Rioters by a Record of the Force upon their proper View, the Sheriff ought to be Party to ſuch Inquiſition; and ſo he ought by 19 *H.* 7. *ch.* 13. But if the Rioters diſperſe of themſelves, and after they are parted, an Inquiſition is made of it by two Juſtices of the Peace; there is no need that it appear by the Inquiſition that the Sheriff was Party to the Inquiry; becauſe the Juſtices may make the Inquiſition without him.

1 Ld. Ray. 215.

[c] Theſe Statutes are to be underſtood to ſpeak of great and notorious Riots, in the Nature of Inſurrections and Rebellions. The Juſtices by their Commiſſion may inquire of ſmall Riots at any Time afterwards. [But it ſeems that the Act does not reſtrain [d] their Authority to one Month after the Riot, ſo as that it cannot be executed afterwards; the Lapſe of the Month only making *them* liable to the Penalty.]

c Dalt. ch. 83. p. 201.

d 1 Ld. Ray. 215.

The Record of the Riot within the View of the Juſtices, by whom it is recorded, is ſuch a Conviction, as cannot be [e] traverſed, the Parties being concluded thereby. Yet the Parties may take Advantage of the Inſufficiency of the Record, and except againſt it, if the Juſtices have not purſued the Statute.

e Dalt. ch. 82. p. 199, 200.

[f] It is ſaid, that the Offenders, being arreſted by the ſaid Juſtices, and convicted upon the Record of their Offence in their Preſence, ought to be ſent immediately to Gaol, till they pay the Fine aſſeſſed by the ſame Juſtices, who drew up the Record; which Fine ſhall be eſtreated into the Exchequer to the King's Uſe; or elſe the Juſtices may record ſuch Riot by them viewed, and commit the Offender; and after certify the Record into the King's Bench, or to the Aſſizes, or Seſſions.

f Dalt. ch. 82. p. 199, 200. 201, 202.

If the Offenders are gone, then the Juſtices ſhall inquire by a Jury; and if the Riot is found, the Juſtices muſt make a Record of it, and fine them, or receive the Traverſe, to be ſent by the Juſtices to the next Quarter-Seſſions, or into the King's Bench, or to be tried according to Law. [See 2 *H.* 5. *ch.* 8. and 8 & 9 *H.* 6. *ch.* 14.]

By 19 H. 7. ch. 13. *The Sheriff having a Precept directed to him to return a Jury, according to* 13 H. 4. ch. 7. *ſhall return twenty-four Perſons*, &c. *to inquire of the Riot, Rout, or unlawful Aſſembly.* [See 13 *Car.* 2. *St.* 1. *ch.* 5. An Act againſt Tumults and Diſorders upon Pretence of preparing or preſenting publick Petitions, *&c.* to his Majeſty or the Parliament.]

But 1 *Geo.* 1. *ch.* 5. which ſee *ante.* is a more ſevere Statute againſt Rioters, if they meet to the Number of *twelve*, adjudging them to be *Felons* without Clergy. But that Statute, being wholly in the Affirmative, does not take away any Authority in the Suppreſſing of a Riot by Common Law or by Statute. [See 1 *Geo.* 1. *St.* 2. *ch.* 25. For preventing Diſturbances by *Seamen* and others.]

[Oppoſing Officers of the Cuſtoms, to the Number of eight Perſons armed, is to be puniſhed with Tranſportation, by 6 *Geo.* 1. *ch.* 21.]

See ante.

10. *Riding* or *going armed* with dangerous and unuſual Weapons to the Terror of the People, is an Offence at [a] *Common Law*, and prohibited by *Statute*.

a 3 Inſt. 160.

By the Statute of *Northampton*, or 2 Ed. 3. ch. 3. *None* [b] *(except the King's Servants in his Preſence, and his Miniſters in executing his Precepts or their Office, and ſuch as be in their Company aſſiſting them, and alſo upon a Cry made for Arms to keep the Peace in the Place where ſuch Acts hap-*

b Hawk. P. C. B. 1. p. 135. 4 Black. Com. 148.

pen) ſhall come with Force and Arms before the King's Juſtices, or other of the King's Miniſters, doing their Office or executing his Commands; nor go or ride armed by Night or Day in Affray of the People in any other Place; upon Pain to forfeit their Armour, and to ſuffer Impriſonment at the King's Pleaſure.

Juſtices of the Peace, &c. *have Power to put this Act in Execution. And the Juſtices of Aſſize have Power to puniſh them that have not done their Duty.*

[See 25 *Ed.* 3. *St.* 5. *ch.* 2. 7 *Ri.* 2. *ch.* 13. 20 *Ri.* 2. *ch.* 1. By the laſt of which Acts a Fine is added to the other Penalties for riding or going armed, to be ſet by the Juſtices.]

Theſe Statutes are ſeldom put in Execution.

c 3 Inſt. 162.

[c] No Perſon can excuſe the wearing ſuch Armour in publick, by alledging that he wears it for his Safety againſt an Aſſault, which one has threatened. But he may aſſemble his Friends, and arm them, againſt thoſe that threaten to do him Violence in his *Houſe*, as before obſerved. Men may uſe common Arms according to their Quality, and according to the Faſhion, and have ſuch Attendants with them armed as is agreeable to their Characters. And Men may arm themſelves, to take Felons, ſuppreſs Rioters, to execute the King's Proceſs, *&c.* as is excepted in the Statute of *Northampton*.

d Terms of the Law, v. Lible. 5 Rep. 125. Hawk. P. C. B. 1. ch. 73. 2 Str. 788. 3 Black Com. 125. 4 Black. Com. 150.

a 5 Rep. 125. Hob. 253. Hard. 470.

11. [d] A *Libel* (*Libellus Famoſus*) is a malicious Defamation of any Perſon, expreſſed either in Printing or Writing, Signs or Pictures, to aſperſe the Reputation of one that is alive, or the Memory of one that is dead. If it be made againſt a *private* Man, it may excite the Libelled, or his Friends, to revenge, and be the Cauſe of Bloodſheding. If it be againſt a *Magiſtrate,* it is not only a Breach of the Peace, but a Scandal to the Government. A Libel is puniſhable, tho' the private Man or Magiſtrate is dead at the Time of making the Libel; for others of the ſame Family are alſo provoked to a Breach of the Peace; and in the Caſe of a Magiſtrate deceaſed, the Government is alſo traduced, which never dieth. It is not material, whether the Matter of the Libel be [a] true or falſe, if the Proſecution is by Information or Indictment. But in an Action of the Caſe one may juſtify, that it is true. [*Qu.*]

b Hob. 215. c Hurt's Caſe Trin. 12 An.

The Printing or Writing may be libellous, tho' the Scandal is not charged in direct Terms, [b] but obliquely or ironically; [c] or tho' there is but one or two Letters of the Name expreſs'd, or the firſt and laſt Letter of the Name; if the Jury will underſtand it, to point at a particular Perſon.

d Dyer. 285. 4 Rep. 14, 15. 2 Inſt. 228. 1 Roll. Abr. 34.

Falſe or ſcandalous Matter in a [d] legal Proceeding in a Courſe of Juſtice (as by Bill of Complaint, Petition, Articles, *&c.*) will not amount to a Libel; if the Court, or the Perſon applied to, hath Juriſdiction in the Cauſe. Therefore no preſentment of a Grand Jury can be a Libel.

e 9 Rep 59. 2 Salk. 417. 1 Ld. Ray. 415. S. C.

If one *finds* a Libel, he ought to burn it, or deliver it to a Magiſtrate. [e] For not only the Contriver, but the Procurer, or Publiſher of it, knowing it to be a Libel, is puniſhable. If one readeth a Libel, or hears it read, and laughs at it, it is not a publiſhing of it; for before he reads it, or hears it, he cannot know it to be a Libel. But if after he hath read it, or heard it read, he repeats or ſings it, or any Part of it, in the hearing of others; or if after he knoweth it to be a Libel, he reads it to others; it is an unlawful Publiſhing of it. But if one, writes a Copy of it, and does not deliver it to others, the Writing of a Copy is no Publication [*Qu.*] but it is a great Evidence that he publiſhed it, if it is publiſhed, when he knowing it to be a Libel, writeth a Copy of it, if he does not afterwards deliver it to a Magiſtrate, to examine it. For then the ſubſequent Act doth explain the precedent Intent. [f] If a Libel is found in a Houſe, the Maſter of the Houſe cannot be puniſhed on an Information or Indictment, for framing, printing, and publiſhing of it. But he may be indicted for having it, and not delivering it to a a Magiſtrate. [*Qu.*] [g] It is ſaid, That if Bookſellers or Hawkers publiſh or ſell Libels, tho' they know not the Contents of them, yet they are puniſhable; the publick Peace being to be more regarded than a private Intereſt.

To ſend an abuſive [h] *Letter* to one, without publiſhing of it to others, is an High Offence; becauſe it directly tends to the Diſturbance of the Peace; but no Action will lie, becauſe it is no Publication. To ſcatter and diſperſe a libellous Letter in the Fields, without ſending any to the Perſon himſelf, is a Publication of the Libel.

I ſaid that a Libel may be by [i] *Signs* and *Pictures*, as well as by Printing or Writing. For to fix a Gallows at one's Door, or to paint it upon one's Door, or to paint one in a Fool's Coat, or to draw one's Picture with Aſſes Ears, is very provoking, and direct ſtirring up a Quarrel, cauſing a Diſturbance of the Peace.

[k] A Libeller or a Publiſher of a Libel, or thoſe that procured the making or publiſhing of it, may be puniſhed upon Indictment at Common Law by Fine and Impriſonment, and by the Pillory, by wearing Papers ſignifying the Fault, or other Corporal Puniſhment, if the Offence deſerves it.

12. *Falſe and Scandalous Tales and News,* [a] whereupon Diſcord may ariſe betwixt the King and Great Men of the Realm, may be puniſhed at Common Law by Fine and Impriſonment.

13. [b] *Falſe Prophecies,* (where Perſons pretend extraordinary Commiſſions from God) to raiſe Jealouſies in the People, or to terrify them with impending Judgments, are puniſhable at Common Law as Impoſtors. Predictions, either of the Time of the End of the World, or that it is at Hand, are not lawful.

By 5 El. ch. 15. *None ſhall publiſh or ſet forth any Phantaſtical* or *Falſe* Propheſy, *with an Intent to make Rebellion, Loſs of Life, or Diſturbance, in pain of* 10 l. *for the firſt Offence, and a Year's Impriſonment. And for the ſecond Offence, to forfeit all his Goods and Chattles, Real and Perſonal, and to incur Impriſonment during Life.*

The Proſecution is to be within ſix Months.

Theſe are the chief Offences againſt the *Publick Peace.* But to this Head all Kind of *Miſdemeanors,* and *Treſpaſſes Vi et Armis,* may be referred; which are innumerable.

III. Offences againſt *Publick Trade* are *Uſury, Foreſtalling Ingroſſing* and *Regrating, Monopolies, Deceit* and *Coſinage, Deſtroying of the Game, Deſtroying of Corn, Wood,* &c.

1. [c] *Uſury* (*Uſus Æris*) is the Gain of any Thing by Contract above the Principal or Thing lent, exacted only in Conſideration of the Loan of it, or for the Forbearance of the Demand of it. It may be of Money, Wares, *&c.*

[f] 1 Vent. 31. 5 Rep. 125.

[g] Moor 627. Contra. 9 Rep. 59.

[h] 12 Rep. 34. Hob. 62, 215, 253. 1 Lev. 139.

[i] 5 Rep. 125.

[k] 5 Rep. 125. 3 Inſt. 174. 3 Cro. 175.

[a] 2 Inſt. 226, 227, 228. 4 Black. Com. 149.

[b] 3 Inſt. 128, 129. 4 Black. Com. 149. 4 Burn Juſt. 50.

[c] 3 Inſt. 151, 152. 2 Str. 816, 1243.

Hawk. P. C. B. 1. ch. 82. Exod. xxii. v. 25. Levit. xxv. v. 36, 37. Deut xxiii. v. 19, 20. See Hawk. P. C. B. 1. p. 245. Comy. 583. 2 Black, Com, 455. 4 Black. Com. 115, 156.

All Uſury was anciently held to be againſt the *Common Law*, and puniſhable by it. [But now it is generally agreed, that the taking of reaſonabe Intereſt for the Uſe of Money is in itſelf lawful. But to reſtrain the exceſſive Rate of it:] It is enacted,

By 12 Ann. ch. 16. *That no Perſon ſhall take directly or indirectly for the Loan of any Money, Wares, or Commodities whatſoever, above the Value of Five Pounds for the Forbearance of one Hundred Pounds for a Year, and ſo after that Rate for a greater or leſſer Sum, or for a ſhorter or longer Time; in pain that all Bonds and Contracts to the contrary ſhall be void; and the Receiver to forfeit for every ſuch Offence the treble Value of the Money, Wares, and Things ſo lent and bargained.*

Every Scrivener, Broker, or Solicitor, taking for Procuration above Five Shillings for the Loan of 100 l. *for a Year, and ſo rateably; or above* 12 d. *over and above the Stamp Duties, for making the Bond or Bill, ſhall forfeit* 20 l. *for every Offence, with Coſts of Suit, and ſuffer Impriſonment for Half a Year.*

A Contract for Six *per Cent.* made before this Statute, is not within the Meaning of it. [See the old Statutes concerning Uſury, 37 *H.* 8. *ch.* 9. 13 *El. ch.* 8. 21 *Ja.* 1. *ch.* 17. 12 *Car.* 2. *ch.* 13. And ſee 1 *Ja.* 1. *ch.* 21. and 30 *G.* 2. *ch.* 24. concerning Pawn-brokers; 8 & 9 *W.* 3. *ch.* 20. and 32. 6 *Ann. ch.* 16. and 7 *G.* 2. *ch.* 8. to reſtrain the Number and ill Practice of Brokers and Stockjobbers.]

[a] 2 Inſt. 89. 2 Roll. Abr. 801, 802.

[b] 2 Cro. 208, 209, 508, 509, Show. Rep. 8.

[c] 2 Str. 1243.

[d] 1 Cro. 27. 2 Cro. 253. 5 Rep. 69, 70. Show. Rep. 8.

[e] 2 Cro. 677. 678. 3 Cro. 501. 2 Ventr. 83.

[f] 5 Rep. 70.

[g] 5 Rep. 69.

[a] Special Agreement to pay double the Sum borrow'd, &c. by way of *Penalty* for Non-payment of the principal Debt at a certain Day, is not within the Statutes; for this is only a Penalty for Damages; and the Borrower might repay the Principal at the Time agreed, to avoid the Penalty. [b] Neither is it exceſſive Uſury, if the Intereſt doth exceed Five *per Cent.* when poſſibly the Principal and Intereſt are in Hazard upon Contingencies or Caſualties; or where there is a Hazard, that one may have leſs than his Principal. As upon a Bond with condition of Payment of a large Sum, which depends upon the Return of a Ship from the *Indies*, &c. [But the taking more than legal Intereſt for diſcounting a Note or Bill ſeems to be Uſury [c] within 12 *Ann. ch.* 16.] [d] Nor upon a Grant of an Annuity for Life beyond legal Intereſt. If the Agreement is to pay Fifty Shillings at the End of Six Months, the Computation muſt be by Kalendar Months; becauſe if the Computation was by Lunar Months, the Intereſt would exceed the Rate allowed by the Statute. But where the Agreement is for Intereſt allowed by the Statute, the [e] Miſtake of the Scrivener ſhall not avoid a fair Agreement, if he draws a Bond, &c. in ſuch Manner as brings it within the Statute. Neither ſhall the Receipt of the Intereſt before the Time for the Conveniency of the Creditor, &c. without any corrupt Agreement, make the Receiver liable to the Forfeiture of the treble Value; or if the Lender accepts of a [f] voluntary Gratuity from the Borrrower upon Payment of Principal and Intereſt; if there was no Agreement made for it, though the Lender might expect it. [[g] But in all theſe Caſes the Contract muſt appear to be fair, and not eluſive, or intended to evade the Statutes.]

[*Note*, That the above Determinations, tho' made upon the old Statutes, yet ſeem to be equally applicable to 12 *Ann. ch.* 16. which is penned in nearly the very ſame Words.]

[See 9 & 10 *W.* 3. *ch.* 17. Where Inland *Bills* of *Exchange* of Five Pounds or upwards (in which Bills the Value ſhall be expreſs'd to be received) ſhall be paid with *Intereſt* and Charges from the proteſting;

and in Default of ſuch Proteſt, and due Notice thereof, the Perſon failing thereof ſhall be liable to all Coſts, Damages, and *Intereſt*. See alſo 3 *&* 4. *Ann. ch.* 9. For giving *like* Remedy upon *Promiſſory Notes*, as is uſed upon Bills of Exchange; and for the better Payment of Inland Bills of Exchange.]

2. Of *Foreſtalling*, *Regrating*, and *Ingroſſing*.

A [h] *Foreſtalling* (from the *Saxon* Word *Far* or *Fare*, the *Way* or *Paſſage*, and *Stall*, a *Hindrance*) is deſcribed in the following Statute. For,

By 5 & 6 Ed. 6. ch. 14. *A Buying or Contracting for any Merchandize, Victual, or any other Thing whatſoever, coming by Land or Water to any Fair or Market, to be ſold in the ſame, or coming from beyond Sea to any Port or Haven to be ſold; or cauſing the ſame to be bought; or a diſſuading People by Word, Letter, Meſſage or otherwiſe, from bringing ſuch Things to Market, or perſuading them to enhance the Price, after they are brought thither, is* Foreſtalling. *And the Party guilty in any of theſe Inſtances ſhall be adjudged a Foreſtaller.*

[h] 1 Inſt. 161.b. 3 Inſt. 195. 4 Black. Com. 158. 2 Burn Juſt. 194. to 200.

It is againſt the Common Law, to ſell Corn in [a] Sheafs, before it is threſhed and meaſured; for by ſuch Sale the Market is in effect foreſtalled.

[a] 3 Inſt. 197. H. P. C 152.

[b] To diſcourage People with falſe Reports, to ſell their Wool, or by falſe Reports to lower the Price of our Native Commodities, is fineable. For all Attempts of this Kind are prejudicial to Trade.

[b] 3 Inſt. 196.

3. [c] *Regrating* (from *Regratement*, Huckſtry) is deſcribed by the ſame Statute. For,

[c] 3 Inſt. 195.

By 5 & 6 Ed. 6. ch. 14. *A* Regrating *is a buying, or obtaining in any Fair or Market any Corn, Wine, Fiſh, Butter, Cheeſe, Candles, Tallow, Sheep, Lambs, Calves, Swine, Pigs, Geeſe, Capons, Hens, Chickens, Pigeons, Conies, or other Dead Victual whatſoever, brought to a Fair or Market to be ſold there, and a ſelling the ſame again in the ſame Fair, or Market, or Place, or in ſome other Fair or Market within four Miles thereof.*

By Regrating, the Goods are made dearer, for every Seller will gain ſomething.

4. [d] An *Ingroſſing*, (from *Groſſe*, Great or Whole) is alſo deſcribed by the ſame Act. For,

[d] 3 Inſt. 195.

By 5 & 6 Ed. 6. ch. 14. *An* Ingroſſing *is a getting into one's Poſſeſſion, by Buying, Contract, or Promiſe (other than by Grant or* Leaſe *of Land or Tithes) any Corn growing in the Fields, or any other Corn or Grain, (except* Barley *and* Oats *to make* Malt *and* Oatmeal, *in his own* Houſe) *Butter, Cheeſe, Fiſh, or other Dead Victual whatſoever* (of like neceſſary and common Uſe) *with Intent to ſell them again.*

[e] Salt is within the Statute (See 13 *El. ch.* 25. § 21.) but not Apples, Plums, Cherries, for they are no Victual; nor [f] Hops, nor [g] Malt, nor the buying of Corn to make Starch of it, and then to ſell it, or to make [h] Meal, and then to ſell it; nor the buying of [i] Barley, with Intent to make it into Malt, and then to ſell it.

[e] 3 Inſt. 195. 196. H. P. C. 152. 2 Cro. 214. 3 Cro. 231.
[f] 3 Cro. 231.
[g] 3 Inſt. 196. H. P. C. 152.
[h] 3 Cro. 231.
[i] 3 Inſt. 196. 3 Cro. 231.

[k] A Stranger or Subject bringing Victuals, or other Merchandize into the Realm, may ſell the ſame in Groſs; but he that buys them, cannot do the like; neither may any Merchant buy in Groſs within the Realm, and ſell in Groſs; for then a rich Man might ingroſs a whole Commodity, and ſell it at what Price he thought fit. [See 5 *El. ch.* 5. § 13.]

[k] 3 Inſt. 196.

By the ſaid Statute, *The Party Guilty of any of the Offences aforeſaid,* (i. e. Foreſtalling, Regrating, *or* Ingroſſing) *upon Conviction at the*

Quarter-Seſſions by two Witneſſes, upon Bill, Information, or Preſentment, loſeth for the Firſt Offence, *the Value of the Goods ſo bought or had, and ſhall ſuffer two Months Impriſonment; for the* Second Offence *double the Value, and ſix Months Impriſonment; and for the* Third Offence *he ſhall forfeit all his Goods, be ſet upon the Pillory, and be impriſoned at the King's Pleaſure.*

The Forfeitures are to the King's Uſe only, if there are no Informers; otherwiſe a Moiety to the King, and a Moiety to the Informer.

The Information muſt be within two Years after the Offence. [See 31 *El. ch.* 5.]

This Act ſhall not reſtrain the Buying of any ſuch Barley *or* Oats, *as any Perſon (not foreſtalling) ſhall buy, to convert into* Malt *or* Oatmeal *in his own Houſe.*

Or the Buying of any ſuch Things by any Fiſhmonger, Butcher, or Poulterer, Innholder, or Victualler, (not foreſtalling) as concern his Trade, he retailing the ſame at reaſonable Prices.

Or the Taking of any of the Things above-mentioned reſerved upon a Leaſe.

Or the Buying of any dried or ſalted Fiſh, Herring, or Sprats (not foreſtalled) and ſold for reaſonable Prices.

Or any Badger, Lader, Kidder, or Carrier, aſſigned to that Office by three Juſtices of the Peace, and ſelling and delivering the Commodity in open Fair or Market, or out of his Hand within one Month after he buys it.

Or to a Common Drover licenſed by three Juſtices, buying and ſelling Cattle, &c.

[See 5 *El. ch.* 12. An Act touching Badgers of Corn and Drovers of Cattle to be *licenſed*. See alſo 13 *El. ch.* 25. § 20, 21.]

Or the Proviſion made for any Town-Corporate, Ship, Caſtle, Fort, &c.

[See 23 *Ed.* 3. *ch.* 6. 25 *H.* 8. *ch.* 2. How and by whom the Prices of Victuals ſhall be aſſeſſed. 5 *El. ch.* 5. Concerning Sea-Fiſh, Wine, Oil, Sugar, Salt, *&c.* 21 *Ja.* 1. *ch.* 22. Concerning Traders in Butter and Cheeſe. 1 *W. & M. Seſſ.* 1. *ch.* 12. and 2 *G.* 2. *ch.* 18. and 5 *G.* 2. *ch.* 12. For Exportation of Corn. 1 *W. & M. Seſſ.* 1. *ch.* 22. For the Exportation of Beer, Ale, Cyder, and Mum. 3 *W. & M. ch.* 8. To permit the Exportation of Beef, Pork, Butter, Cheeſe, and Candles. 9 & 10 *W.* 3. *ch.* 27. 3 & 4 *Ann. ch.* 4. 4 *G.* 1. *ch.* 6. For licenſing Hawkers and Pedlars. And 31 *G.* 2. *ch.* 40. To prevent Common Saleſmen of Hay and Straw, or Saleſmen, Brokers, or Factors in Cattle, from buying and ſelling on their own Account.]

5. A [a] *Monopoly,* (from Μόνος alone, and πωλέω to ſell) is an Allowance by the King, by his Grant, Commiſſion, or otherwiſe, to any Perſon or Perſons, for the ſole buying, ſelling, making, working, or uſing of any Thing, whereby any Perſon or Perſons are ſought to be reſtrained of any Freedom that they had before, or to be hinder'd in their lawful Trade.

The procuring or making uſe of any unlawful Monopoly, is puniſhable at [b] *Common Law* by Fine and Impriſonment. And,

By 21 Ja. 1. ch. 3. *All Perſons are made incapable to have or put in Ure any Monopoly, or any Commiſſion, Grant or Licenſe, or other Matter or Thing tending to inſtitute, ſtrengthen, or countenance the ſame. And any Perſon grieved thereby, or diſturbed by Reaſon thereof, ſhall recover treble Damages and double Coſts.*

[a] 3 Inſt. 181. Hawk. P. C. B. 1. ch. 79. 4 Black. Com. 159.

[b] 2 Inſt. 47, 61. 3 Inſt. 181. 8 Rep. 125, &c. 11 Rep. 53, 54, 86, &c. 2 Roll. Abr. 214.

This Statute not to extend to any Letters Patent granted for the ſole making or working of any [c] New *Manufacture to the Inventors thereof, for the Term of* 14 *Years, being not contrary to Law, or prejudicial to the Commonwealth; nor to Grants heretofore confirmed by Act of Parliament; nor to any Warrant or Privy Seal granted or to be granted to the Juſtices of the K. B. or Common Pleas, Barons of the Exchequer, Juſtices of Aſſize or Peace, to compound for the Forfeitures of any penal Statutes; nor to any Corporation, concerning any Grants to them made, or concerning any of their Cuſtoms; nor to any Corporation, Company, or Fellowſhip of any Trade or Myſtery; or to any Company or Society of Merchants; nor to any Grant for Printing; for digging or making Saltpetre or Gunpowder, Ordnance or Shot for Ordnance; nor to any Grant of any Office in being, and put in Execution before the making this Statute; nor to the Liberties of* Newcaſtle *concerning Sea-Coals; nor to licenſing of Taverns, ſo the King receives the Benefit; nor to Commiſſions concerning Allum or Allum-Mines. By* 16 Car. 1. ch. 21. *The putting in Execution any Patent or Inhibition whatſoever to reſtrain the Importation of Gunpowder, or Saltpetre, Brimſtone, or other Materials for making Gunpowder, incurs a Premunire.* [a]

All Matters of this Nature ought to be tried at [b] Common Law only, and not at the Council-Table, *&c.*

6. [c] *Deceit* and *Coſinage* are Offences at *Common Law*, and are all Practices of defrauding, or of endeavouring to defraud another by ſome artful Device, of his known Right, contrary to common Honeſty. * A mere Lie is not puniſhable. The Puniſhment at Common Law for Fraud or Cheating, is Fine and Impriſonment; and ſometimes Pillory, as for Cheating with Falſe Dice, *&c.* [See 16 *Car.* 2. *ch.* 7. 9 *An. ch.* 14. 12 *G.* 2. *ch.* 28. 13 *G.* 2. *ch.* 19. and 18 *G.* 2. *ch.* 34. Of Gameſters and Gaming. And 30 *G.* 2. *ch.* 24. As to Perſons obtaining Money or Goods by falſe Pretences; for preventing the unlawful Pawning of Goods; for the eaſy Redemption of Goods pawned; and for preventing Gaming in Publick Houſes by Journeymen, Labourers, Servants, and Apprentices.]

Deceit and Coſinage may be committed by one or more; but [d] *Covin* is a ſecret Aſſent determined in the Heart, of two at leaſt, to defraud and prejudice another.

The *Kinds* of Frauds and Deceits of Tradeſmen and others are infinite; but many of them are reſtrained and puniſhable by *Statutes.* Therefore there are *Statutes* concerning the Frauds of Alehouſe-keepers, Bakers, Bankrupts, Braſiers, Brewers, Butchers; concerning Brandy, Butter, Buttons, Chandlers, Cheeſe, Cyder, Coffee, Mead, Metheglin, *&c.* concerning Coals and Colliers, Cloth, Carders, Spinſters, Weavers and Fullers, Conſpiracies amongſt Tradeſmen, and concerning Artificers in our Manufactures exerciſing their Trades beyond Sea, Coopers, Curriers, Diers, Diſtillers, Felt-Makers, Fuel, Fuſtian and Cotton, Gaming, Goldſmiths, Hatters, Hemp, Hops, Innholders, Iron, Gold and Silver Lace, Leather, Linen, Maltſters, Millers, Mohair, Paper and Parchment ſtampt, Pewterers, Pawn-Brokers, Tailors, Salt, Seamens Wages, Serges, Shoemakers, Silk, Snuff, Soap, Stockings, Tanners, Tile-Makers, Tobacco, Tokens, falſe or counterfeit Letters, Victuallers, Vinegar-Makers, Vintners, Upholſterers, Wax-Chandlers, Weights and Meaſures, Woodmongers, Wool, Yarn, *&c.*

[c] 3 Inſt. 184.

[a] See ante.

[b] 3 Inſt, 182, 183.

[c] Finch Book 3 ch. 2. p. 188. 2 Cro. 497, 498. 3 Cro. 235. 2 Roll. Abr. 78. Hawk. P. C. B. 1. ch. 71. * 2 Str. 866. 2 Ld. Ray. 1013. 4 Black. Com. 158 1 Burn Juſt. 299, to 301. 2 Burn Juſt. 308.

[d] 1 Inſt. 357. a. & b.

All theſe Offenders ſhall pay their Fines and ſuffer Impriſonment as the ſeveral Statutes direct. But where a Statute creates a *new* Offence, and inflicts a particular Puniſhment, there the Statute muſt be purſued, and the Offender puniſhed only by the Statute.

[See 6 *Geo.* 1. *ch.* 21. For preventing Frauds and Abuſes in the publick Revenues of Exciſe, Cuſtoms, Stamp-Duties, Poſt-Office and Houſe-Money.]

Amongſt theſe Ways of Deceit and Coſinage, Frauds by falſe *Weights* and *Meaſures* are moſt common; a crying Sin and a Shame to a Chriſtian Nation. Therefore I ſhall enlarge a little upon that Head, and touch upon the Statutes relating to them. Beſides, the Learning about Weights and Meaſures is very curious, and of great Uſe.

By Magna Charta, *or* 9 H. 3. ch. 25. 14 Ed. 3. ch. 12. 25 Ed. 3. ch. 10. 27 Ed. 3. St. 2. ch. 10, &c. *There is to be but* one *Weight and Meaſure, and one Yard throughout* England, *according to the Standard in the Exchequer.* [See 17 *Car.* 1. *ch.* 19. *infra.*]

By 8 H. 6. ch. 5. *Every City, Borough, and Town, ſhall have a* common Balance *ſealed, with* common Weights, *ſealed, according to the Standard in the Exchequer, upon the common Coſt, and in the Keeping of the head Officer; in pain that every City for ſuch Default ſhall forfeit* 10 l. *a Borough* 5 l. *and every other Town where a Conſtable is,* 40 s.

By 11 H. 6. ch. 8. *In every City, Borough, and Town, there ſhall be a* common Buſhel *ſealed according to the Standard, in like manner to be bought and kept, and upon like Pain for Default as in* 8 H. 6. ch. 5. *is ſpecified for a common Balance.*

And all Juſtices of the Peace, Mayors, and head Officers may hear and determine the Offences committed againſt the ſaid Statutes.

By 11 H. 7. ch. 4. Meaſures *and* Weights *of* Braſs *ſhall be ſent to the Cities and Boroughs in this Act named; by which every Market-Town in the ſame Shire ought to have their Common Weights and Meaſures, to be marked by him that hath the Standard.*

The Penalties in former Acts for not having common Weights and Meaſures ſealed, to extend only to Cities, Boroughs, and Market-Towns.

None ſhall buy or ſell with any other Weights and Meaſures in any City, Borough, or Market-Town, but ſuch as are marked by the chief Officer, nor in any other Place, unleſs it be equal with the Standard; nor either within or without Cities, Boroughs, or Market-Towns with a Buſhel *that is not mark'd.*

Mayors and chief Officers of Cities, Boroughs, and Market-Towns, ſhall at leaſt twice in the Year, view *all Weights and Meaſures within their Juriſdictions, and break and burn them which they find defective; and alſo ſet a Fine of* 6 s. 8 d. *payable to the Mayor,* &c. *for the firſt Offence, for the ſecond* 13 s. 4 d. *and for the third* 20 s. *and adjudge the Offender to the Pillory.*

And two Juſtices of the Peace (one Quorum) *have Authority to hear and determine the Defaults of Mayors and other head Officers, and alſo of Buyers and Sellers, contrary to this Act, and to ſet Fines at Diſcretion on Offenders, and to burn defective Weights and Meaſures.*

By 16 Car. 1. ch. 19. *There ſhall be but one Weight, one Meaſure, and one Yard, according to the Standard of the Exchequer. And whoſoever ſhall ſell by, or keep any other Weight, Meaſure, or Yard, whereby any Thing is bought or ſold, ſhall forfeit for every ſuch Offence* 5 s. *being thereof lawfully convicted by the Oath of one Witneſs before a Juſtice of Peace, or head*

head Officer in Cities, &c. *to be levied by Diſtreſs for the Uſe of the Poor; and in Default of Diſtreſs they may commit the Offender to Priſon till Payment.*

By 22 Car. 2. ch. 8. Water-Meaſure, *as to Corn or Grain, ground or unground, or Salt, is declared to be within the Statute of* 16 Car. 1. ch. 19. *And if any ſell any Grain or any kind of* Salt, *uſually ſold by the Buſhel, by any other Buſhel or Meaſure, than what is agreeable to the Standard in the Exchequer, commonly called* Wincheſter-Meaſure, *he ſhall forfeit for every ſuch Offence* 40 s. *to be levied by Diſtreſs, as in the former Act.*

Mayors and all other Officers permitting the Uſe of any other Meaſure, or who upon Complaint ſhall not puniſh according to the Statute, ſhall, upon Conviction by Preſentment or Indictment, at the Quarter-Seſſions, forfeit 5 l.

He that hath the Toll, *or* Profit *of the* Market *where no Toll is, ought to provide one Meaſure of Braſs, and chain it in the publick Market-Place, on Penalty of* 5 l.

Conſtables may ſearch and examine, if any uſe other Meaſures, &c. *and preſent the Offender at the next Seſſions.*

By 22 & 23 Car. 2. ch. 12. *They that ſell or buy* Corn *or* Salt *without meaſuring, (if required) or in other Manner than by* 22 Car. 2. ch. 8. *ſhall forfeit, beſides the Penalty of* 40 s. *all the Corn or Salt, or the Value thereof, to the Perſons complaining. The Proof to lie upon the Perſon accuſed, and to be by the Oath of one Witneſs, that he did buy or ſell the ſame according to this and the ſaid former Act, or elſe to forfeit as by this Act is directed.*

[See 1 *An. ch.* 15. Concerning *Water Meaſure.* 5 & 6 *W.* & *M. ch.* 7. 7 & 8 *W.* 3. *ch.* 31. 9 & 10 *W.* 3. *ch.* 6, &c. Concerning the Meaſure of *Salt.* 2 *W.* & *M. Seſſ.* 2. *ch.* 14. Concerning the Meaſure of *Wine* and *other Liquors.* 11 & 12 *W.* 3. *ch.* 15. Concerning the Meaſure of *Ale* and *Beer* by Retailers of it. 31 *G.* 2. *ch.* 29. Concerning the Aſſize of *Bread.* 7 *Ed.* 6. *ch.* 7. 43 *El. ch.* 14. Concerning the Aſſize of *Fuel.* 9 *An. ch.* 15. 10 *An. ch.* 6. Concerning the Aſſize of *Billet.* 12 *An. St.* 2. *ch.* 17. and 3 *G.* 2. 26. Concerning the Meaſure of *Coals.* 6 *Geo.* 2. *ch.* 29. Concerning the Meaſure of *Ballaſt*; and 31 *G.* 2. *ch.* 40. As to the Weight and Soundneſs of Truſſes of Hay and Straw within *London* and thirty Miles thereof. For the Meaſure of other Things, See *Dalton, Nelſon,* and *Burn,* Tit. *Weights* and *Meaſures.*

But notwithſtanding the Statute of *Magna Charta,* &c. there are [a] *two* Kinds of *Weights* uſed in *England,* and both warrantable by Cuſtom, (*viz.*) *Troy* Weight and *Averdupois. Troy* Weight contains twelve Ounces to the Pound, and no more; by which are weighed Gold, Silver, Pearl, precious Stones, Silks, Electuaries, Wheat and Grain, and all Liquors. [See 51 *H.* 3. *St.* 1 & 6. 31 *Ed.* 1. 12 *H.* 7. *ch.* 5.] *Averdupois* (*Aver du pois,* to have Weight) hath ſixteen Ounces to the Pound, and is confirmed by 27 *Ed.* 3. *ch.* 10. By which are weighed all Grocery Wares, and all Commodities whereof comes a Refuſe, as alſo Copper, Tin, Iron, Lead, Fleſh, Cheeſe. Here twelve Pounds over are allowed to every Hundred. So as one hundred and twelve Pounds make a hundred Weight, fifty-ſix Pounds make half a Hundred, and twenty-eight Pounds make a Quarter. [b] And ſo in many Places and Counties there are different *Meaſures* of Corn and Grain; and the Buſhel in one Place is larger than in another. I cannot well account for the Lawfulneſs

[a] Dalt. ch. 112. p. 248, 249.

[b] Dalt. ch. 112. p. 250.

neſs of it, ſince Cuſtom or Preſcription is not allowed to be good againſt a Statute. But it is generally practis'd without Reſtraint. From this and the Statutes before-mentioned, you may infer, that we have three different Meaſures, (*viz.*) One for *Wine*, one for *Ale* and *Beer*, one for *Corn*. In *London* there is a Difference betwixt *Ale* and *Beer* Meaſure. [*Qu.*]

The *Puniſhment* for ſelling by falſe Weights and Meaſures may be by Fine, *&c.* upon Indictment; notwithſtanding a Puniſhment is appointed by the Statutes above-mentioned; becauſe it is an Offence at Common Law.

4 Black.Com. 174. 7. *Deſtroying the Game* is an Offence againſt publick Trade, as it promotes Idleneſs in the ordinary Sort of People, taking them away from their proper Profeſſions and Callings.

By 3 & 4 W. & M. ch. 10. *If any Perſon ſhall unlawfully courſe, hunt, take in Toyls, kill, wound, or take away any* Deer *in any Foreſt, Chaſe, Purlieu, Paddock, Wood, Park, or other Ground incloſed, where Deer are uſually kept, without the Conſent of the Owner, or Perſon chiefly intruſted with the Cuſtody thereof, or be aiding therein, and ſhall be convicted by Confeſſion, or the Oath of* one *Witneſs, before a Juſtice of the Peace, where the Offence ſhall be committed, or the Party apprehended, within a Twelvemonth* [*within three Years by* 9 G. 1. ch. 22. § 13.] *after the Offence done, he ſhall forfeit for hunting or courſing only, without taking, killing, or wounding,* 20l. *and for every Deer wounded, taken, or killed,* 30l. *to be levied by Diſtreſs, or for want thereof, the Offender is to be impriſoned for a Year, and ſet in the Pillory for an Hour.* [*And by* 5 G. 1. ch. 15. § 4. *before Diſcharge to become bound in fifty Pounds to be of good Behaviour, and not offend in like Manner. And by* 10 G. 2. ch. 32. *the ſecond Offence, in any open Foreſt or Chaſe, if convicted on Indictment or Information, is Tranſportation for ſeven Years.*]

Conſtables, Headboroughs, or Tythingmen, by a Juſtice's Warrant, may enter and ſearch the Houſes, or other Places, of ſuſpected Perſons; and if any Veniſon or Skins of Deer, *or Toyls be found, they ſhall carry the Offender before a Juſtice of Peace; and if he do not give a good Account, how he came by them, or in convenient Time produce ſufficient Evidence of his having bought the ſame,* (*or by* 9 G. 1. ch. 22. § 17. *if it ſhall appear that ſuch Veniſon or Skin was bought of any one who might be juſtly ſuſpected of having come by it unlawfully, and he does not produce, or prove upon Oath the Name and Place of Abode of the Party of whom he bought it*) *he ſhall be ſubject to the Penalties as for killing any one Deer.*

[*And by* 5 Geo. 1. ch. 15. *No Writ of* Certiorari *ſhall iſſue to remove Convictions or Proceedings under the above Act, unleſs the Party convicted give ſufficient Security, in the Penalty of ſixty Pounds, to the Juſtice, to proſecute the Writ with effect, and to pay the Forfeitures, or render the Offender, within one Month after the Conviction confirmed, or* Procedendo *granted, as well as Security in fifty Pounds to the Proſecutor, for Payment of full Coſts and Damages within the like Time.*

Perſons ſued for any Thing done in Purſuance of this or the above Act, may plead the general Iſſue, and give the ſpecial Matter in Evidence, and recover treble Coſts.

A Keeper or other Officer of any Foreſt, &c. *convicted of killing or taking any Deer, or aſſiſting therein, without the Owner's Conſent, ſhall forfeit fifty Pounds for each Deer, to be levied by Diſtreſs, and for want thereof, be impriſoned for three Years, and ſet in the Pillory for two Hours.*

Perſons convicted on Confeſſion, or the Oath of one Witneſs before a Juſtice, of pulling down or deſtroying, or cauſing ſo to be, the Pales or Walls of any Park or Ground incloſed, where any Deer are then kept, without the Conſent of the Owner, or Perſon chiefly entruſted with the Cuſtody thereof, ſhall be ſubject to the Forfeitures and Penalties inflicted by the above Act for killing any one Deer.]

[*And by* 5 G. 1. ch. 28. *Any Perſon convicted by Verdict or Confeſſion, upon Indictment before Juſtices of Gaol Delivery, of entering into any Park or other incloſed Ground where Deer are uſually kept, and wilfully wounding or killing any Deer there, without the Conſent of the Owner, or Perſon entruſted with the Care of ſuch Park or incloſed Ground, ſhall be tranſported for ſeven Years.* See 9 G. 1. *ch.* 22. *ante.*]

[*By* 10 G. 2. ch. 32. *If any Perſon armed ſhall come into any Foreſt, Chaſe, or Park, where Deer are uſually kept, whether incloſed or not, with Intent to courſe, hunt, kill, wound or take, any Deer, and ſhall there unlawfully beat or wound any Keeper or Page of ſuch Foreſt, Chaſe, or Park, his Servants, or Aſſiſtants, in the Execution of their Office, and be thereof lawfully convicted, he ſhall be tranſported for ſeven Years.* [See the old *Statutes* concerning *Deer*, of 3 *Ed.* 1. *ch.* 20. 21 *Ed.* 1. *St.* 2. 1 *H.* 7. *ch.* 7. 19 *H.* 7. *ch.* 11. 1 *Ja.* 1. *ch.* 27. 3 *Ja.* 1. *ch.* 13. 7 *Ja.* 1. *ch.* 13. and 13 *Car.* 2. *ch.* 10.]

[See 28 *G.* 2. *ch.* 19. § 3. whereby to burn or deſtroy Goſs, Furze, or Fern, in any Foreſt or Chaſe, without the Owner or Keeper's Conſent, incurs a Forfeiture, not more than five Pounds, nor leſs than forty Shillings.]

By 1 Ja. 1. ch. 27. *Every Perſon convicted on Confeſſion, or by* two *Witneſſes upon Oath before two or more Juſtices of the Peace, to have ſhot at, killed, taken, or deſtroyed, any Pheaſant, Partridge, Pigeon, Mallard, Duck, Heron, Moorgame, or any ſuch Fowl, or any Hare, with any Gun or Bow, or any Pheaſant, Partridge, Houſe-dove, or Pigeon, with Setting-Dogs and Nets, or other Engines whatſoever, or to have taken the Eggs of any Pheaſant, Partridge, or Swan, out of the Neſt, or to have broke or deſtroyed the ſame in the Neſt, or to have traced or courſed any Hare in the Snow; or to have taken or deſtroyed any Hare with Hare-pipes or other Engines, ſhall be committed to Priſon without Bail for three Months, unleſs he immediately pays to the Uſe of the Poor, where the Offence was committed, or he was apprehended,* 20 s. *for every Fowl, Hare, or Egg, ſo taken, killed, or deſtroyed.* [See 7 *Ja.* 1. *ch.* 11. whereby one Witneſs is ſufficient to convict of taking or killing Pheaſants or Partridges with Setting-Dogs, Nets, or Snares.]

By 22 & 23 Car. 2. ch. 25. *Lords of Manors or other Royalties not under the Degree of an Eſquire, may by Writing under their Hands and Seals authorize* Game-keepers *within their Manors,* &c. *to ſeize Guns, Dogs, and Engines for taking of the Game. And ſuch Game-keepers, and others, may by Warrant from a Juſtice of Peace, in the Day-time, ſearch the Houſes of Perſons prohibited to keep or uſe, and ſuſpected to keep, ſuch Guns, Dogs, or Engines, and ſeize them to the Uſe of the Lord of the Manor, or deſtroy them.*

Perſons not having an Eſtate of Inheritance, in their own or their Wives Right, of 100 l. per Annum, *or for Life, Leaſe, or Leaſes, for Ninety-nine Years or longer of* 150 l. per Annum *clear (other than the Son and Heir apparent of an Eſquire, or other of higher Degree, or Owners and Keepers of Foreſts, Parks, Chaſes, or Warrens, being ſtocked with Deer or*

Conies for their neceſſary Uſe, in reſpect of ſuch Foreſts, &c.) *are declared to be Perſons not allowed to keep any Guns, Dogs, or Engines,* &c.

By 4 & 5 W. & M. ch. 23. *Conſtables,* &c. *by a Juſtice of Peace's Warrant, may, and are required, to enter and ſearch Houſes of ſuſpected Perſons not qualified; and if* any Game *ſhall be found there, the Offender ſhall be carried before a Juſtice of Peace, and if he do not give a good Account how he came by the ſame, or in convenient Time produce ſufficient Evidence of his having bought the ſame, he ſhall be convicted of ſuch Offence by the ſaid Juſtice, and forfeit for every Hare, Partridge, or other Game, not under* 5s. *nor above* 20s. *the one Moiety to the Informer, the other to the Poor of the Pariſh where,* &c. (*See* 2 Geo. 3. ch. 19. *infra.*) *and to be levied by Diſtreſs and Sale of Goods; and for want of Diſtreſs, to be committed to the Houſe of Correction, for any Time not exceeding a Month, nor leſs than ten Days, there to be whipped and kept to hard Labour.*

If any Perſon, not qualified by Law, do keep or uſe any Bows, Grayhounds, ſetting-Dogs, Lurchers, Ferrets, Coney-Dogs, Hays, Nets, Tunnels Low-bells, Hare-pipes, Snares or other Inſtruments for Deſtruction of the Game, and ſhall be convicted as aforeſaid, he ſhall be ſubject to the Pains and Penalties aforeſaid. [See 5 An. ch. 14. *infra.*]

No Perſons whatſoever ſhall keep any Net, Angle, or other Engine for taking Fiſh, *other than the Makers and ſellers thereof, or the Owner or Occupier of a River or Fiſhery. And the Owners of Rivers and Fiſheries, and ſuch as they ſhall authorize, may ſeize and keep to their own Uſe any ſuch Engine, which ſhall be uſed by or in the Poſſeſſion of any Perſon whatſoever, fiſhing in any River or Fiſhery without the Conſent of the Owner or Occupier. And any Perſon whatſoever, authorized by a Warrant from a Juſtice of the Peace, may, in the Day-time, ſearch the Houſes and other Places of Perſons prohibited, and ſuſpected to have in their Cuſtody any ſuch Engines, and ſeize and keep or deſtroy the ſame.* [See 22 *Car.* 2. *ch.* 25. For the Puniſhment for taking Fiſh in ſeveral Waters; and of *Common* of *Piſcary, B.* 2. *ch.* 2. *ante.*]

No Certiorari *ſhall be allowed to remove any Conviction or other Proceedings concerning any Matter in this Act, unleſs the Party convicted ſhall become bound to the Proſecutor in the Sum of* 50l. *with Sureties to pay to the Proſecutor, within a Month after Conviction confirmed, full Coſts and Charges, to be aſcertained upon Oath.*

Perſons proſecuted for any Thing done in purſuance of this Act may plead the general Iſſue, and may recover treble Coſts.

By 5 An. ch. 14. *If any Higler, Chapman, Carrier, Innkeeper, Victualler, or Alehouſe-keeper, (or by* 28 G. 2. ch. 12. *any Poulterer, Saleſman, Fiſhmonger, Cook, or Paſtry-Cook) hath in his Cuſtody, (or by* 28 G. 2. ch. 12. *if any other Perſon, whether qualified or not, ſells, expoſes, or offers to ſale) any Pheaſant, Partridge, Hare, Moor, Heath-Game, or Grouſe, (unleſs ſuch Game, in the Hands of a Carrier, be ſent by ſome Perſon qualify'd to kill the Game) he ſhall be carried before ſome Juſtice for the County or Place where the Offence was committed, and upon View, or Oath of one Witneſs, ſhall forfeit for every Pheaſant,* &c. 5l. *Half to the Informer, and Half to the Poor of the Pariſh where the Offence was committed,* [See 2 G. 3. ch. 19. infra.] *to be levied by Diſtreſs and Sale, and for want thereof, to be committed to the Houſe of Correction for three Months for the firſt Offence, and four Months for every other Offence.*

The Conviction is to be within three Months after the Offence.

No Certiorari *is to be allowed to remove the Proceedings, unleſs the Offender ſhall be bound to the Proſecutor in the Sum of* 50 l. *with ſufficient Security, on Condition to pay the Proſecutor full Coſts, within* 14 *Days after Conviction confirmed, or* Procedendo *granted.*

Any Perſon that ſhall deſtroy, ſell or buy any Pheaſant, &c. *and within three Months make Diſcovery of any ſuch Higler,* &c. *ſo as that he be convicted of the Offence, the Diſcoverer ſhall be diſcharged of the Penalties in this Act for killing or ſelling Game, and have the Benefits given to other Informers by this Act.*

If any Perſon not qualified ſhall keep or uſe any Dogs *or* Engine *to kill or deſtroy the Game, and ſhall thereof be convicted by the Oath of one credible Witneſs by a Juſtice of Peace, where the Offence is committed, he ſhall forfeit* 5 l. *one half to the Informer, the other to the Poor of the Pariſh,* [See 2 G. 3. ch. 19. infra.] *to be levied by Diſtreſs and Sale, and for want thereof to be ſent to the Houſe of Correction for three Months for the firſt Offence, and four Months for every other Offence.*

Juſtices and Lords of Manors within their reſpective Liberties may take away any ſuch Pheaſant, &c. *from Higlers or Perſons not qualified, and may take away ſuch Dogs and Engines to their own Uſe.*

And ſuch Lords of Manors may by Writing under their Hand and Seal empower their Game-keepers *to kill any Game. But if they ſell or diſpoſe thereof without Conſent of their Lord, and ſhall be convict, upon Complaint of ſuch Lord, and upon Oath of one credible Witneſs, before a Juſtice of Peace, they ſhall be committed to the Houſe of Correction for three Months, to be kept to hard Labour.*

By 9 An. ch. 25. *The Statutes of* 5 An. ch. 14. *is made perpetual:* But,

No Lord of a Manor ſhall appoint more than one Game-keeper *in one Manor, with Power to kill Game. His Name muſt be entered with the Clerk of the Peace; if not entered, or not otherwiſe qualified by Law to kill Game, and yet ſhall deſtroy any Pheaſant, Partridge, Hare,* &c. *or if any Game-keeper or other Perſon, not qualified in his own Right, ſhall ſell or expoſe to Sale any Pheaſant,* &c. *he ſhall incur ſuch Forfeitures and Penalties, as are inflicted by* 5 Ann. *on Higlers, Carriers,* &c. *for buying or ſelling Game; ſuch Forfeitures to be recovered as by that Act.*

If any Pheaſant, &c. *ſhall be found in the Poſſeſſion of any Perſon, not qualified in his own Right to kill Game, or intitled thereto under ſome Perſon ſo qualified, the ſame ſhall be adjudged an Expoſing to Sale.*

Deſtroying ſuch Game in the Night-Time, is made ſubject to the like Forfeitures and Penalties.

Driving and taking by Hays, Tunnels, or Nets, any Water-Fowl, betwixt the 1ſt of July *and the 1ſt of* September, [*between the 1ſt of* June *and 1ſt of* October, *by* 10 G. 2. ch. 32. § 10] *is a Forfeiture of* 5 s. *for every Fowl, on Conviction upon the Oath of one credible Witneſs before a Juſtice of Peace; one Moiety to the Informer, the other to the Poor of the Pariſh,* [See 2 G. 3. ch. 19. infra.] *to be levied by Diſtreſs and Sale, and for want of Diſtreſs, to be committed to the Houſe of Correction for any Time not exceeding a Month, nor leſs than* 14 *Days, there to be whipped, and kept to hard Labour; and the Juſtice ſhall cauſe the Hays, Tunnels, and Nets to be deſtroyed in his Preſence.*

By 3 Geo. 1. ch. 11. *No Lord of a Manor ſhall appoint any Perſon to be a* Game-keeper, *with Power to kill or take any Game, unleſs ſuch Perſon is qualified according to Law, or be truly a Servant to ſuch Lord, or* *be immediately employed to kill the Game for the ſole Uſe of ſuch Lord, and not otherwiſe: And no Lord ſhall* authorize *any Perſon not qualify'd by Law, to take or kill Game, or to keep any Dogs, or any Engine to kill Game; and any Perſon not qualify'd, or not truly a Servant, or not immediately employ'd to take or kill the Game as aforeſaid, who, under Colour or Pretence of a Deputation granted to him, ſhall take or kill Game, or keep or uſe any Dog or Engine to kill or deſtroy Game, ſhall incur ſuch Forfeitures and Penalties, as are inflicted by* 5 Ann. ch. 14. *and* 9 Ann. ch. 25.

[*By* 8. G. 1. ch. 19. *Perſons liable to any pecuniary Penalties, for Offences againſt the Laws for the Preſervation of the Game, may be ſued for the ſame by any other Perſon, by Information before a Juſtice, or by action or Information in any of the Courts at* Weſtminſter, *wherein the Plaintiff ſhall have double Coſts.* And,

By 26 G. 2. ch. 2. *Such Actions,* &c. *may be brought before the End of the ſecond Term, after the Offence committed.*

But by 2 G. 3. ch. 19. *Such Actions,* &c. *may be brought or exhibited within ſix Months after the Fact committed.*

And the Whole of ſuch pecuniary Penalties, recovered by Action or Information in any of the Courts at Weſtminſter, *ſhall be to the ſole Uſe of the Proſecutor, with double Coſts, and no Part to the Poor of the Pariſh.*

And no Perſon ſhall, upon any Pretence whatſoever, take, kill, deſtroy, carry, ſell, buy, or have in his Poſſeſſion or Uſe, any Partridge, between the 12th of February *and 1ſt of* September, *or any Pheaſant, between the 1ſt of* February *and 1ſt of* October, *or any Heath Fowl, commonly called Black Game, between the 1ſt of* January *and 20th of* Auguſt, *or any Grouſe, commonly called Red Game, between the 1ſt of* December *and 25th of* July, *in any Year, (except Pheaſants, taken in the Seaſon allowed by this Act, kept in Mews or Breeding Places) upon the Forfeiture of* 5 l. *per Bird to the Proſecutor upon Conviction by the Oath of one credible Witneſs; and ſuch Penalty may be ſued for and recovered, with full Coſts of Suit, in any of the Courts at* Weſtminſter.]

By the 10 Geo. 3. ch. 19. *An Act for better Preſervation of the Game within that Part of* Great Britain *called* England: Sect. 1. *After* June 24, 1770. *Perſons taking, killing,* &c. *any Hare, Pheaſant, Partridge,* &c. *between Sun-ſetting and Sun-riſing, or uſing any Gun or Engine for deſtroying Game; for the firſt Offence to be impriſoned not leſs than three Months, nor more then ſix Months; and for the ſecond Offence, to be impriſoned not more than twelve Months nor leſs then ſix Months, and for each Offence to be publickly whipped. By Sect* 2. *Offenders on a* Sunday, *uſing a Gun, Dog, Engine,* &c. *for deſtroying Game, on Conviction, to forfeit* 20 l. *to be levied by Diſtreſs with Charges; and to be applied to the Informer and the Poor: For want of Diſtreſs the Offender to be committed for not more than ſix Months, nor leſs than three Months.*

See 11 *H.* 7. *ch.* 17. Concerning the Forfeiture of 10 *l.* for taking Pheaſants or Partridges with Engines, and killing or taking away Hawks. 15 *H.* 8. *ch.* 10. Concerning the Forfeiture of ſix Shillings and eight Pence for tracing or killing a Hare in the Snow. 23 *El. ch.* 10. For taking or killing Pheaſants and Partridges in the Night; under the Forfeiture of 20 *s.* for every Pheaſant; and 10 *s.* for every Partridge; and the Forfeiture of 40 *s.* for Hawking or Hunting with Spaniels in ſtanding Corn. And ſee *Burn's Juſtice*, Title *Game*, *per Totum*.

8. Concerning the *Deſtruction of Corn, Wood,* &c.

By 43 El. ch. 7. *If any ſhall be convicted by his own Confeſſion, or* one *Witneſs upon Oath, before one Juſtice of the Peace, to have cut or taken away any Grain growing, robb'd any Orchard or Garden, broken any Hedges, Pales, or other Fences,* [See 5 Geo. 1. *ch.* 15. under the laſt Title] *cut or pulled up any Trees, to the Intent to take the ſame away, cut or ſpoiled any Woods, Pales, or Trees ſtanding (not being Felony)* [*or any Bark or Baſt of Trees, Gates, Stiles, Poſts, Broom, or Furze, by* 15 Car. 2. ch. 2.] *or been acceſſory thereunto, he ſhall pay the Damages, or be committed to the Conſtable, to be whipp'd.*

4 Black. Com. 233.
4 Burn's Juſtice, tit. Wood per tot.

[*And by* 15 Car. 2. ch. 2.] *Any Officer or Inhabitant of the Place may apprehend any ſuſpected Perſon, having or carrying any kind of Burthen or Bundles of Wood, Bark,* &c. *and any Officer by Warrant under the Hand and Seal of a Juſtice, may enter and ſearch the Dwelling-Houſe, or other Place belonging thereto, of ſuſpected Perſons, and carry ſuch ſuſpected Perſon, ſo conveying Wood,* &c. *or found to have Wood,* &c. *upon ſuch Search, before a Juſtice, and ſuch ſuſpected Perſon, not giving a ſatisfactory Account how he came by the ſame, or not producing, within convenient Time, the Perſon of whom he bought the ſame, or ſome credible Witneſs of the Sale thereof to the Offender, ſhall be convicted, and ſuffer the Pains and Penalties inflicted by* 43 El. *and this Act.* And,

For the firſt Offence againſt this Act, the Offender ſhall, beſides paying the Damages to the Owner, alſo pay a Sum (not exceeding ten Shillings) for the Uſe of the Poor of the Pariſh, or in Default thereof, be committed to the Houſe of Correction for a Time not exceeding one Month, or be whipped by the Conſtable: For the ſecond Offence, ſhall be committed to the Houſe of Correction for one Month, there to be kept to hard Labour; and for the third Offence, ſhall be deemed an incorrigible Rogue.

And one Juſtice of the Peace may hear and determine on any Charge of Buying ſtolen Wood, &c. *and award the Buyer to pay treble the Value to the Owner, to be levied by Diſtreſs and Sale, or for want thereof, commit the Party to Gaol for one Month.*

No one to be puniſhed by this Act, unleſs he be queſtioned within ſix Weeks after the Offence committed.]

[See 22 & 23 *Car.* 2. *ch.* 7. § 5. Whereby treble Damages to be recovered by Action, are given againſt Perſons deſtroying Plantations of Trees, or throwing down Incloſures in the Night; and 13 *G.* 2. *ch.* 21. whereby treble Damages and full Coſts are given againſt Perſons maliciouſly drowning Coal-Pits.]

By 1 Geo. 1. St. 2. *ch.* 48. *If any Perſon ſhall maliciouſly deſtroy, or bark, ſpoil, or break down, any Timber-Trees, Fruit-Trees, or other Trees, (or break open, throw down, or deſtroy any Hedge, Gate, Ditch, or other Incloſure of ſuch Woods, Plantations, or Trees, by* 6 G. 1. ch. 16.) *the Perſons damaged ſhall receive Satisfaction from the Inhabitants of the Pariſh, to be levied as by* 13 Ed. 1. St. 1. ch. 46. *for Hedges and Ditches overthrown, (unleſs the Offender be convicted by ſuch Pariſh in ſix Months, by* 6 G. 1. ch. 16.) *And any two Juſtices on Complaint ſhall commit the Offender to the Houſe of Correction for three Months, to be kept to hard Labour (or to Gaol for four Months, where no Houſe of Correction is within the Diſtrict) and to be whipp'd every Month, and before Diſcharge, to find Sureties for good Behaviour for two Years.* [See 29 *Geo.* 2. *ch.* 36.]

Theſe are the chief Offences againſt Publick *Trade*. [Beſides which, as it concerns Trade in general, it may be proper to take Notice of 23 *G.* 2. *ch.* 13. Whereby

Perſons, convicted of ſeducing Artificers in the Manufactures of Great Britain *out of the Dominions of* Great Britain, *ſhall forfeit five hundred Pounds, and be impriſoned for twelve Months, and until ſuch Forfeiture is paid; and for the ſecond Offence, one thouſand Pounds, and two Years Impriſonment; Proſecution to be within twelve Months after Offence.* (See 5 *G.* 1. *ch.* 27.)

And Perſons exporting Tools or Utenſils uſed in the Woollen or Silk Manufactures, to any Place not in the Dominions of Great Britain, *ſhall forfeit the ſame, and two hundred Pounds, and the Captain of the Ship one hundred Pounds, to be recovered by Action.*]

Of Offences againſt the Health and Eaſe of the King's People.

4. There are Offences againſt the *Health* and *Eaſe* of the King's People; which are *Nuſances* (from *Nuire*, to *Hurt*) of *ſeveral* Sorts and Kinds.

[a] 2 Inſt. 272. 2 Roll. Abr. 83, 137, &c. [b] Hawk. P. C. B. 1. ch. 75. See ante. 4 Black. Com. 166. 3 Burn Juſt. title Nuſance.

A [a] *Nuſance, particularly* ſo call'd, is where one encroaches on the King's Land, or the Highways, or common Rivers, or common Streets of a City, *&c.* endeavouring to make that private which ought to be publick [b]. But theſe are alſo accounted Nuſances, (*viz.*) When one erecteth a Wall, or doth any Thing upon his own Ground, to the unlawful Hurt or Annoyance of his Neighbour; or maketh Annoyances upon common Ways, by Logs, Blocks, Hedges, Gates, Dunghills, Pales, Ditches, Carrion, by ſtopping or turning Waters out of their right Courſe, or ſtraitning the Paſſages; and ſometimes a Nuſance may be committed by neglecting to do a Thing, which the common good requires, or by Suffering or not Suffering.

[c] 2 Inſt. 406.

Nuſances are either [c] *publick*, *common*, or *private*. *Publick*, againſt the whole Kingdom; *common*, againſt all that paſs that Way; *private* againſt a particular Perſon, as to his Houſe or Mill. But Nuſances are uſually *divided* into *common* or *private* Nuſances only. *Common*, ſuch are Annoyances in Highways, Bridges, and publick Rivers; diſorderly Alehouſes, Bawdy-houſes, Gaming-houſes, Stages for Rope-Dancers, Mountebanks, Brewing-houſes, and Melting-houſes for Candles, erected in inconvenient Places, Cottages and Inmates. [See the *Statutes infra.*] Common Scolds, Eaves-droppers. [d] *Private*, ſuch are Nuſances by ſtopping up the Light of another's Houſe, building a Houſe ſo near to mine, that the Rain which falleth from that Houſe, falleth upon mine. This may be juſtified by Cuſtom in *London*, by building on the old Foundation to any Height. Every man muſt have Light and an wholeſome Air. Therefore, if a Lime-kiln is built ſo near to me, that the Smoke thereof is offenſive to me; or if a Hogſty is built ſo near to me, that the Smell is ungrateful or infectious; it is a Nuſance, and an Action lieth.

[d] 3 Inſt. 201. 3 Black. Com. 216. 9 Rep. 54, 58. 5 Rep. 101. 1 Danv. Abr. 173, 174. 2 Ld. Ray. 1163.

[*] 5 Rep. 73, 1 Inſt. 56. a. 1 Roll. Abr. 391. 1 Vent. 208.

There muſt be an [*] *Indictment* at the Suit of the King for all *common* and *publick* Nuſances, Incroachments, Purpreſtures, and all Annoyances upon Highways, tho' it is but a common Footway; and the Party may be fined and impriſoned. For here no one ſhall have an Action of the Caſe; for the Law avoideth Multiplicity of Suits; becauſe if one might have an Action, all Men might have the like. Therefore the Indictment muſt be *Ad Commune Nocumentum Omnium Ligeorum Domini Regis*, not to the Damage of private Perſons, or to Inhabitants of ſuch a Town, *&c.* Upon which Account, if a private Way is ſtraitned, there can be no common Nuſance. [b] A new Dove-houſe erected cannot be a *common* Nuſance, or be indicted as ſuch, [but ſee 18 *Ed.* 2. the Statute for *View of Frank-pledge*] tho' perhaps the Owner may be liable to an Action of the Caſe at the Suit of the Lord of the Manor, for erecting ſuch a Houſe without his Licence, to the Prejudice of his Dove-houſe. For common Nuſances [c] the Law hath provided an apt Remedy in the Turn or Leet. But if one has a particular Damage, as if he and his Horſe fall into a Ditch, that is made overthwart the Way, he may have an Action of the Caſe for his particular Damage upon a common Nuſance. [d] An Indictment will not lie for a private Nuſance; but one may bring his *Action* for it, to recover Damages, and to have Judgment, that the Nuſance ſhould be removed. But both in publick and private Nuſances one may juſtify the Removing of them himſelf.

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[*] *Infinitum in jure reprobatur* 2 Inſt. 340, 597. 4 Inſt. 115. 7 Rep. 45.

[b] 2 Cro. 382, 490. 2 Roll. Abr. 138, 139. Contra. 5 Rep. 104. 1 Cro. 548. 1 Inſt. 56. 5 Rep 73. Comy. 58.

[d] 5 Rep. 101. 9 Rep. 54, 55. 2 Roll. Abr. 83. 84, 144, 145. Finch 18.

A common Scold (*Communis Rixatrix*) is a common Nuſance, and is puniſhable by being put in a Ducking-ſtool. 4 *Black. Com.* 169. 3 *Burn Juſt.* 217, to 220.

See B. 4. ch 3. § 3. and B 4. ch. 4. § 1. poſt.

There are ſome Nuſances puniſhed by *Statutes*; as Nuſances in *Highways*, by *diſorderly Ale-houſes*, *Cottages*, *Fireworks*, *unwarrantable Undertakers* by *publick Subſcriptions*, &c.

1. Of *Highways*.

[See the *Statutes* concerning Highways, *B.* 1. *ch.* 7. *ante. Tit.* Surveyors of Highways]

2. Nuſances relating to [e] *Inns* and *Ale-houſes*, are where the Keeper of them uſually and knowingly harbours Thieves, idle Rogues and Vagabonds or ſuffers frequent Diſorders in his Houſe, or where one ſets up a new Inn or an Ale-houſe, where there is no Occaſion for one, or in an improper or blind Place in a Town, or remote from any Town. At the *Common Law* the Keeper of ſuch a Houſe may be indicted and fined.

[e] H. P. C. 146. Dalt ch. 7. p. 33, 44.

It is not fit, that Bailiffs or Serjeants ſhould be allowed to keep ſuch Houſes. [See 22 & 23 *Car.* 2. *ch.* 20. § 9.]

The true Uſe of Inns and Ale-houſes [f] is for Lodging and Relief of Travellers. [See 1 *Ja.* 1. *ch.* 9.] Therefore if an Inn-keeper or Ale-houſe-keeper refuſes to lodge a Traveller, or to find him Victuals for his Money, he may be indicted, or the Party may have an Action of the Caſe againſt him.

[f] 8 Rep 32. 9 Rep. 87. Dalt. ch. 7. p. 30.

[a] At Common Law it was lawful, for any Perſon, to erect an Inn without Licence, to receive Travellers. But as Ale-houſes multiplied, and were too often uſed to diſorderly Purpoſes, [b] ſo ſeveral Statutes were made for the Regulation or Suppreſſion of them; which Statutes generally concern the Granting of *Licences* to them, the Puniſhment of Diſorders in them, or the Duty of *Officers* in putting thoſe Statutes in Execution againſt them. Inn-keepers are equally concerned in thoſe Statutes with Ale-houſe-keepers, except as to the Licence. For an Inn-keeper is not required to have a Licence; [c] the keeping of an Inn being no Franchiſe, but a lawful Trade. But for Diſorders in the Houſe an Inn may be ſuppreſſed, as well as a common Ale-houſe: [And Inn-keepers are expreſſly named in the late Acts for granting Licences; and certainly if they ſell Wine, Ale, or ſpirituous Liquors, they muſt have a Licence, as well as other Sellers of thoſe Liquors by Retail.]

[a] H. P. C. 146.

[b] H. P. C. 147, 148, 149, 150. Dalt. ch. 7. p. 32, 33.

[c] 2 Roll. Abr. 84. Dalt ch 7. p 33.

4 Black. Com. 167, 168. 1 Burn Juſt. 21 to 43. tit. Ale-houſes.

Concerning *Inn-keepers*, See 21 *Ja.* 1. *ch.* 21. and for Licenſing of *Ale-houſes*, *&c.* See 5 & 6 *Ed.* 6. *ch.* 25. 3 *Car.* 1. *ch.* 3. 2 *Geo.* 2. *ch.* 28. 25 *G.* 2. *ch.* 36. 26. *G.* 2. *ch.* 13. & 31. 28 *G.* 2. *ch.* 19. 29 *G.* 2. *ch.* 12. For Puniſhment of *Diſorders* in *Inns* and *Ale-houſes*, See 1 *Ja.* 1. *ch.* 9. 4 *Ja.* 1. *ch.* 5. 7 *Ja.* 1. *ch.* 10. 21 *Ja.* 1. *ch.* 7. 1 *Car.* 1. *ch.* 4. 30 *G.* 2. *ch.* 24.

[d] 2 Inſt. 740. 4 Black. Com. 168.

3. [d] *Cottages* are eſteemed to be Neſts for idle Perſons, Thieves, Stealers of Wood, *&c.* and prejudicial to the Education of Youth. Therefore,

By 31 El. ch. 7. *No one muſt build or convert a Building to a* Cottage *for Habitation, unleſs he lay to it* four *Acres of freehold Land of Inheritance, to be occupied with it; in Pain to forfeit* 10 l. *to the King for every Erection or Converſion, and* 40 s. *a Month, ſo long as he continues the ſame.*

And no Owner or Occupier of any Cottage ſhall ſuffer any Inmates, *or more Families than one, to inhabit therein, in Pain to forfeit to the Lord of the Leet* 10 s. a *Month.*

Hence we may obſerve, that a Cottage (*Sax. Cote*) is a little Houſe for Habitation, without any Land belonging to it.

[e] 1 Bulſt. 50, * 2 Inſt. 737, 738. 2 Roll. Abr. 139.

This Statute does not extend to [e] *Houſes* that are Copyhold. But four Acres of * Ground holden by Copy, or for Life or Lives, or for any Number of Years, will not be ſufficient to make it a lawful Cottage. And the four Acres in Fee-ſimple or Fee-tail muſt lie near the Cottage, and be occupied therewith, ſo long as the Cottage ſhall be inhabited.

[f] 1 Str. 405.

Neither does this Statute extend to Cottages in Cities, Boroughs, or Market-Towns [f], or to thoſe provided for Labourers in Mines, Quarries, or for Sea-faring Men, or for a Keeper or Warrener, ſo long as they dwell therein; or to Cottages theretofore made, and inhabited by a Shepherd or Herdſman, or poor and impotent Perſons; nor to Cottages tolerated by Order of the Juſtices of Aſſize, or of the Peace. And Juſtices of the Peace may alſo, with the Conſent of the Lord, order Houſes to be built on the Waſte for the Poor to inhabit, and place Inmates or more Families than one in a Cottage. By 43 *El. ch.* 2.

[a] Kitch. 92.

[b] 1 Str. 405. Contra.

[c] 2 Inſt. 740.

That Branch of the Statute concerning *Inmates* [a], extendeth to Cottages only, and to Cottages having four Acres of Ground or more laid to them, as well as to others having no *Ground* at all; as alſo to Inmates in Cottages [b] in any City, Borough, or Market Town. [*Qu.*] For crowding in one Houſe may be very dangerous in Time of Infection. [c] Cottages cannot by this Statute be pulled down; yet the Execution of the Penalty will work the deſired Effect.

New erected Cottages within the Memory of Man, though they have four Acres of Ground laid to them, ought not to common in the Waſtes of the Lord.

4 Black. Com. 168.

4. Of *Fireworks.*

By 9 & 10 W. 3. ch. 7. *To make or ſell any* Fire-works, *as Squibs,* &c. *or to permit any Fire-works to be caſt out of his Houſe, or Place of Habitation, into any publick Street, Highway, Road, or Paſſage, or to throw, or to be aſſiſting in throwing, any Fire-works in or into any Street, Houſe, Shop, River, Highway, Road, or Paſſage, is a* common Nuſance.

Any Perſon, who ſhall make, ſell, give, or utter, any Fire-works, or Caſes or Implements for making the ſame, ſhall, upon Conviction, by Con-

feſſion, or the Oath of two Witneſſes, before a Juſtice, forfeit five Pounds; or who ſhall ſuffer any Fire-works to be thrown from his Houſe, Shop, or Lodging, or any Place thereunto belonging or adjoining, ſhall forfeit twenty Shillings, to be levied by Diſtreſs and Sale. And any Perſon who ſhall throw or fire any Fire-works, or aid or aſſiſt therein, in or into any publick Street, Houſe, Shop, River, Highway, Road, or Paſſage, ſhall forfeit twenty Shillings, and upon Non-payment immediately on Conviction, ſhall be ſent to the Houſe of Correction, to be kept to hard Labour for any Time not exceeding one Month, unleſs he ſhall ſooner pay ſuch Forfeiture.

5. Of *unwarrantable Undertakers by publick Subſcriptions,* &c.

By 6 Geo. 1. ch. 18. (commonly called the Bubble Act) *All unwarrantable Undertakings by publick Subſcripions, Receipts, Aſſignments, Transfers,* &c. *are deemed publick Nuſances.* See ante.

This is a Summary of our *Criminal Laws* or *Pleas* of the *Crown*, and an Account of the *Puniſhments* for Offences, whether Capital or not Capital. It would be endleſs to mention every ſmall Offence that is puniſhable by a Juſtice of Peace, *&c.* in a Work of this Kind; and therefore the Reader is referred to Dr. *Burn*'s Juſtice of Peace, the 11*th* Edition in 8*vo.* printed in 1771. I proceed therefore to the fourth and laſt Object of the *Laws* of *England*.

The End of the Third Book.

BOOK IV.

Of the *Courts* of *Juſtice*, or *Juriſdiction* of *Courts*.

CHAP. I.

Of a *Court*, and of the ſeveral *Kinds* of Courts, which are of the *largeſt Extent*, (*viz.*) The *Parliament*, The *Privy Council*, The Court of the *Lord High Steward*; The *Chancery*, The *King's Bench*, The *Common Pleas*, The *Exchequer*, The Court of the *Conſtable* and *Marſhal*, The *Admiralty*, The Court *by Commiſſion by Virtue of* 28 *H*. 8. The *Aſſizes*, The *Quarter-Seſſions*, The *Sheriff's Turn*, The *County*-Courts, *Hundred*-Courts, Courts-*Leet*, Courts *Baron*, *Ancient Demeſne* Courts, The Courts of *Coroners*, The Courts of *Clerks of the Markets*, *Pie-powder* Courts, Of the Courts of the *Commiſſioners* of *Sewers*, *Commiſſioners of Bankrupts*, *Commiſſioners for Examination of Witneſſes*, *Foreſt* Courts, The *Eccleſiaſtical* Courts, or *Courts Chriſtian*.

Of the Courts of Juſtice.

THE *fourth Object* of our Laws are the *Courts* of Juſtice, for the Relief of *Perſons* that are injured, for the Security of their *Eſtates*, and for the Puniſhment of *Crimes*, and *Offences* committed by them. I purpoſe to treat of theſe Courts in the five following Chapters. The *firſt* whereof ſhall deſcribe what is a *Court*, and the ſeveral *Kinds* of our Courts, which are of the *largeſt Extent*, that have Power throughout *England*, and are not confined to one particular County or Precinct. The *ſecond* ſhall ſet forth the Courts that are *particular*, *limited*, or *exempt* Juriſdictions. The *third* ſhall ſhew, what *Remedies* there may be *without Suit* in Court. The *fourth* ſhall deſcribe in *General* the *Proceedings* in *civil* Cauſes; and the *fifth* the *Proceedings* in Cauſes *criminal*.

The

[a] The King may create a Court of Law, and appoint Judges in it.

[a] 6 Rep. 11.

A *Court (Curia à Curâ)* [b] is a Place where the Power of the Law is judicially adminiſtred. *Juriſdiction* is the Right by which that Power is adminiſtred. [c] To uſurp a Juriſdiction, and by Colour thereof to impriſon another, is puniſhable. See *Mag. Chart. ch.* 29.] All the Courts of Judicature are called the King's Courts, as all our Laws are called the King's Laws. And theſe Courts are either of *Record* or *not of Record*.

[b] 1 Inſt. 58. a. 4 Inſt. pref.

[c] 10 Rep. 74.

A Court of [d] *Record* is that which hath Power to hold Plea according to the Courſe of the Common Law, of real, perſonal, and mixt Actions, where the Debt or Damages amount to 40 *s.* or above, and of Treſpaſſes *Vi et Armis*; and whoſe Acts and Memorials are in Parchment. The Rolls being the Memorials of the Judges, are of ſuch uncontroulable Credit, that they admit of no Averment, Plea, or Proof to the contrary, inſomuch that they are to be tried only by themſelves. * For otherwiſe there would be no End of Controverſies. But yet, during the Term wherein any judicial Act is done, the Roll is alterable in that Term, as the Judges ſhall direct. When the Term is paſt, then the Record admits no Alteration, Averment, or Proof that it is falſe in any Inſtance. To a Grant by Letters Patent under the Great Seal, you cannot plead that there is *no ſuch Record*; but as it is in the Nature of a Conveyance, one may deny the Operation of it, and plead *Non Conceſſit*, and prove that the King had nothing in the Thing granted, *&c.* If the Judges do err, a *Writ* of *Error* lieth only from a Court of Record. Theſe Courts of Record are created by Parliament, Letters Patent, or Preſcription.

[d] 1 Inſt. 117. b. 260. a. 2 Inſt. 311. 3 Inſt. 71. 3 Rep. Pref. 4 Rep. 52. 2 Roll. Abr. 574. 2 Ld. Ray. 1140. 3 Black. Com. 24, 330.

A Court [e] *not of Record* is either, where it cannot hold Plea of Debt or Treſpaſs, if the Debt or Damages amount to 40 *s.* or of Treſpaſſes *Vi et Armis*; or where the Proceedings are not according to the Courſe of the Common Law, and where the Acts of Court are not inrolled in Parchment; as in the County-Court, Hundred-Court, Court-Baron, Eccleſiaſtical Court. Here the Proceedings may be denied, and tried by a Jury; and upon the Judgments of ſuch Courts a Writ of Error lieth not, but a Writ of *falſe Judgment*, or an *Appeal*.

[e] 1 Inſt. 117 b. 118 a. 260. a. 2 Inſt. 311, 312. 3 Black. Com. 25.

Note, That a Court that is not of Record, cannot impoſe a [f] Fine, or impriſon.

[f] 8 Rep. 38, 41. 11 Rep. 43.

Some Courts may fine, but not impriſon; as the Leet. Some may impriſon but not fine; as the Conſtables at the Petit Seſſions, for an Affray made in Diſturbance of the Court. Some Courts cannot fine, or impriſon, but amerce; as the County-Court, Hundred-Court, Court-Baron. Some Courts cannot fine, impriſon, or amerce; as the Eccleſiaſtical Courts. But the Courts of Record at *Weſtminſter*, or elſewhere, may fine, impriſon, and amerce, as the Caſe requires.

† Some Juriſdictions are Eccleſiaſtical, ſome Temporal. Of theſe, ſome be primitive or without Commiſſion, ſome derivative and dele-

† 4 Inſt. Pref.

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[d] *Nemo poteſt contra recordum verificare per patriam.* 2 Inſt. 380.

Recorda ſunt veritatis et vetuſtatis veſtigia. 1 Inſt. 118. a.

* *Expedit reipublicæ ut ſit finis litium.* 1 Inſt. 303. b. 6 Rep. 45.

† *Derivativa poteſtas eſt ejuſdem juriſdictionis cum primitiva.* 2 Inſt. 71. Noy's Max. 4. Finch. 11.

In præſentia majoris ceſſat poteſtas minoris. 2 Inſt. 26, 166. 4 Inst. 7. 9 Rep. 118.

gated by Commiſſion; ſome to inquire, hear, and determine, ſome to inquire only; and ſome are guided by one Law, and ſome by another.

3 Black.Com. 25, 26.

In every Court there muſt be a *Judge*, *Plaintiff* and *Defendant*. *Serjeants*, *Counſellors*, *Regiſters*, *Attornies*, &c. *may be* Aſſiſtants.

[b] 4 Inſt. 56. b. 59. b. 4 Rep. 27. 2 Roll. Abr. 578. 1 Danv. Abr. 179. [c] 1 Inſt. 141. a. 294. a. 2 Inſt 25, 422. 2 Roll. Abr. 92, 93. 2 Ld. Ray. 766. [d] 2 Inſt. 178, 186, 187. 4 Inſt. 70, 71.

A *Judge* is a Perſon appointed by publick Authority with Juriſdiction. [b] To him it belongs eſpecially to judge what is a *reaſonable* Time, Cuſtom, Fine, *&c.* and not to a Jury. [c] He cannot be excepted againſt or challenged, or regularly have an Action brought againſt him for what he doth as Judge. [But ſee 31 *Car.* 2. *ch.* 2. § 12. or the *Habeas Corpus* Act.] But he ought not to be Judge in his own Cauſe, except in caſe of Neceſſity. He is to be of Counſel with [d] Priſoners. And in all Caſes the King doth judge by his Judges. [See 18 *Ed.* 3. *St.* 4. and 20 *Ed.* 3. *ch.* 1.]

The *Plaintiff* (*Querens*, * *Actor*,) is he that calls the Defendant to Trial. In ſome criminal Cauſes he is called the *Informer*. The *Defendant* (*Defendens*, *Reus*) is he againſt whom the Action or Information is brought.

[e] 2 Inſt. 214, 422. 563, 564, 597. 2 Cro. 668. 3 Cro. 84. 2 Lev. 129. 1 Ld. Ray. 399. 1 Black. Com. 24. 3 Black.Com. 27.

A [e] *Serjeant* at Law, (*Serviens ad Legem*) Serjeant *Counter* or a Serjeant of the Coif, is the higheſt Degree taken in the Law, as that of a Doctor in the Civil or Canon Law. He is the chief Advocate or Patron of Cauſes, and is ſuppoſed to be the moſt experienced in the Law and Practice of the Courts. One Court (*viz.*) The *Common Pleas* is ſet apart for Serjeants only to plead; yet they may alſo plead in other Courts. Theſe are made by the King's Writ directed unto them, commanding them upon great Penalty to take upon them that Degree by a certain Day. But if one refuſes, he cannot be fined more than once. They ſhall be impleaded only in the *Common Pleas*, as ſome ſay; but others inſiſt that they may be ſued in any of the Courts at *Weſtminſter*, and that if they are ſued in any Court *elſewhere*, they may plead their Privilege, to be ſued only there. [See their Oath, 2 *Inſt.* 214.] Of theſe one or more are eſpecially called the *King's Serjeants*, to plead for him in all Cauſes. [See their Oath, *Ibid.* and ſee *Weſt.* 1. *ch.* 29.]

[f] 2 Inſt. 213, 214, 563, 564. 1 Black. Com. 26.

1 Black. Com. 28.

[a] 2 Ld. Ray. 1556. 2 Str. 822. S. C.

[f] A *Barriſter* (heretofore called an *Apprentice* of the *Law*) is a Counſellor learned in the Law (*Counſel* being taken for Advice and Direction in Law) admitted to plead without the Bar, and there to take upon him the Protection and Defence of his Client. He is admitted to this Degree without Oath. [See *Weſt.* 1. *ch.* 29.] It has been queſtioned, whether an Action of Debt doth lie for a Counſellor for his Fees againſt the Party that retained him. For his Fee is *Honorarium quiddam*, not *mercenarium*, as that of an Attorney or Solicitor. Certainly if it is upon a ſpecial Retainer, the Action will lie. A Barriſter who conſtantly attends the King's Bench, *&c.* ought to have the Privilege [a] of being ſued in all tranſitory Actions in *Middleſex*.

1 Black. Com. 17.

A *Regiſter* is he that takes the Minutes and Acts of the Court, and enters all the Proceedings. He goes under ſeveral Names in Courts, as

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[c] *Aliquis non poteſt eſſe judex et pars.* 1 Inſt. 141. a.
Aliquis non poteſt eſſe judex in ſua propria cauſa. Ibid. 2 Inſt. 103. 8 Rep. 118.

[*] *Actori incumbit onus probandi.* 4 Rep. 71.

[b] *Preignotary, Proto-Notary, Clerk, Steward.* [c] Any Error that appeareth to the Court to be the Clerk's Miſpriſion or Miſtake, may be amended at any Time. [See 14 *Ed.* 3. *St.* 1. *ch.* 6. 9 *H.* 5. *St.* 1. *ch.* 4. 4 *H.* 6. *ch.* 3. 8 *H.* 6. *ch.* 12 & 15. 27 *El.* *ch.* 5. 4 *An.* *ch.* 16. 9 *An.* *ch.* 20. § 7. and 5 *Geo.* 1. *ch.* 13.]

An [d] *Attorney* at Law is he that at the Requeſt of another ſtands in his Stead or *Turn*, to manage his Cauſe for him; his Warrant (or Proxy) implies it. His Duty is to follow the Advice of the Serjeants and Barriſters that are retained in the ſame Cauſe, and to carry on the practical Part of it. [e] An Attorney is either *general* or *ſpecial*. A *general* Attorney is he that is appointed by a general Authority, to manage all Affairs or Suits; as the *Attorney General* of the King; who is uſually one of the moſt learned of the Barriſters. He and the *Solicitor General* are made by Letters Patent *Quam diu ſe bene geſſerint*. (*Qu.* if not *during Pleaſure* only.] A *ſpecial* Attorney is he that is employed in one or more Cauſes. There are alſo in ſeveral Courts Attorneys *at large*, and Attorneys *ſpecial* belonging to one Court only. [f] By the Common Law no one could appear by Attorney without the King's Writ or Letters Patent; but was forced to follow his Suit in Perſon, by Reaſon whereof there were but few Cauſes in our Courts. But ſince ſeveral *Statutes* have provided, that it ſhall be lawful to appoint an Attorney, without any ſuch Authority to enable him. One cannot make an Attorney [g] irrevocably; for ſuch an Authority is of its own Nature revocable.

[See *Weſt.* 1. *ch.* 20. Againſt deceitful Practice. 4 *H.* 4. *ch.* 18. 3 *Ja.* 1. *ch.* 7. 2 *G.* 2. *ch.* 23. 22 *G.* 2. *ch.* 46. For regulating and reſtraining the Number of Attornies: And 18 *H.* 6. *ch.* 9. 32 *H.* 8. *ch.* 30. 18 *El.* *ch.* 14. 4 *An.* *ch.* 16. Of filing Warrants of Attorney.]

By 3 Ja. 1. ch. 7. *An Attorney, Solicitor, or Servant to any ſhall not be allowed any* Fees *laid out for Counſel or otherwiſe, unleſs he hath Tickets thereof ſigned by the Hand of them that receive ſuch Fees.*

He ſhall alſo give unto his Client true Bills *of all Charges of Suit under his own Hand, before he can charge his Client with the Payment thereof.*

[*And by* 2 G. 2. ch. 23. § 23. *He ſhall not commence any Action for his Fees till one Month after Delivery of his Bill, wrote in a legible Hand, and in Engliſh, (except Law Terms and Names of Writs) and in Words at length (except Times and Sums.)*]

If he delays his Client's Cauſe for Gain; or demands by his Bill more for Diſburſments than he hath laid out, the Client ſhall have his Action againſt him, and recover therein Coſts and treble Damages; and he ſhall be for ever after diſabled from being an Attorney or Solicitor.

An Attorney ſhall not admit any other to follow a Suit in his Name, in pain that each of them ſhall forfeit 20 l. *to be divided betwixt the King and the Party grieved.*

[*And by* 2 G. 2 ch. 23. § 17. *Attornies permitting others, not being ſworn Attornies or Solicitors of ſome other Court, to act in their Names, (or by* 22 G. 2. ch. 46. *practiſing as Agents for Perſons not qualified, or permitting Perſons not qualified to act in their Names at any General or Quarter-Seſſions of the Peace, beſides forfeiting* 50 l.) *ſhall be incapable of acting as Attornies from thenceforth, and their Admiſſion ſhall be void.*]

[See 7 & 8 *W.* 3. *ch.* 24. Which requires all Practiſers of the Law to take the *Oaths* to the Government (the Form of which, as now altered,

[b] Terms of the Law, v. Preignotary.

[c] Finch 227, 228.

[d] 1 Inſt. 51 b. 2 Inſt. 215. Terms of the Law, v. Attorney.

[e] Terms of the Law, v. Attorney. 4 Inſt. 117. 1 Vent. 1. 3 Black. Com. 25.

[f] F. N. B. 25. Terms of the Law, v. Attorney. 2 Inſt. 249.

[g] 8 Rep. 82.

tered, ſee in 1 *G.* 1. *St.* 2. *ch.* 13.) and to ſubſcribe the Declaration under the Penalties and Forfeitures in the Statute of *Præmunire* of 16 *Rich.* 2. *ch.* 5. which Oaths and Declaration are by 9 *G.* 2. *ch.* 26. to be taken and made within ſix Months after entering upon ſuch Practice.]

[a] 1 Cro. 425, 459. 3 Cro. 159, 160. 1 Roll. Abr. 17.

[b] 2 Cro. 520. 1 Roll. Abr. 17, 593, 594.

[a] An Attorney may be a Solicitor for his Client in other Courts as well as in the Court where he is Attorney; and a Promiſe to pay him for it is lawful: but in this Caſe he cannot ſue for his Fees without a ſpecial Promiſe; as he may upon a general Retainer in the Court, where he is an allowed Attorney. [But by 2 *G.* 2. *ch.* 23. § 10. an Attorney or Solicitor may practice in other Courts than where admitted, in the Name of an Attorney or Solicitor of that Court with his Conſent in Writing.] Alſo a [b] Solicitor of inferior Rank, who ſolicits Cauſes for his Clients, may take Recompenſe, and take a Promiſe to be repaid what he ſhall lay out. But if he retains an Attorney to proſecute a Suit for his Client in the Court where he is allowed, and undertakes to pay him his Fees: In this Caſe an Action of Debt lies againſt the Solicitor for the Fees, and Expences diſburſed in the Suit; for the Contract was made betwixt the Attorney and Solicitor, not in the Name of his Client.

[c] 1 Vent. 299. Hob. 177. 3 Lev. 298. 1 Ld. Ray. 342, 533. 2 Str. 1141. 2 Wilſon, 231, 232.

An Attorney hath a [c] Privilege to ſue and to be ſued only in that Court at *Weſtminſter*, of which he is admitted But he ſhall not have this Privilege, after he has left off Practice, or in an Action brought againſt himſelf and his Wife, or when he is ſued jointly with others. If an Attorney is Executor or Adminiſtrator, he ſhall not be allowed his Privilege. He ſhall not be forced to put in ſpecial Bail; for though he is an Attorney at large, he hath the ſame Privilege with the Clerks of the Court; and is ſuppoſed to appear *de Die in Diem*.

[See the Oaths to be taken by Attornies and Solicitors, and of their Admiſſion, Inrollment, *&c.* in the ſeveral Acts for Regulation of Attornies and Solicitors of 2 *Geo.* 2. *ch.* 23. 6 *Geo.* 2. *ch.* 27. 12 *Geo.* 2. *ch.* 13. and 22 *Geo.* 2. *ch.* 46. and ſee 12 *Geo.* 1. *ch.* 29.]

There are inferior Officers likewiſe attendant upon every Court. In the higher Courts at *Weſtminſter*, the *Sheriff* of every County is ſuppoſed to be preſent, to execute the King's Writs; and the *Ordinary* is their Officer for Matters Spiritual; as to certify Excommunication.

3 Black Com. 275, to 278.

The Courts of Juſtice are open *four* Times in every Year, called *Term Time*; during which Time the Cauſes are diſpatched. One is called *Hilary* Term, and begins the 23d of *January*, and endeth the 12th of *February* following; this hath four Returns. The ſecond is *Eaſter* Term, which begins the *Wedneſday* Fortnight, or ſeventeen Days after *Eaſter* Day, and ends the *Monday* next after *Aſcenſion Day*, and hath five Returns. The third is *Trinity* Term, beginning the *Friday* next after *Trinity Sunday*, ending the *Wedneſday* Fortnight after, and hath four Returns. [See 32 *H.* 8. *ch.* 21.] The fourth is *Michaelmas* Term, which begins on the 6th of *November*, and ends the 28th of *November*, and hath four Returns. [See 16 *Car.* 1. *ch.* 6. 24 *Geo.* 2. *ch.* 48.]

But *Note*, That if either the Return Day, or firſt or laſt of the Term falls upon the Lord's Day, or *St. John Baptiſt*, then the Day following is taken inſtead of it.

[a] 1 Inſt. 135.a. 2 Inſt. 264, 265.

[a] In all theſe Terms there are *Dies non Juridici* (*viz.*) The *Lord's Day* throughout the whole Year; in *Eaſter* Term, *Aſcenſion Day*; in

Trinity Term, *St. John Baptiſt*, when it falls in that Term; in *Hilary* Term the Day of the *Purification* of the *Virgin Mary*.

The reſt of the Year is call'd the *Vacation*.

N. B. The Courts will judicially take Notice of the Beginning and End of the Terms, as well moveable as immoveable.

2 Ld. Ray. 1557.

But the High Court of Parliament, the Privy Council, the Court of the Lord High Steward, and ſeveral inferior Courts, do not obſerve theſe *Terms*. Neither is the High Court of Chancery confined to them. But the Courts of the King's Bench, Common Pleas, and Exchequer (the higheſt Courts at Common Law) are confined to them.

The *Eſſoine Day* (from *Eſſoine* or *Exonnie*, *Excuſe*) is regularly the firſt Day of the Term, but the fourth Day after is allowed of Favour; tho' every Term is to be accounted but as one Day to many Purpoſes; and therefore a Plea or Judgment on the laſt Day of the Term is as effectual, as on the firſt Day of Term.

Hilary and *Trinity* Terms are *iſſuable* Terms; becauſe in thoſe Terms the *Iſſues* (or Facts to be tried) are joined, and the Records made up, that they may be tried at the *Aſſizes*; which reſpectively follow each of theſe Terms.

Now there are ſeveral *Courts*, and ſeveral *Sorts* of them, whoſe Juriſdiction extends, or which are diſperſed throughout the Kingdom, (*viz.*) The *Parliament*, The *Privy Council*, The Court of the Lord *High Steward*, The Courts of *Chancery*, *King's Bench*, *Common Pleas*, *Exchequer*, Of the *Conſtable and Marſhal*, The *Admiralty*, The Court by *Commiſſion* by Virtue of 28 *H.* 8. The *Aſſizes*, The *Quarter Seſſions*, The *Sheriff's Turn*, The *County-Courts*, *Hundred-Courts*, *Courts-Leet*, *Courts-Baron*, *Ancient Demeſne* Courts, The Courts of the *Coroners*, *Clerks* of the *Markets*, *Pie-Powder* Courts, The Courts of *Commiſſioners* of *Sewers*, *Bankrupts*, and for *Examination of Witneſſes*, The *Foreſt-Courts*, The *Eccleſiaſtical Courts*, or *Courts Chriſtian*.

I. The [b] *Parliament* (from *Parler la ment*, to ſpeak the Mind ſincerely) is the higheſt, moſt honourable, and moſt abſolute Court of Juſtice, conſiſting of the *King* and the *three* Eſtates. The *Lords Spiritual* (two Archbiſhops, and twenty-four Biſhops, who are called by Writ, and ſit there by Succeſſion in reſpect of their Baronies, Parcel of their Biſhopricks) are the *firſt* Eſtate. The *Lords Temporal* (Dukes, Marquiſſes, Earls, Viſcounts, and Barons, who ſit in Parliament in reſpect of their Deſcent or Creation) are the *ſecond* Eſtate. Every one of which, being of full Age, ought to have a Writ or Summons. The *Commons* are the *third* Eſtate, whereof there are Knights of Shires, Citizens of Cities, and Burgeſſes of Boroughs. Theſe are elected to this Office by the People, [and a Perſon having an undoubted Right to vote in any ſuch Election, whoſe Vote is refuſed by the returning Officer, may have [a] an Action on the Caſe againſt ſuch Officer] theſe repreſent all the Commons of *England*; every Member, tho' choſe for one particular Place, ſerving for the whole Kingdom. They are called to Parliament by Force of the King's Writ of Summons out of *Chancery*, at leaſt forty Days before the Parliament begins.

Of the Parliament.
[a] 1 Inſt 109 b. 110. a.
4 Inſt. 1, 2.
1 Ventr 324, 325.
1 Black. Com. ch. 2.
Of the Parliament per totum.
[a] 2 Ld Ray. 938.

The chief *Statutes* concerning the *Election* of *Knights*, *Citizens*, and *Burgeſſes* to Parliament, are as follow:

By 23 H. 6. ch. 14. *The Sheriff, after the Receipt of the Writ, ſhall deliver a Precept under his Seal to every Mayor and Bailiff of Cities and Boroughs*,

Boroughs, or to the Bailiff or Bailiffs, where no Mayor is, commanding them to chooſe Members to come to Parliament; and ſuch Head Officers ſhall return ſuch Precept to the Sheriff by Indenture betwixt them and the Sheriff of ſuch Election, and the Sheriff ſhall make a Return of every ſuch Writ, and of the Return made by ſuch Head Officers. Head Officer making a falſe Return ſhall forfeit 40 l. *to the Perſon choſen, that is not returned. The Sheriff not making due Return ſhall forfeit* 100 l. *as by* 8 H. 6. ch. 7. *concerning the Election of* Knights *of the Shires.* [See 8 *H.* 6. *ch.* 7. and 7 & 8 *W.* 3. *ch.* 25. *infra.*]

By 5 & 6 W. & M. ch. 20. *No* Officer *of the* Exciſe, *or other Perſon concerned therein, ſhall make any Intereſt, or diſſuade any from giving a Vote for Members of Parliament, under the Penalty of* 100 l. *one Moiety to the Informer, the other to the Poor of the Pariſh where ſuch Offence ſhall be committed; and upon Conviction on any ſuch Suit, he is to be incapable of ever exerciſing any Office of Truſt under the King.*

By 12 & 13 W. 3. ch. 10. § 91. *Officers of the* Cuſtoms; *By* 9 An. ch. 10. *Officers belonging to the* Poſt-Office; *By* 9 An. ch. 11. *Officers concerned in the Duties upon* Leather; *By* 10 An. ch. 19. *Officers and other Perſons concerned in the Duties upon Soap, Paper, ſtriped Linens imported, Hackney-Chairs, Cards, and Dice,* &c. *are in like Manner reſtrained from interfering in Elections under the ſame Penalties.*

By 7 W. 3. ch. 4. *No Perſon hereafter to be elected to ſerve in Parliament for any Place after the* Teſte *of the Writ of Summons to Parliament, or ordering of the Writ of Election, or after any Place becomes vacant, ſhall directly or indirectly before his Election, give, preſent, or allow to any Perſon, having a Vote, any Money, Entertainment, Gift, Reward; or promiſe, or agree to give or allow any Money,* &c. *to any ſuch Perſon, or to any ſuch County, City, Town, or Borough in general, for being elected, or in order to be elected, upon Penalty to be incapable to ſerve as a Member.*

[*And by* 2 G. 2. ch. 24. *Electors of Members of Parliament ſhall, before they poll at the Election, (if demanded by either of the Candidates, or any two of the Electors) take the Oath againſt Bribery (or being Quakers, affirm) as therein ſet forth, which the preſiding Officer ſhall adminiſter, on pain of forfeiting fifty Pounds. The Sheriff or returning Officer admitting any Perſon to poll without taking ſuch Oath, if demanded as aforeſaid, to forfeit one hundred Pounds, and the Perſon ſo polling ſhall incur the like Penalty.*

And if any Perſon, having or claiming any Right to vote in any ſuch Election, ſhall aſk, receive, or take any Money or other Reward by way of Gift, Loan, or other Deviſe, or agree or contract for any Money, Gift, Office, Employment, or other Reward, to give his Vote, or to refuſe or forbear to give his Vote, or if any Perſon by himſelf, or any Perſon employed by him, ſhall, by any Gift or Reward, or by any Promiſe, Agreement, or Security for any Gift or Reward, corrupt or procure any Perſon to give his Vote, or to forbear to give his Vote, in any ſuch Election, he ſhall for every ſuch Offence forfeit five hundred Pounds, and after Judgment or Conviction for ſuch Offence, ſhall be for ever diſabled to vote in any Election of Members of Parliament, or to hold, exerciſe, or enjoy any Office or Franchiſe, as Member of any City, Borough, Town Corporate, or Cinque Port, as if naturally dead.

Offenders within twelve Months after Election, and before Conviction of any Offence againſt this Act, diſcovering any other Offender, ſo that he be thereon convicted, ſhall be indemnified.

The Proſecution on this Act muſt be commenced within two Years after the Offence, and be carried on without wilful delay: And by 9 G. 2. ch. 38. *no Perſon ſhall be liable to the Diſabilities and Penalties, unleſs actually and legally arreſted, ſummoned, or otherwiſe ſerved with Proceſs, within two Years after the Offence, unleſs the ſame be prevented by his abſconding or withdrawing out of the Kingdom.*]

By 7 & 8 W. 3. ch. 7. *If any Perſon ſhall make a Return of a Member of Parliament contrary to the laſt Determination in the Houſe of Commons of the Right of Election for ſuch Place, or ſhall wilfully, falſely, and maliciouſly return more Perſons than are required to be choſen by the Writ or Precept, the Party grieved ſhall recover double Damages with full Coſts of Suit. All Contracts and Securities, given to procure any Return of any Member of Parliament, or any Thing relating thereto, are adjudged void. And the Perſon that makes any Contract or Security, or gives any Gift or Reward, to procure ſuch falſe or double Return, ſhall forfeit* 300 l. *one Third to the King, another to the Poor of the Place concerned, the other to the Informer with Coſts. The Action to be brought within two Years.*

By 7 & 8 W. 3. ch. 25. *There ſhall be forty Days between the* Teſte *and* Return *of the Writ of Summons to every new Parliament; and in caſe of a new Parliament, or upon any Vacancy, the Sheriff ſhall iſſue out Precepts to* Cities, Boroughs, &c. *three Days after the Receipt of the Writ of Election,* [See 10 & 11 W. 3. ch. 7. infra.] *who are to proceed to Election in eight Days, having given four Days Notice at leaſt of the Day appointed for Election. And for Election of* Knights *of the Shire, the Sheriff ſhall hold his County-Court at the moſt publick and uſual Place in the County, and where the ſame hath moſt uſually been for forty Years paſt, and at the next County-Court proceed to Election, unleſs the ſame falls out to be within ſix Days after the Receipt of the Writ, or upon the ſame Day; and then ſhall adjourn the ſame Court to ſome convenient Day; giving ten Days Notice of the Time and Place of Election (ſuch Adjournment not to exceed ſixteen Days, by* 18 G. 2. ch. 18. § 10.)*; and in caſe ſuch Election be not determined upon the View, but a Poll ſhall be required, then he, or in his Abſence the Under-Sheriff, ſhall appoint a Number of* Clerks *to take the Poll in his Preſence, or in the Preſence of his Under-Sheriff, or ſuch as he ſhall depute.*

Every Clerk ſo appointed ſhall be ſworn by the ſaid Sheriff, or Under-Sheriff, truly and indifferently to take the Poll, &c. *And the Sheriff or Under-Sheriff ſhall appoint* Inſpectors *of every Clerk to be nominated by each Candidate; and every Freeholder ſhall, before he is admitted to poll, if required by any of the Candidates (or any other Perſon having a Right to vote at ſuch Election, by* 10 An. ch. 23.) *take the Oath of his being a Freeholder,* &c. [The Form of which, as now altered, ſee in 18 *G.* 2. *ch.* 18.]

Where the County-Court hath uſually been held on a Monday, *it ſhall now be held on a* Wedneſday.

The Sheriff, or the Under-Sheriff, ſhall not adjourn the Court to any other Town or Place without the Conſent of the Candidates, nor by any unneceſſary Adjournment in the ſame Place delay the Election, but ſhall proceed from Day to Day.

‘ *Every Sheriff or other Officer, to whom the Execution of any Writ or Precept ſhall belong for the Election of Members of Parliament, ſhall forthwith deliver to any Perſon that ſhall deſire it, paying for writing the ſame, a Copy of the Poll taken at ſuch Election.*

Every ſuch Sheriff or Officer, as aforeſaid, for every wilful Offence contrary to this Act, ſhall forfeit to every Party grieved the Sum of 500 l. *with full Coſt of Suit.*

Truſtees or Mortgagees are not capable of voting in the Election of a Member of Parliament unleſs they are in actual Poſſeſſion. But the Ceſtuy que Truſt *or Mortgagor in Poſſeſſion may vote for the ſame Eſtate. See* 9 An. ch. 5. *infra.*]

All Conveyances *of* Lands, Tenements, *or* Hereditaments, *in order to* multiply *Votes ſhall be void; and no more than one Vote ſhall be admitted for one and the ſame Houſe or Tenement.* [See 10 *An. ch.* 23. *infra.*]

No Perſon under the Age *of twenty-one ſhall be admitted to vote, or to be elected a Member.*

By 10 & 11 W. 3. ch. 7. *Sheriffs and other Officers muſt make their Returns, in caſe of a new Parliament, on or before the Day ſuch Parliament is called to meet, or in caſe of a Vacancy, within fourteen Days after the Election, on Pain of* 500 l. *The proper Officer of the* Cinque Ports, *ſhall be allowed ſix Days for Delivery of the Precept after the Receipt of the Writ, notwithſtanding* 7 & 8 W. 3. ch. 25. *to the contrary.*

By 12 & 13 W. 3. ch. 2. *No Perſon born out of the King's Dominions, tho' naturalized, or made Denizen, except born of* Engliſh *Parents, (or unleſs naturalized before the Acceſſion of King* George *the Firſt, by* 1 G. 1. St. 2. ch. 4.) *ſhall be Member of either Houſe.*

By 2 An. ch. 4. *The* Regiſter *of Deeds,* &c. *for the* Weſt-Riding *of the County of* York, *or his* Deputy, *is not capable of being choſen a Member of Parliament: Nor by* 6 An. ch. 35. *the* Regiſter *for the* Eaſt-Riding, *or his* Deputy: *Nor by* 7 An. ch. 20. *the* Regiſter *for* Middleſex, *or his* Deputy, *or any Perſon receiving Profit out of the Office: Nor by* 8 G. 2. ch. 6. *the* Regiſter, Deputy, *or other,* &c. *for the* North-Riding *of* Yorkſhire.

By 11 & 12 W. 3. ch. 2. § 150. *No Member of Parliament ſhall be capable of being a Commiſſioner of the Exciſe or Appeal, or of holding, in his own Name, or in the Name of any other, or of executing by himſelf or Deputy any Office concerning the Management of the Exciſe.* [*Nor of the Cuſtoms, by* 12 & 13 W. 3. ch. 10. § 89.]

By 6 An. ch. 7. *No Perſon having new Office or Truſt or Benefit thereof, erected ſince 25th* October 1705, *or hereafter to be erected, under the Crown, nor Commiſſioner or Subcommiſſioner of Prizes, Secretary or Receiver of Prizes, Comptroller of the Account of the Army, Commiſſioner of Tranſports, or of the ſick and wounded, Agent for a Regiment, Commiſſioner for Wine-Licences, Governor or Deputy Governor of a Plantation, Commiſſioner of the Navy employed in any of the Out-Ports, nor Perſon having Penſion from the Crown during Pleaſure, ſhall be capable of being elected* Member *of the Houſe of Commons. And if any Member accepts of any Office of Profit from the Crown, his Election ſhall be void. But ſuch Member ſhall be capable of being again elected.*

By 1 Geo. 1. ch. 56. *No Perſon having a* Penſion *from the Crown for any Term or Number of Years, either in his own Name or in Truſt for him, is capable of being elected Member of the Houſe of Commons; and if any Perſon,*

Perſon, who ſhall have ſuch Penſion at the Time of his Election, or at any Time after, ſhall ſit or vote in the Houſe, he ſhall forfeit 20 l. *for every Day he ſhall ſo ſit or vote, with full Coſts of Suit.*

[*By* 15 G. 2. ch. 22. *No Commiſſioner of the Revenue in* Ireland, *or Commiſſioner of the Navy or Victualling Offices; nor any Deputy or Clerk in any of the ſaid Offices, or in any of the Offices following,* to wit, *the Office of Lord Treaſurer or Commiſſioners of the Treaſury, of the Auditor of the Receipt of the Exchequer, of the Tellers, or of the Chancellor of the Exchequer; of the Lord Admiral or Commiſſioners of the Admiralty, of the Paymaſters of the Army, or Navy; of the Secretaries of State; of the Commiſſioners of Salt, or Stamps, or Appeals, or Wine Licences, or Hackney Coaches, or Hawkers or Pedlars; nor any Perſon having any Office Civil or Military, in* Minorca *or* Gibraltar, *other than Officers having Commiſſions in Regiments there only, ſhall be capable of being elected Member.*

If any ſuch Perſon is returned, ſuch Election and Return ſhall be void, and he ſhall forfeit twenty Pounds for every Day he ſhall ſit or vote as a Member, with full Coſts, and be thenceforth incapable of taking or enjoying any Place of Profit or Honour under the Crown.

But this Act ſhall not extend to the Treaſurer or Comptroller of the Navy, the Secretaries of the Treaſury, of the Chancellor of the Exchequer, or of the Admiralty, the under Secretaries of State, or the Deputy Paymaſter of the Army, or to any Perſon holding any Office for Life, or ſo long as he ſhall behave well therein.]

By 9 An. ch. 5. *No Perſon is qualified to be a* Knight of the Shire, *who hath not an Eſtate in* England *or* Wales *of Freehold or Copyhold for Life at leaſt of* 600 l. per Annum; *nor to repreſent any City, Borough, or Cinque-Port, who hath not* 300 l. per Annum *to and for his own Uſe, either in Law or Equity, clear of all Incumbrances; otherwiſe the Return of ſuch Perſon ſhall be void.*

Proviſo, *That the* eldeſt Son *of a Peer, or of any Perſon qualified to ſerve as Knight of the Shire, ſhall not be incapable; that the* Univerſities *may return Members as formerly; that a Mortgagee, when the Equity of Redemption is in another, ſhall not be capable, unleſs the Mortgagee ſhall have been in Poſſeſſion ſeven Years before the Election.*

Every Candidate, except as aforeſaid, at the Requeſt of another Candidate, or of two or more Perſons that have a Right to vote, ſhall at the Time of the Election, or before the day fixed in the Writ for the Meeting of the Parliament, take an Oath (mentioned in the Statute) *of the* Value *of his Eſtate, and where ſituate. The Oath ſhall be adminiſtred by the Sheriff, or Under-Sheriff, or by the Officer who is to take the Poll, or make the Return, or by any two or more Juſtices of the Peace. The Candidate refuſing to take ſuch Oath as aforeſaid, his Election and Return ſhall be void.*

By 33 G. 2. ch. 20. *Every Perſon (except the eldeſt Son or Heir apparent of a Peer, or of a Perſon qualified to ſerve as a Knight of the Shire, the Members for the two Univerſities, and the Members for* Scotland) *who ſhall be Elected a Member of the Houſe of Commons, ſhall, before he votes or ſits there, after the Choice of a Speaker, deliver in at the Table, while the Houſe is ſitting, an Account ſigned by him of the Place where his Eſtate lies, by which he makes out his Qualification, and take and ſubſcribe the Oath there mentioned,* That he truly, and *bona fide* hath ſuch Eſtate, of ſuch Value, &c. *Any Member preſuming to ſit or vote before he has delivered ſuch Account, and taken and ſubſcribed ſuch Oath,* *or not being qualified according to* 9 An. *his Election ſhall be void, and a new Writ ſhall iſſue.*]

By 10 An. ch. 23. *Fraudulent* Conveyances *and* Eſtates *made to qualify Voters at Elections of Knights of the Shire, ſubject to an Agreement to reconvey or determine the ſame Eſtate, ſhall be taken againſt the Grantors as free and abſolute, and be held by the Grantee, diſcharged of all Manner of Truſt or Condition, and all Securities and Agreements for defeating ſuch Eſtate ſhall be void; and the Perſon making ſuch Conveyance, or who being privy to ſuch Purpoſe, ſhall deviſe or prepare the ſame, and the Perſon voting by Colour thereof, ſhall forfeit* 40 l. *to any Perſon who will ſue for the ſame in any Court at* Weſtminſter, *together with full Coſts.*

No Perſon ſhall vote for Knights of the Shire in Right of Lands or Tenements, for which ſuch Perſon ſhall not have received, or have been intitled to receive, the Profits to his own Uſe for one Year before the Election, unleſs ſuch Lands, &c. *came to him within that Time by* Deſcent, Marriage, Marriage-Settlement, Deviſe, Preſentation, *or* Promotion. *The Perſon voting contrary ſhall, for every Offence, forfeit* 40 l. *one Moiety to the Poor of the Pariſh, where the Lands are, and the other Moiety to him that will ſue for it in any Court of Record at* Weſtminſter.

[*And by* 13 G. 2. ch. 21. *The Proviſions in the above Act are extended to Electors for ſuch Cities and Towns as are Counties of themſelves, wherein Perſons have a Right to vote in reſpect of Lands, Tenements, or Hereditaments, of the yearly Value of forty Shillings.*]

[*By* 18 G. 2. ch. 18. *No Perſon ſhall vote in the Election of Knights of the Shire in Right of any Meſſuages, Lands or Tenements, which have not been charged to the Land-Tax, twelve Calendar Months next before ſuch Election, except in right of Rents, or Chambers in Inns of Court or Chancery, or any Meſſuages or Seats belonging to any Offices, which have not been uſually charged to the Land-Tax.*

No Perſon ſhall vote in ſuch Election without having a Freehold Eſtate in the County, of the clear yearly Value of forty Shillings, above all Rents and Charges payable thereout, or without having been in the actual Poſſeſſion or Receipt of the Rents and Profits thereof to his own Uſe, above twelve Calendar Months, unleſs the ſame came to him within the Time aforeſaid, by Deſcent, &c. *(as in the above Act) or ſhall vote in Right of any Freehold Eſtate granted to him fraudulently on purpoſe to qualify him, or ſhall vote more than once at the ſame Election; upon pain to forfeit to the Candidate, for whom ſuch Vote ſhall not have been given, and who ſhall firſt ſue, forty Pounds, to be recovered, with full Coſts, by Action of Debt, in the Courts at* Weſtminſter; *the Proof in ſuch Action to lie on the Perſon againſt whom brought, unleſs the Fact whereon it is grounded be the having polled more than once.*

But no publick Tax or Rate ſhall be deemed a Charge on a Freehold within the Meaning of this Act.

All Actions, Suits, and Proſecutions, on this Act, are to be commenced within nine Calendar Months after the Fact committed, and the Plaintiff or Informer diſcontinuing, becoming Nonſuit, or having a Verdict paſs againſt him, ſhall pay the Defendant treble Coſts,]

[*And by* 19 G. 2. ch. 28. *The Proviſions in the above Act are extended to Elections for ſuch Cities and Towns as are Counties of themſelves, wherein Perſons have a Right to vote in reſpect of Freehold Lands, Tenements or Hereditaments, of the yearly Value of forty Shillings, And*

The Sheriff of every City or Town, being a County of itſelf, and having a Right to elect by Virtue of the Writ of Summons, without any Precept thereupon, ſhall forthwith, upon Receipt of the Writ, give publick Notice of the Time and Place of Election, and ſhall proceed to the Election within eight Days, excluſive, after the Receipt of the Writ, and give three Days Notice thereof, at leaſt, excluſive.]

[*And by* 31 G. 2. ch. 14. *No Perſon who holds his Eſtate by Copy of Court-Roll ſhall be intitled thereby to vote at the Election of Knights of the Shire; ſuch Vote ſhall be void, and the Perſon ſo voting ſhall forfeit fifty Pounds.*]

[*By* 2 G. 2. ch. 24. *No Perſon convicted of wilful and corrupt Perjury, or Subornation of Perjury, ſhall be capable of voting in any Election of any Member of Parliament.*]

And by 3 Geo. 3. ch. 15. *To prevent occaſional Freemen from voting at Elections of Members to ſerve in Parliament, for Cities and Boroughs, no Perſon as a Freeman, ſhall be admitted to vote at any Election of Members for any City, Town, Port, or Borough in* England, Wales, *and* Berwick upon Tweed, *unleſs ſuch Perſon has been admitted to his Freedom, twelve Calendar Months before the firſt Day of ſuch Election; if any Perſon vote contrary to the Act, he ſhall forfeit* 100 l. *for every Offence, and ſuch Vote ſhall be void.*

Sect. 2. *Perſons intitled to their Freedom by Birth, Marriage, or Servitude excepted.*

Sect. 3. *Penalty of antedating the Admiſſion of any Freeman,* 500 l.

Sect. 4. *The Books and Papers of Admiſſion of Freemen to be open to Inſpection, upon Demand of a Candidate, his Agent, or a Freeman, upon Payment of* 1 s. *and Copies and Minutes of the Admiſſions to be given, paying reaſonably for writing the ſame; and the Books, &c. to be produced if demanded; upon the Penalty of* 100 l. *on Refuſal by the Mayor, Bailiff, Sheriff, Town Clerk, or other Officer.*

Sect. 5. *The Penalty may be recovered with full Coſts of Suit.*

Sect. 6. *Provided the Proſecution be commenced within a Year.*

Sect. 7. *This Act to be openly read by the Returning Officer at Elections, immediately after the Act of* 2 Geo. 2. *againſt Bribery and Corruption in Elections.*

Sect. 8. *This Act not to extend to* London *or* Norwich.

See 10 Geo. 3. ch. 16. *An Act to regulate the Trials of controverted Elections, or Returns of Members to ſerve in Parliament. Alſo ſee* 11 Geo. 3. ch. 42. *An Act to explain and amend the* 10 Geo. 3. ch. 16.

By the 10 Geo. 3. ch. 41. *The Speaker of the Houſe of Commons during the Receſs of Parliament, may iſſue Warrants to the Clerk of the Crown to make out Writs for new Elections; provided the Deceaſe of a late Member be certified by two Members, and notified by the Speaker in the* London Gazette. *The Speaker not to iſſue his Warrant to the Clerk of the Crown to make out a new Writ for the electing a Member in the Room of any Member deceaſed, unleſs the Return of the Writ, by virtue of which ſuch Member deceaſed was elected, ſhall have been brought into the Office of the Clerk of the Crown, fifteen Days before the End of the Seſſion of Parliament immediately preceding the Death of ſuch Member.*

[See 7 *Geo.* 2. *ch.* 16. and 16 G. 2. *ch.* 11. For better regulating Elections of Members of the Houſe of Commons for *Scotland,* 8 *Geo.* 2. *ch.* 30. for regulating the Quartering of Soldiers during the Time of the

Elections of Members to ſerve in Parliament; and 30 *Car.* 2. *St.* 2. 13 & 14 *W.* 3. *ch.* 6. and 1 *G.* 1. *St.* 2. *ch.* 13. concerning the *Oaths* of Allegiance and Supremacy to be taken, and the *Declaration* againſt Tranſubſtantiation to be ſubſcribed by Peers and Members of Parliament, before they ſit or vote in the Houſe.]

The [a] *Fees* of *Knights* of the Shire are *four* Shillings a Day, of Citizens, and Burgeſſes *two* Shillings a Day. [See 12 *Ri.* 2. *ch.* 12. 23 *H* 6. *ch.* 10. 6 *H.* 8. *ch.* 16. 35 *H.* 8. *ch.* 11.]

At the Return of the Writs the *Parliament* cannot *begin* but by the Royal Preſence of the King, either in Perſon, or by [a] Repreſentation by Letters Patent or Commiſſion. If the Parliament is prorogued upon Return of the Writs of Summons, it begins at the End of the Prorogation.

The [b] *Juriſdiction* of this Court is ſo tranſcendent, that it makes, enlarges, diminiſhes, abrogates, repeals, and revives Laws and Statutes concerning Matters Eccleſiaſtical, Common, Civil, Criminal, Martial, Maritime, &c.

And as every Court of Juſtice hath Laws and Cuſtoms for its Direction, ſo the High Court of Parliament hath its own proper Laws and Cuſtoms, called the [c] *Laws and Cuſtoms of Parliament.* Inſomuch that no Judges ought to give any Opinion of Matters done in Parliament; becauſe they are not to be decided by the Common Law.

[d] There can be no Act of Parliament without the Conſent of the Lords and Commons, and the Royal *Fiat* of the King, giving his Conſent perſonally, or by his Letters Patent ſigned by his Hand. [See 33 *H.* 8. *ch.* 21.] But Acts of Parliament may be good without the Conſent of the Spiritual Lords; that is to ſay, if they refuſe to vote, or voluntarily abſent themſelves.

[e] The *Lords* and *Commons* in their reſpective Houſes have Power of *Judicature*, and ſo have both Houſes together. [f] Every Member hath a judicial Place, and cannot be a Witneſs. [But this ſeems to extend only to ſuch Things as paſs in the Houſe.] The Lords have one that *preſides* in common Affairs; [either the Lord Chancellor, or Lord Keeper of the Great Seal for the Time being, or, in his Abſence, the Lord Chief Juſtice of the King's Bench, or ſome Peer appointed by the Houſe] and the Commons have their Speaker, choſen by the Houſe, but to be approved of by the King. The Commons have often [g] impeached ſeveral Perſons before the Houſe of Lords, and have proſecuted them to Judgment. For the Commons coming from all Parts are the general Inquiſitors. [See 12 & 13 *W.* 3. *ch.* 2.]

The *Houſe of Lords* is a [h] *diſtinct Court* for many Purpoſes. They may try Cauſes of Life and Death, [upon an Impeachment of the Commons, or where a Peer is Defendant] take a Recognizance; and before the Lords in the Upper Houſe, the Proceedings, in Chancery, or the Equity Side of the Exchequer, upon an Appeal from thoſe Courts, or upon Writs of Error to reverſe Judgments by Original in the King's Bench, or Judgments in the Exchequer Chamber, Errors in ſuch Judgments may be examined. All their Decrees are as Judgments, and if they err, the Parliament only hath Power to reverſe their Judgments.

[i] The *Houſe of Commons* is alſo a *diſtinct Court* for ſeveral Purpoſes, *viz.* to examine Elections, to expel their own Members, to commit them or others to Priſon for any Contempt of the Houſe. The Book of the

[a] 4 Inſt. 46.

[a] 4 Inſt. 6, 7. 1 Ld. Ray. 343.

[b] 1 Inſt. 110. a.

[c] 4 Inſt. 14, 15. 1 Salk. 19. 2 Ld. Ray. 938, &c.

[d] 2 Inſt. 157, 585, 586, 587. 4 Inſt. 25.

[e] 4 Inſt. 23.

[f] 4 Inſt. 15. 2 Ld. Ray. 1105. 1 Ld. Ray. 15.

[g] 4 Inſt. 11, 23, 24.

[h] 2 Inſt. 536. 4 Inſt. 21, 22, 23. Finch 233. 1 Ld. Ray. 15.

[i] 2 Inſt. 536. 4 Inſt. 23, 28. 2 Ld. Ray. 1105.

Clerk of the Houſe of Commons is a Record[k]. [*Qu.*] [See 6 *H.* 8. *ch.* 16. 7 & 8 *W.* 3. *ch.* 7.]

A Lord being abſent may make another Lord his Proxy, but one of the Houſe of Commons cannot make his Proxy.

A Member of Parliament ſhall have [l] *Privilege* of Parliament, not only for himſelf and his Servants, to be free from Arreſts, *Subpœna's*, Citations, *&c.* but for his Horſes and Goods, to be free from Diſtreſſes. Privilege of Parliament doth generally hold, except in Treaſon, Felony, and Breach of the Peace. [a] And this Privilege to be free from Arreſts is claimed by the Commons to be for forty Days, both before and after the Seſſions, *eundo & redeundo*, but the Time has never been expreſſly determined, however, there muſt be a reaſonable Time, even after a Diſſolution.

[See 12 & 13 *W.* 3. and 11 *G.* 2. *ch.* 24. under Title *Arreſt*, in *ch.* 4. *poſt.* See alſo 5 *H.* 4. *ch.* 6. 11 *H.* 6. *ch.* 11. and *ante.*]

[b] The paſſing of any Bill, or the giving any Judgment in Parliament, doth not make a *Seſſion*; but the Seſſion doth continue, 'till it is *prorogued* or *diſſolved*. Every Seſſion of Parliament is in Law a ſeveral Parliament. By Prorogation in open Court, there is a Seſſion, and then ſuch Bills as paſſed in either Houſe, or in both Houſes, and had not the Royal Aſſent to them, muſt fall. But may be brought in again at the next Seſſion. If the Parliament is only *adjourned*, that does not make a Seſſion, but all things continue in the ſame State as they were in before the Adjournment. This is the Difference between Prorogation and Adjournment. [c] The Houſe of Commons is not prorogued or adjourned by the Prorogation or Adjournment of the Lords Houſe. For, as hath been ſaid, it is a diſtinct Court for ſome Purpoſes; and therefore it may prorogue or adjourn itſelf. [But now [d] an Ajournment by the King of the Parliament is called a *Prorogation*, and when either Houſe adjourns itſelf, it is not called a Prorogation but *an Adjournment*, and has no Relation to the other Houſe; nor has it the ſame Effect of putting an End to the Seſſion as a Prorogation of the Parliament by the King has, which is never now called an Adjournment.]

When the Parliament is *diſſolved* without any *Act or Judgment* paſſed, it is no Seſſion, but a Convention. [e] The King only can diſſolve the Parliament, in Perſon, or by Repreſentation.

By 5 An. ch. 8. *An Act for an* Union *of the two Kingdoms of* England *and* Scotland, *there is to be but one Parliament for* Great Britain.

By 6. An. ch. 7. *The Parliament ſhall not be* diſſolved *by the Death of a King or Queen; but, if then ſitting, ſhall immediately proceed to act, and if then ſeparated by Adjournment or Prorogation, ſhall immediately after ſuch Demiſe, convene and ſit, or if no Parliament then in Being, that hath ſat, then the laſt preceding Parliament ſhall immediately convene and ſit, and in all the ſaid Caſes, the Parliament ſhall continue to act for ſix Months after ſuch Demiſe, unleſs ſooner prorogued or diſſolved by the Succeſſor.*

[*By* 30 G. 2. ch. 25. § 46. *If the Parliament is ſeparated by an Adjournment or Prorogation, which will not expire in fourteen Days; the King may in caſe of an actual Invaſion, or imminent Danger thereof, or in caſe of a Rebellion, iſſue a Proclamation for their Meeting, giving fourteen Days Notice of the Day appointed, and the Parliament ſhall accordingly meet on that Day, as if it had ſtood adjourned or prorogued to that Day.*

[k] Hob. 110. 1 Ld. Ray. 15. contra.

[l] 4 Inſt. 24, 25.

[a] Comy. 444. 2 Str. 985.

[b] 4 Inſt. 27.

[c] 4 Inſt. 28.

[d] 1 Ld. Ray. 343.

[e] 1 Inſt. 110 a.

By 6 & 7 W. & M. ch. 2. *A Parliament ſhall be holden once in three Years, at furtheſt, and ſhall not have Continuance longer than three Years. But,*

By 1 Geo. 1. St. 2. ch. 38. *The* Continuance *of a Parliament may be for ſeven Years, and no longer.*

So much of the Parliament, as it is the higheſt and moſt honourable Court of Juſtice.

Of the Privy Council.
[a] 4 Inſt. 53, 54. 1 Black. Com. 229.

II. The [a] *Privy Council* is a moſt noble Aſſembly of the King and Privy Counſellors in the King's Court or Palace, for Matters of State. The King chuſes his Counſellors; and by Force of an Oath they are made Privy Counſellors, without Patent or Grant, and are to continue ſo during the King's Pleaſure. They are to adviſe the King for the publick Good with Relation to affairs at Home and Abroad. There are ſome here that bear the higheſt Offices. As

[b] 4 Inſt. 55. 1 Black. Com. 230.

1. There is a *Lord* [b] *Preſident* of this Council; whoſe Office is granted by Letters-Patent under the Great Seal *Durante Beneplacito.*

He makes a Report to the King of the Buſineſs at the Council Table

[c] 4 Inſt 55. 2 Black. Com. 347.

[d] 2 Inſt. 554, 555, 556. 8 Rep. 18, 19.

[e] 2 Inſt. 17. 11 Rep. 92. 1 Roll. Abr. 183.

2. There is alſo a *Lord* [d] *Privy Seal*, who ſits in Council next to the Lord Preſident, and takes a particular Oath as Lord Privy Seal. He muſt not put his Seal to any Grant without good Warrant, nor with Warrant, if it is againſt Law or inconvenient, but muſt firſt acquaint the King with it. [d] The *Privy Seal* is a Seal that the King uſeth in Grants that are to paſs the Great Seal. For firſt they paſs the *Privy Signet*, then the *Privy Seal*, and then the *Great Seal.* [See 27 *H.* 8. *ch.* 11. How the King's Grants, Writings, Leaſes, ſhall paſs the *three* Seals, (*viz.*) the *Privy Signet*, the *Privy Seal*, and the *Great Seal*; and the Duties of the *Clerk* of the Privy Signet and Privy Seal, and what *Fees* ſhall be paid, and where none at all, *&c.* and many Articles concerning the paſſing of the King's Grants, *&c.*] [e] No Protection can be granted under the Privy Seal, but under the Great Seal. But a Warrant of the King under the Privy Seal to iſſue out Money out of his Coffers, is ſufficient, becauſe it concerns but a Chattel in Poſſeſſion. And the Privy Seal is ſometimes uſed in Things of leſs Conſequence, that never paſs the Great Seal; as to cancel a Recognizance made to the King, to diſcharge a Debt. But no Writs ſhall paſs under the Privy Seal, which touch the Common Law. [See 28 *Ed.* 1. *ch.* 6. 11 *Ri.* 2. *ch.* 10.]

1 Black. Com. 338.

[f] 2 Inſt. 555, 556. 4 Inſt. 115. 116. 2 Rep. 17. 8 Rep. 18, 19. 11 Rep. 92. 2 Roll. Abr. 183.

[g] See ante.

3. The *Secretaries of State* are alſo of the Privy Council. Theſe every Day attend upon the King, and receive and diſpatch Petitions of the Subjects at Home, and are employed about foreign Affairs. The *Principal* Secretary of State hath the Cuſtody of the [f] *Privy Signet*, becauſe the King's private Letters are ſigned with it. There are four *Clerks* of the Privy-Signet Office, who write out ſuch Grants, Letters Patent, as paſs by Bill ſigned, or Bill ſuperſcribed by the *Sign Manual*, or under the Hand of the King; which being tranſcribed and ſealed with the Signet is a Warrant to the Privy Seal, as the Privy Seal is a Warrant to the Great Seal. The Law takes Notice of the *Sign Manual* [g], and in a more particular Manner of the *Privy Signet*. For a *Ne Exeat Regno* may by Commandment be under the Privy Signet or the Privy Seal, as well as by the King's Writ under the Great Seal; and the Subjects ought to obey

obey it. But a Warrant under the Privy Signet is not ſufficient to iſſue out any Treaſure, or to diſcharge a Debt; much leſs an Order by Word of Mouth. For it ought to be under the Great Seal, or at leaſt under the Privy Seal.

The *Paper-Office* belongs to the Secretaries of State, where all Paper-Writings that paſs the Secretaries, are tranſmitted and kept.

A [a] Secretary of State hath Power to *commit* Criminals for Treaſon to ſafe Cuſtody, as *Conſervators* of the Peace, or as Juſtices of the Peace all over *England*, or at leaſt by immemorial Uſage.

[a] 1 Str. 3. 1 Ld. Ray. 65.

[b] It is in the Power of the Privy Council as a *Court*, to inquire into all Crimes againſt the Government, and to *commit* the Criminals in order to their Trial in ſome of the other Courts. Any one or two of the Privy Council may lawfully do it. But they take Cognizance of no [c] private Matters, that may be determined in other Courts. Yet for Controverſies ariſing in Point of Law amongſt the King's Subjects in the Iſles of *Jerſey* and *Guernſey*, and the Plantations abroad, the King and his Privy Council are the proper Judges, without Appeal.

[b] Ibid.
[c] 3 Inſt. 182, 183. 4 Inſt. 53.

The King, by the Advice of his Privy Council, doth publiſh *Proclamations* binding to the Subject, if they are not againſt Common or Statute Law, or introductory of a new Law.

By 16 Car. 1. ch. 10. It is declared, *That neither the King nor the Privy Council, have Authority by* Engliſh *Bill, Petition, Articles, Libel, or any other arbitrary Way, to examine or draw into Queſtion, or to determine or diſpoſe of the Lands, Tenements, Hereditaments, Goods, or Chattels of any Subject of this Kingdom.*

By 12 & 13 W. 3. ch. 2. *No Perſon born out of the King's Dominions, though naturalized or made denizen, except born of* Engliſh *Parents, (or naturalized before the Acceſſion of* George *the Firſt, by* 1 G. 1. St. 2. ch. 4.) *ſhall be of the Privy Council.*

By 6 An. ch. 6. *There is to be but one Privy Council for the Kingdom of* Great Britain.

By 6 Ann. ch. 7. *The Privy Council ſhall continue and act for ſix Months after the Demiſe of the King, unleſs ſooner diſcharged by his Succeſſor.*

[See 3 *H.* 7. *ch.* 14. Of Felony in conſpiring to deſtroy the King or his Counſellors; and 9 *An. ch.* 16. Of *Felony* to attempt to kill, *&c.* a Privy Counſellor, *ante*; and for their *Precedency* and Place, See 31 *H.* 8. *ch.* 10.]

III. There is alſo a *Court* of the *Lord High Steward* of *Great Britain*. [d] This *Office* is very ancient, and was anciently of Inheritance; but is now granted only *pro hac vice*; as when a Lord of Parliament is indicted for Treaſon, Felony, or Miſpriſion of Treaſon or Felony. He to whom this Office is granted muſt be a Lord of Parliament. His Commiſſion is reſtrained to proceed only on that Indictment, according to the Laws and Cuſtoms of *England*. But he is not ſworn.

Of the Court of Lord High Steward.
[d] 4 Inſt. 58, 59, 60. 4 Black Com. 257, 258, 260;

At every Coronation he hath a Commiſſion alſo under the Great Seal, to hear and determine the Claims of Grand Searjeanty, and other honourable Services, to be done for the Solemnization thereof. For which Purpoſe he holds a Court ſome Time before the Coronation. But to return.

When a Peer has committed Treaſon, Felony, or Miſpriſion of Treaſon or Felony, the [a] Indictment is to be found by Freeholders before Commiſſioners of *Oyer* and *Terminer*, or in the King's Bench, if the Offence was committed in the County where the King's Bench ſits, tho' the

[a] 3 Inſt. 28. 9 Rep. 118.

[b] 2 Inſt. 49.

the Trial may be in any County. And if he hath a [b] Pardon, he may plead it there before the Judges of that Court, who have Power to allow it. But he cannot confeſs the Indictment, or plead Not guilty there. This muſt be done before the Lord High Steward, when the Indictment is removed by *Certiorari* out of Chancery before him.

This Trial is given by *Magna Charta, ch.* 29.

For the Method of trying a Peer *per Pares* before the Lord High Steward, See 3 *Inſt.* 27, 28, 29. and ſee of *Trial, ch.* 5. *poſt.*

Of the Court of Chancery.
[c] 2 Inſt. 23, 551, 552, 553, 554.
3 Black. Com. 46, 49, 429.
[d] 2 Inſt. 552, 553.
4 Inſt. 79.
Weſt Simb. Of the Chancery, § 15, 16.
[e] 4 Inſt. 84, 88.
[f] 4 Inſt. 82.

IV. The High Court of *Chancery*, The *King's Bench*, The *Common Pleas*, and the Court of *Exchequer*, have been the King's Courts [c] Time out of Mind.

In the *Chancery (Cancellaria)* are *two Courts*. [d] One *ordinary*, where the Proceedings are according to the Laws and Statutes of the Realm; another *extraordinary*, being a Court of Equity.

1. The *ordinary* or *legal* Court is a Court of Record, held *coram Domino Rege in Cancellaria*, on the Petty-Bag Side.

[e] The *Lord Chancellor* (*à Cancellando*, from his Power to cancel Letters Patent, being the higheſt Point of his Juriſdiction) or *Lord Keeper*, is the Judge of this Court of Common Law.

[f] He hath theſe *Officers* under him, (*viz.* twelve *Maſters* of Chancery, whereof the *Maſter* of the *Rolls* is the Chief) the *Clerk* of the *Crown*, the *Clerk* of the *Hamper*, the *Sealer*, the *Chaſe-Wax*, the *Comptroller* of the Chancery, twenty-four *Curſitors* (incorporated by Queen *Elizabeth*) for making out Writs of *Courſe*, or *formed* Writs, according to the Regiſter of Writs, a Book of great Antiquity and Authority. The *Clerk* of the *Preſentations*, the *Clerk* of the *Faculties*, [See 25 *H.* 8. *ch.* 21.] the Clerk *Examiner* of *Letters Patent*, the *Clerks* of the *Petty-Bag*, (in whoſe Office the Proceedings of this Court are filed and kept) the ſix *Attornies*.

[g] 4 Inſt. 79, 80, 81, 88.
1 Danv. Abr. 776.
1 Str. 146.
1 Eq. Ab. 127, &c.
4 Rep. 54.

This Court hath [g] *Juriſdiction* to hold Plea by *Scire Facias* for Repeal of the King's *Letters Patent*, at the ſuit of a former Patentee, when they are granted to ſeveral Perſons for one and the ſame Thing. But when they are againſt Law, or granted upon a falſe Suggeſtion, the King may have a *Scire Facias* to repeal his own Grant by Letters Patent. See 18 *H.* 6. *ch.* 1. 3 & 4 *Ed.* 6. *ch.* 4. 13 *El. ch.* 6.] Here alſo it may hold Plea of Petitions, *Monſtrans de Droit*, (*i.e.*) for a Subject to be reſtored unto Lands, which he ſhews to be his Right. See 34 *Ed.* 3. *ch.* 14. 36 *Ed.* 3. *ch.* 13.] Traverſes of Offices, (*i.e.*) to prove that an Inquiſition taken of Lands or Goods is defective and wrong. There may be alſo a *Scire Facias* upon Recognizances in this Court, [See 23 *H.* 8. *ch.* 6.] Execution upon a Statute-Staple; but the Execution upon a Statute-Merchant is returnable in the *King's Bench* or *Common Pleas*. And this Court may hold Plea of all perſonal Actions by or againſt any Officer of this Court, and, by Acts of Parliament, of ſeveral Offences and Cauſes.

[a] 2 Saund. 27. Contra. 1 Eq. Ab. 128.

The *Proceſs* is under the Great Seal, and in *Latin*, according to the Common Law. [It is now in *Engliſh*, as are all other Law-Proceedings, by 4 *Geo.* 2. *ch.* 26.] But when the Parties come to iſſue, this Court cannot try the Cauſe by a Jury, but the Record is to be delivered by the Lord Chancellor into the King's Bench, to be tried there; and after Trial it is to be remanded into Chancery [a], that the Judgment may be given there according to the Rules of Law. [*Qu.*] But if there is a Demurrer in Law, it ſhall be argued and adjudged in this

Court. Upon a Judgment given in this Court a Writ of Error [b] doth lie returnable into the King's Bench. [*Qu.*]

1 Vern. 131. Contra. 1 Eq. Ab 129.

[c] This Court is ſaid to be *Officina Juſtitiæ*, out of which all original Writs, all Commiſſions of charitable Uſes, Bankrupts, Sewers, Idiots, Lunaticks, *&c.* that paſs under the Great Seal, do go forth. And for theſe Ends this Court is always open. [d] So one from hence may have an *Habeas Corpus* or Prohibition, in the Vacation; which iſſue out of the other Courts only in the Term-Time. [e] It is ſaid, no Motion can be made on the Petty-bag Side in the Vacation. Here alſo a *Subpœna* may be had to force Witneſſes to appear in other Courts when *they* have no Power to call them. [*Qu.*]

c 4 Inſt. 80.
d 4 Inſt. 81.
e 1 Wms 522.

2. [f] The *extraordinary* Court is a Court of *Equity*, and proceeds by the Rules of Equity and Conſcience. This *Equity* conſiſts in abating the Rigour of the Common Law; for it rather conſiders the Intention than the Words of the Law) and exerting Power, in Caſes wherein the Subject is without Remedy in the Courts of Common Law.

f 4 Inſt. 79, 82, 84.

[g] A Commiſſion or Letters Patent, without an Act of Parliament, cannot raiſe a Court of Equity. But a Court of Equity may be held by Preſcription.

g 4 Inſt. 87, 121, 213, 242, 248. 12 Rep. 113. 2 Roll. Abr. 164.

The *Officers* are theſe that follow, (*viz.*)

1. The *Lord Chancellor* or *Lord Keeper*, the chief [h] Judge in this extraordinary Court of Equity, as well as in the ordinary Court of Common Law. [i] He is not made by Letters Patent, but by the Delivery of the *Great Seal* to him, and by taking an *Oath* [k] to ſerve the King and his People faithfully in the Office of Lord Chancellor. [l] This Great Seal is ſaid to be *Clavis Regni*; under which are paſſed Commiſſions, Charters, Letters Patent, Writs, as hath been ſaid. [m] By the Common Law no Grant of any Land by the King is available, or pleadable, but under this Great Seal.

h 4 Inſt. 84. 3 Black. Com. 46, 47.
i 4 Inſt. 87.
k 4 Inſt. 88.
l 2 Inſt. 552, 554, 555, 556. 4 Inſt. 80.
m 2 Rep. 16. 2 Roll. Abr. 182.

[n] When an Act of Parliament doth authorize the Lord Chancellor, or Lord Keeper, to grant any Commiſſion under the Great Seal, he may grant the ſame without further Warrant, becauſe the King is Party to the Act.

n 4 Inſt. 167. Cromp Jur. 47. a. 54. b.

The Lord Chancellor or Lord Keeper is to *viſit* all Hoſpitals and free Chapels of the King's Foundation. And it is his Privilege, to preſent to all the King's Benefices of or under twenty Pounds in the King's Books, where the King is Patron in Right of his Crown; but not if the King hath them by a collateral Title, as by Lapſe: For then the King himſelf ſhall preſent. [See 22 *Ed.* 4. *ch.* 18.]

See ante.

By 5 El. ch. 18. *The Authority, Preheminence, and Advantage of the* Lord Keeper *of the Great Seal, and of the Lord Chancellor, are declared to be the ſame to all Intents and Purpoſes.*

By 1 W. & M. Seſſ. 1. ch. 21. Commiſſioners *to be appointed to execute the Office of Lord Chancellor, or Lord Keeper, may uſe and exerciſe like Juriſdiction, and have the like Privileges and Advantages, which the Lord Chancellor or Lord Keeper of Right ought to uſe, or have, as belonging to their Offices or otherwiſe; and ſhall take Place after the Peers and Speaker of the Houſe of Commons.*

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[f] *Nunquam decurritur ad extraordinarium, ſed ubi deficit ordinarium.* 4 Inſt. 84.

One Commiſſioner may hear Motions, and give Orders touching interlocutory Proceedings; ſo as ſuch one in the Abſence of the others ſhall not make any Decree, or put the Great Seal to any Thing whereunto the whole Broad Seal ought to be affixed, unleſs there be two Commiſſioners preſent.

[a] 4 Inſt. 84, 88, 213.

[a] The Lord Chancellor (or Lord Keeper) in caſe of Sickneſs, or extraordinary Buſineſs, may call ſome of the Judges to aſſiſt him. But he cannot make a Deputy.

[b] 4 Inſt 97. Crompt. Jur. 41. b.
[c] 4 Inſt. 95.

He hath twelve *Maſters* under him, whereof the *Maſter* of the *Rolls* is the Chief, as before obſerved. [b] The *Maſter* of the *Rolls* in his Abſence doth make Orders and Decrees. [c] This Office is granted by the King for Life. [See his *Oath*, 18 *Ed* 3. *ch.* 16.] The judicial Authority of the Maſter of the Rolls is confirmed by 3 *Geo.* 2. *ch.* 30. [And ſee 23 *G.* 2. *ch.* 25. as to the Increaſe of his Salary.]

[d] 2 Inſt. 407. 4 Inſt. 82. 3 Black.Com. 442.

[d] The *Maſters* in *Chancery* are Aſſiſtants to the Lord Chancellor or Lord Keeper, or to the Maſter of the Rolls, and ſit with them; to whom *References* touching Accounts, Matters of Practice, *&c.* are made, upon which they make a *Report.* They take *Affidavits* (or Oaths in Writing) made before them, Acknowledgment of Deeds and Recognizances. [See their Oath 18 *Ed.* 3. *ch.* 16. And 13 *Car.* 2. (not printed) concerning the *Office* of the Maſters in Chancery.]

[See 12 *Geo.* 1. *ch.* 32. which erects the Office of Accountant-General.]

There are alſo in this Court ſeveral other *Officers.* As,

The *Regiſter*; who hath many Regiſters under him to ſit in Court, and to draw up the Orders and Decrees. In his Office are filed all *Reports* from the Maſters upon References, and all *Exceptions* taken to any of the ſaid Reports.

The *Six Clerks*; in whoſe Office all Proceedings upon Bill and Anſwer, to the Decree, and after, are tranſacted and filed. The Office of a Six Clerk is in the Gift of the Maſter of the Rolls. [See 14 *H.* 8. *ch.* 8.]

Here are alſo the *Maſters* of the *Subpœna Office*, the *Clerk* of the *Affidavits*, where you file ſuch *Affidavits* as are uſed in Court; the *Examiners*, who take the Depoſitions of Witneſſes, and make out Copies of the Depoſitions; the *Clerks* of the [Chapel of the] *Rolls*, who ſit conſtantly in the Rolls, to ſearch for Inrollments of Patents and Deeds, the Rolls whereof are kept there, and to make out Copies thereof. The *Uſher* of the Court. The *Serjeant at Arms*, who carrieth the Mace before the Lord Chancellor, or Lord Keeper, and by whom, or his Subſtitutes, Perſons ſtanding in Contempt of the Court are taken into Cuſtody. The *Warden* of the *Fleet*, who receives ſuch Priſoners, as are committed by the Court. The *Clerk* of the *Appeals*. [See 25 *H.* 8. *ch.* 19.]

[a] 4 Inſt. 84. Crompt. Jur. 52. a. 1 Roll. Abr. 373.
* 4 Inſt. 213. 1 Danv. Abr. 749. 1 Eq. Ab. 64.
[b] 3 Wms. 38.

2. The *Juriſdiction* and *Power* of this Court of *Equity* is of vaſt Extent, tho' no Court of [a] Record. Almoſt all Cauſes of Weight and Moment, firſt or laſt, have their Determination here. In this Court the *Lord Chancellor* himſelf may ſue. * But he cannot make a Decree in his own Cauſe. Here Relief is often given for or againſt an *Infant*, notwithſtanding his Minority; for or againſt a *Married Woman*, notwithſtanding her Coverture. In ſome Caſes ſhe may ſue her Huſband, as for Alimony or Maintenance, when they are parted. She may ſue without her Huſband, when he is beyond Sea, *Qu.* [or where ſhe has a ſeparate Eſtate.[b]] Alſo in ſuch Caſe ſhe may be compelled to anſwer without her Huſband. Here *Executors* may ſue one another, or one Executor alone without the Reſt may be ſued. But he ſhall be charged for no more than he has received.

[c]All *Frauds* and Deceits, for which there is no Remedy at Common Law; all *Accidents*, as to relieve Obligors, or Mortgagors againſt Penalties and Forfeitures upon Statutes, Bonds, and Mortgages, where the Intention was to pay the Debt or Duty, but ſome extraordinary Matter happened to diſable the Debtor; and all Breaches of *Truſt* and Confidence, not executed by 27 *H.* 8. *ch.* 10. concerning *Uſes*, are properly cognizable here, and are allowed by all Parties to be under its Juriſdiction. Alſo this Court will afford Relief, when unreaſonable Engagements have been made, or Engagements without Conſideration; where a Charge lies upon one Man alone at Common Law, to make others contribute to the Charge; it will compel Men to perform their Agreements; reduce the General Cuſtoms of a Manor to a Certainty; relieve a Copyholder againſt the ill Uſage of the Lord; aſcertain Fines of Copyholders; [correct an erroneous Judgment given upon Petition in the Lord's Court[d];] decree for a Liberty of Common, or Fiſhing; for Recovery of Money or Land given to charitable Uſes, and miſemployed; diſtinguiſh a Man's Land confounded with others; decree that one ſhall have the Tuition of a Child[e]; make Executors and others give Security and Intereſt for Money that is to lie long in their Hands; order the Performance of a Will, eſpecially if it concerns Lands; confirm a Title to Land, tho' one hath loſt his Writings by which he ſhould make out his Title; make Conveyances, defective thro' Fraud or Miſtake, good and perfect; enforce the Inrollment of a Deed, if there is need for it; force Men to come to an Account with each other; decree for Things in Action upon Aſſignment to an Aſſignee upon Conſideration. [f]In ſuch like Caſes the Court may, without any Regard to Form or Miſpleading, proceed to a Decree according to Equity and good Conſcience.

Note, That this Court will not retain a Suit by *Engliſh* Bill under 10 *l.* Value, except in Caſes of Charity; nor under the Value of 40 *s. per Ann.* in Lands, except it be for a Rent-Service, *&c.*

This Court alſo will reſtrain other Courts, that exceed their Jurriſdiction, and remove the Suit to itſelf by *Certiorari.*

But let it be obſerved, That in all Caſes where the Plaintiff hath his Remedy at Common Law, he ought not to be relieved here. Nor will this Court give Relief, where the Subſtance of the Suit tends to the Overthrow of an Act of Parliament made for the Publick Peace, or to the Overthrow of any Fundamental Point of Common Law, or take from other Courts their peculiar Juriſdiction; though Judgments and Sentences in other Courts may be examined in Equity; ([a]and in ſome Caſes this Court may have a concurrent Juriſdiction.) [See 4 *H.* 4. *ch.* 23. and upon that Statute, *Dr. & Stud. Dial.* 1. *ch.* 18. 15 *H.* 6. *ch.* 4. and 3 *Inſt.* 11[illegible], 123, 124. 4 *Inſt.* 84, 85, 86, 87. And ſee more at large *Crompt. Cur.* Tit. *Chancery*, and *Harriſon*'s Practice in *Chancery*, for the Juriſdiction and Power of the Court of Chancery. And ſee of *Præmunire*, *B.* 3. *ch.* 1. ante.]

3. The *Method* of *Proceeding* in this Court, is, Firſt, To file a *Bill* of Complaint [See 4 *Ann. ch.* 16. § 22.] for ſome Fraud, Force, or Injury done, praying Relief. And if the Bill is to quiet the Poſſeſſion of Lands, or to ſtay Waſte, or to ſtay Proceedings at Law, an *Injunction* is alſo herein prayed.

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[c] Weſt Symb. Of Chancery, § 18, 19. 4 Inſt. 84. 1 Danv. Abr. 749, 750, 751, 752, 753, 754, &c. 769, 770, 771. &c. 1 Str. 447.] 1 Eq. Abr. 129, &c.

[d] 1 Wms. 330.

[e] 1 Wms. 704.

[f] Crompt. Jur. 42. b. 1 Roll. Abr. 372.

[a] 1 Eq. Abr. 135. 2 Wms. 156.

Weſt's Symb. ſect. 20, &c.

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The *Regiſter*; who hath many Regiſters under him to ſit in Court, and to draw up the Orders and Decrees. In his Office are filed all *Reports* from the Maſters upon References, and all *Exceptions* taken to any of the ſaid Reports.

The *Six Clerks*; in whoſe Office all Proceedings upon Bill and Anſwer, to the Decree, and after, are tranſacted and filed. The Office of a Six Clerk is in the Gift of the Maſter of the Rolls. [See 14 *H.* 8. *ch.* 8.]

Here are alſo the *Maſters* of the *Subpœna Office*, the *Clerk* of the *Affidavits*, where you file ſuch *Affidavits* as are uſed in Court; the *Examiners*, who take the Depoſitions of Witneſſes, and make out Copies of the Depoſitions; the *Clerks* of the [Chapel of the] *Rolls*, who ſit conſtantly in the Rolls, to ſearch for Inrollments of Patents and Deeds, the Rolls whereof are kept there, and to make out Copies thereof. The *Uſher* of the Court. The *Serjeant at Arms*, who carrieth the Mace before the Lord Chancellor, or Lord Keeper, and by whom, or his Subſtitutes, Perſons ſtanding in Contempt of the Court are taken into Cuſtody. The *Warden* of the *Fleet*, who receives ſuch Priſoners, as are committed by the Court. The *Clerk* of the *Appeals*. [See 25 *H.* 8. *ch.* 19.]

[a] 4 Inſt. 84. Crompt. Jur. 52. a. 1 Roll. Abr. 373.
* 4 Inſt. 213. 1 Danv. Abr. 749. 1 Eq. Ab. 64.
[b] 3 Wms. 38.

2. The *Juriſdiction* and *Power* of this Court of *Equity* is of vaſt Extent, tho' no Court of [a] Record. Almoſt all Cauſes of Weight and Moment, firſt or laſt, have their Determination here. In this Court the *Lord Chancellor* himſelf may ſue. * But he cannot make a Decree in his own Cauſe. Here Relief is often given for or againſt an *Infant*, notwithſtanding his Minority; for or againſt a *Married Woman*, notwithſtanding her Coverture. In ſome Caſes ſhe may ſue her Huſband, as for Alimony or Maintenance, when they are parted. She may ſue without her Huſband, when he is beyond Sea, *Qu.* [or where ſhe has a ſeparate Eſtate.[b]] Alſo in ſuch Caſe ſhe may be compelled to anſwer without her Huſband. Here *Executors* may ſue one another, or one Executor alone without the Reſt may be ſued. But he ſhall be charged for no more than he has received.

[c]All *Frauds* and Deceits, for which there is no Remedy at Common Law; all *Accidents*, as to relieve Obligors, or Mortgagors againſt Penalties and Forfeitures upon Statutes, Bonds, and Mortgages, where the Intention was to pay the Debt or Duty, but ſome extraordinary Matter happened to diſable the Debtor; and all Breaches of *Truſt* and Confidence, not executed by 27 *H.* 8. *ch.* 10. concerning *Uſes*, are properly cognizable here, and are allowed by all Parties to be under its Juriſdiction. Alſo this Court will afford Relief, when unreaſonable Engagements have been made, or Engagements without Conſideration; where a Charge lies upon one Man alone at Common Law, to make others contribute to the Charge; it will compel Men to perform their Agreements; reduce the General Cuſtoms of a Manor to a Certainty; relieve a Copyholder againſt the ill Uſage of the Lord; aſcertain Fines of Copyholders; [correct an erroneous Judgment given upon Petition in the Lord's Court[d];] decree for a Liberty of Common, or Fiſhing; for Recovery of Money or Land given to charitable Uſes, and miſemployed; diſtinguiſh a Man's Land confounded with others; decree that one ſhall have the Tuition of a Child[e]; make Executors and others give Security and Intereſt for Money that is to lie long in their Hands; order the Performance of a Will, eſpecially if it concerns Lands; confirm a Title to Land, tho' one hath loſt his Writings by which he ſhould make out his Title; make Conveyances, defective thro' Fraud or Miſtake, good and perfect; enforce the Inrollment of a Deed, if there is need for it; force Men to come to an Account with each other; decree for Things in Action upon Aſſignment to an Aſſignee upon Conſideration. [f] In ſuch like Caſes the Court may, without any Regard to Form or Miſpleading, proceed to a Decree according to Equity and good Conſcience.

Note, That this Court will not retain a Suit by *Engliſh* Bill under 10 *l.* Value, except in Caſes of Charity; nor under the Value of 40 *s. per Ann.* in Lands, except it be for a Rent-Service, *&c.*

This Court alſo will reſtrain other Courts, that exceed their Juriſdiction, and remove the Suit to itſelf by *Certiorari.*

But let it be obſerved, That in all Caſes where the Plaintiff hath his Remedy at Common Law, he ought not to be relieved here. Nor will this Court give Relief, where the Subſtance of the Suit tends to the Overthrow of an Act of Parliament made for the Publick Peace, or to the Overthrow of any Fundamental Point of Common Law, or take from other Courts their peculiar Juriſdiction; though Judgments and Sentences in other Courts may be examined in Equity; ([a] and in ſome Caſes this Court may have a concurrent Juriſdiction.) [See 4 *H.* 4. *ch.* 23. and upon that Statute, *Dr. & Stud. Dial.* 1. *ch.* 18. 15 *H.* 6. *ch.* 4. and 3 *Inſt.* 11 , 123, 124. 4 *Inſt.* 84, 85, 86, 87. And ſee more at large *Crompt. Cur.* Tit. *Chancery*, and *Harriſon*'s Practice in *Chancery*, for the Juriſdiction and Power of the Court of Chancery. And ſee of *Præmunire*, *B.* 3. *ch.* 1. ante.]

3. The *Method* of *Proceeding* in this Court, is, Firſt, To file a *Bill* of Complaint [See 4 *Ann. ch.* 16. § 22.] for ſome Fraud, Force, or Injury done, praying Relief. And if the Bill is to quiet the Poſſeſſion of Lands, or to ſtay Waſte, or to ſtay Proceedings at Law, an *Injunction* is alſo herein prayed.

[c] Weſt. Symb. Of Chancery, § 18, 19. 4 Inſt. 84. 1 Danv. Abr. 749, 750, 751, 752, 753, 754, &c. 769, 770, 771. &c. 1 Str. 447.] 1 Eq. Abr. 129, &c.

[d] 1 Wms. 330.

[e] 1 Wms. 704.

[f] Crompt. Jur. 42. b. 1 Roll. Abr. 372.

[a] 1 Eq. Abr. 135. 2 Wms. 156.

Weſt's Symb. ſect. 20, &c.

When the Bill is filed, Proceſs of *Subpœna* muſt be taken out, to compel the Defendant to appear, upon Pain of 100 *l.* (being Words of Courſe) and anſwer the Bill. If he doth not appear, then upon Affidavit of the Service of it perſonally, or that it was left at his Dwelling-Houſe with one of the Family, an *Attachment* iſſues out againſt him; and if a *Non eſt Inventus* is returned, then a Writ of *Proclamation* goes againſt him; and if he ſtands further out in Contempt, then a *Commiſſion* of *Rebellion* may be iſſued forth, directed to the Sheriff, or to Private Perſons for apprehending of him; for which Purpoſe they may break open any Door, [*Qu.*] If the Defendant ſtands further out in Contempt a *Serjeant* at *Arms* may be ſent to take him. And if he cannot be taken, a *Sequeſteration* of his Lands and Goods may be obtained, 'till he doth appear. [See 5 *Geo.* 2. *ch.* 25. for making Proceſs in Courts of Equity effectual againſt Perſons who abſcond.]

[b] But if a *Peer* is Defendant, the Lord Chancellor firſt writes a Letter to him, and if he does not appear, then a *Subpœna* goes out, and (if he is ſtill in Contempt) an *Order* to ſhew Cauſe why a *Sequeſteration* ſhould not go forth; and if he ſtill ſtands out, a *Sequeſteration* goes forth; but no Proceſs of Contempt againſt his *Perſon*.

There are ſeveral other *Subpœnas* beſides a *Subpœna* to *anſwer*; as a *Subpœna* to make better *Anſwer*, *Subpœna* to *rejoin*, a *Subpœna* for *Witneſſes* to teſtify, to *hear Judgment*, to *bring in Writings*, for *Coſts*. All the *Proceſſes of Contempt* are likewiſe taken againſt thoſe that obey not *Orders*, or ſtand otherwiſe in Contempt of the Court.

[c] When the Defendant doth appear, then the Proceedings are by the Defendant's *Anſwer* to the *Engliſh* Bill of Complaint, if there is no Cauſe for *Plea*[d] (To the Juriſdiction, in Diſability of the Perſon, or in Bar) or *Demurrer*[e] to the Bill. Then the Plaintiff enters his *Replication* unleſs he files *Exceptions* to the Anſwer as inſufficient, which are referred to a Maſter to *report* whether the Anſwer is inſufficient, or not; to which Report *Exceptions* alſo may be taken by the Parties. After Anſwer, Replication, and Rejoinder, the Parties being then come to Iſſue, *Witneſſes* are to be examined upon *Interrogatories* purſuant to the Bill or Anſwer, either by the Examiners in Town, or by Commiſſion (called a *Dedimus Poteſtatem*) in the Country; then when the Plaintiff and Defendant have examined their Witneſſes, there is to be *Publication* of the *Depoſitions* of the Witneſſes, and the Cauſe is to be ſet down for *Hearing*, after which follows the *Decree*. The Decree being ſerved upon the Party, by a Writ of Execution thereof under the Seal of the Court, and not obeyed, all the Proceſſes of Contempt will iſſue out againſt him for his Impriſonment, 'till he yields Obedience to it; or there may be an *Injunction* granted for Poſſeſſion of *Land*, where the Decree is for Land, and the Party remains obſtinate after his Impriſonment. And if this is diſobeyed, the Court may grant a *Sequeſtration* of the Land, or a Commiſſion to ſome Juſtices (and if need be, a Writ of Aſſiſtance of the Sheriff) to put the Plaintiff in Poſſeſſion. Though it has been ſtrongly urged, that this Court of Equity can bind [a] the Perſon only, not the Lands or Goods of the Defendant. [But long Uſage ſeems now to have eſtabliſh'd the Juriſdiction of this Court, as well againſt the Lands and Goods as the Perſon of the Party.]

If the Plaintiff diſmiſſeth his own Bill, or the Defendant diſmiſſeth the ſame for want of Proſecution, the Bill is to be *diſmiſſed* with Coſts, to be taxed by the Maſter. [See 15 *H.* 6. *ch.* 4. 4 *Ann. ch.* 16. § 23.]

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[b] Weſt's Symb. Of Chancery, Sect. 20. 2 Ventr. 342. 1 Danv. Abr. 776.

[c] Weſt's Symb. Of Chancery, Sect. 33, &c.

[d] See Ch. 4. § 6. poſt.

[e] See ibid.

[a] 4 Inſt. 84, 213. Crompt. Jur. 41. b. 1 Danv. Abr. 749.

In ſeveral Parts of theſe Proceedings, there may be *Affidavits*, Petitions, Motions, References, Reports, Certificates, interlocutory Orders, and Injunctions. Laſtly, there may be a *Bill* of *Review* where there is any Error in Law, or an *Appeal* to the Houſe of Lords. [See 12 & 13 *W.* 3. *ch.* 3. For exhibiting Bills in Chancery, againſt any intitled to Privilege of Parliament.]

Of the Court of King's Bench.

V. The Court of *King's Bench* (becauſe the Proceedings are ſuppoſed to be [b] *Coram Nobis*, (i. e. *Rege*) conſiſts of a *Chief Juſtice* created by *Writ*, who is ſtyled *Lord* Chief Juſtice, and *three* other Judges created by *Letters Patent*. All of them are to continue *Quam diu ſe bene geſſerint*. [See 12 & 13 *W.* 3. *ch.* 2.] [*And by* 1 Geo. 3. ch. 23. *their Commiſſions are to continue and remain in full Force, notwithſtanding the Demiſe of the Crown, and their Salaries are to be paid ſo long as their Commiſſions remain in Force.*] This Court is removeable at Pleaſure. [c] The *Seal* of this Court is in the Cuſtody of the Lord Chief Juſtice.

[d] The *Judges* in this Court are the Sovereign Juſtices of *Oyer* and *Terminer*, Gaol-Delivery, and of *Eyre*, Conſervators of the Peace of *England*, and the Sovereign Coroners of the Land. [See their *Oath*, 18 *Ed.* 3. *St.* 4.] [e] They have ſupreme Authority, the King himſelf being ſuppoſed by the Law to ſit there; [f] tho' the King doth judge by his Judges, who even in his Preſence anſwer all Motions. The King himſelf cannot judge in his own Cauſe. And tho' ſeveral Statutes ſay, That Delinquents ſhall be fined at the Will of the King, it is to be underſtood, that the Fine ſhall be impoſed by his Juſtices according to Law; for that is the Will of the King.

I ſhall ſet forth the *Subordinate Officers* of this Court and its *Juriſdiction*.

1. As to the Officers.

The *Subordinate Officers* on the *Crown-ſide*, or for Pleas of the *Crown*, are the *Clerk* of the *Crown*, with his *Secondary* and Clerks, who frame all Indictments, and tranſact all other Buſineſs relating to criminal Proſecutions and Contempts of the Court.

4 Black. Com. 262, 304.

The ſubordinate *Officers* on the *Plea-ſide* or *Civil-ſide* betwixt Party and Party, are the chief *Clerk* or the *Prothonotary*, who hath his *Secondary* and *Clerks*. The *Secondary*, commonly called the *Maſter*, receives Matters referred to him by the Court to be examined and reported, ſigns Judgments, taxes Coſts, ſtrikes ſpecial Juries, attends the Court to inform them in Matters of Practice, and to ſwear Attorneys, and to take the Acknowledgment of Deeds, &c. The Prothonotary hath alſo a Deputy, who keeps the Stamp for ſigning all Writs and Proceſs, and keeps Remembrances of them, and files the Writs return'd.

The *Clerk* of the *Treaſury* and *Cuſtos Brevium* files all Originals and other Writs, and hath the Cuſtody of the Records in the Treaſury of this Court, examines and ſeals all Records of *Niſi Prius* for Trials at the Aſſizes, and keeps ſeveral Clerks under him.

The *Clerks* of the *Papers* make up all ſpecial Pleadings and Demurrers.

The *Clerk* of the *Declarations* files all Declarations after they are ingroſſed in Parchment.

The *Signer* of Bills of *Middleſex* keeps a Book to enter the Plaintiffs and Defendants Names in all ſuch Writs.

[b] 1 Inſt. 71. b. 2 Inſt. 21. 4 Inſt 71, 73, 74, 75, 76. 1 Str. 302. 3 Black. Com. 41. 4 Black. Com. 261.

[c] 2 Inſt. 555. 2 Burr. 1042.

[d] 4 Inſt. 73. 4 Rep. 57. 9 Rep. 118.

[e] 2 Inſt. 166. 4 Inſt 73.

[f] 4 Inſt. 70, 71.

The *Clerk* of the *Rules* takes Minutes of all Rules and Orders made in Court on the Plea-ſide, and afterwards draws them up, and enters them in a Book at large. He alſo files all *Affidavits* uſed in Court, and with him are given all Rules of *Courſe*.

[See 29 *Car.* 2. *ch.* 5. Concerning *Commiſſioners* to take *Affidavits* in the Country, touching any Matter depending in the Courts at *Weſtminſter*. 16 & 17 *Car.* 2. *ch.* 9. In the Court of the Dutchy of *Lancaſter*. For all *Affidavits* muſt be made before one of the Judges of the Court, or before a Commiſſioner authorized by Act of Parliament. See alſo 4 *W.* & *M. ch.* 4. As to *Commiſſioners* for taking *Bails*.]

The *Philizars*, one for each County, make the mean Proceſs after the Original in ſuing to the Outlawry.

The *Clerk* of the *Errors* allows all Writs of Error, and makes *Superſedeas* thereon. He alſo tranſcribes the Records, to be carried into the Exchequer-Chamber, or Houſe of Lords.

The Clerk of the *Bails* and *Poſtea's*, files Bail-Pieces, and marks the *Poſtea's*.

The *Marſhal* of the *King's Bench* hath the Cuſtody of all Priſoners, committed by the Court. [By 27 *G.* 2. *ch.* 17. The Power of appointing this Officer is reveſted in the Crown.]

There are alſo *Attornies*, *Tipſtaves*, *Crier*, and *Porter*.

2. As to the Juriſdiction of this Court.

The *Juriſdiction* of this Court is general, and over all *England*. It hath Juriſdiction in *criminal* and *civil* Cauſes, and accordingly is divided into a *Crown-ſide* and a *Plea-ſide*.

[a] 4 Inſt. 71, 72, 73. 9 Rep. 118. Hawk. P. C. Book 2. ch. 3.

1.[a] The *Crown-ſide* originally takes Cognizance of all Treaſons, Felonies, Miſdemeanors, tending to the Breach of the Peace, or Oppreſſion of the Subject; and of all Cauſes proſecuted by Way of Indictment, Inquiſition, or Information. Into this Office Indictments from all inferior Courts and Orders of Seſſions, may be removed by *Certiorari*; and a Reſcous may be returned by the Sheriffs. Inquiſitions of *Felo's de ſe*, and of Murder by Miſadventure, are certified hither of Courſe. Hence alſo iſſue Attachments, for diſobeying Rules, or Orders; concerning which the Party ſhall be examined upon Oath to Interrogatories; and if guilty, ſhall be fined; if innocent, diſcharged.

[a] 3 Inſt. 27. 4 Inſt. 73. 9 Rep. 118. Hawk. P. C. Book 2. ch. 3.

[a] It is the ſupreme Court of criminal Juriſdiction. Wherefore by the coming of the Court of King's Bench into any County, the Powers of Commiſſion of *Oyer* and *Terminer*, Gaol-Delivery, and of thoſe that have Conuſance of Pleas, within the ſame County, are ſuſpended, without writing to them, during the Term. But by a *ſpecial* Commiſſion of *Oyer* and *Terminer*, the Commiſſioners may ſit in the ſame County where the King's Bench ſits, and proceed upon an Indictment found before them in the Vacation.

[b] 4 Inſt. 74.

[b] The Juſtices of this Court have no Commiſſion or other Means to hold Pleas, but their Power is original and ordinary. For when the King hath appointed them, they have their *Juriſdiction* from the Law, both in criminal and civil Cauſes. [See 6 *H.* 8. *ch.* 6. For remitting Priſoners with their Indictments to the Places where the Crimes were committed. 4 *W.* & *M. ch.* 18, and 22. for preventing malicious Informations, and for the Regulation of the Crown Office.]

2. [c] On the *Plea-ſide,* or the civil Branch, it hath Cognizance in all Pleas by *Bill* for Debt, Detinue, Covenant, Account, and of all Actions of the Caſe, either upon Promiſes, for ſcandalous Words, ſpecial Nuſances, Trover and Converſion, on penal Statutes, and all other perſonal Actions, and Ejectments, *&c.* againſt any Perſon in the Cuſtody of the Marſhal; as every one ſued here is ſuppoſed to be; or for or againſt any Officer, Miniſter or Clerk of the Court. Theſe Officers, if they are ſued in any other Court, muſt have Privilege of this Court, in reſpect of their neceſſary Attendance here. This Court alſo may hold Plea by *Writ* out of the Chancery of all Treſpaſſes *Quare Vi et Armis,* Replevins, and *Quare impedit, &c.* [See 12 & 13 *W.* 3. *ch.* 3. which gives Power, to hold Plea by Bill againſt Perſons having Privilege of Parliament [d].]

[c] 4 Inſt. 71, 72. Crompt. Jur. 67, 68, 78, 138.

[d] 2 Str. 734. 2 Ld. Ray. 1442. S. C.

[e] This Court may regularly examine all and all Manner of *Errors,* in Fact and in Law, of all Judges and Juſtices, in their Judgments, Proceſſes, and Proceedings in Courts of Record; not only in Pleas of the Crown, but in all Pleas, real, perſonal, and mixt, the Court of Exchequer excepted, as ſhall appear hereafter. It may reverſe a Judgment given in the King's Bench in *Ireland.* [See 6 *Geo.* 1. *ch.* 5.]

[e] F. N. B. 20, 21. cont. Finch 480.

It granteth an *Habeas Corpus* upon Motion, to relieve Perſons wrongfully impriſoned; for upon Return of the Cauſe they may be bailed or diſcharged.

It granteth *Prohibitions* to Courts Temporal and Eccleſiaſtical, to keep them within their proper Juriſdiction.

Alſo, this Court may *Bail* any Perſon whatſoever, reſtore Freemen unjuſtly *diſfranchiſed,* repeal the *Patent* of the King by *Scire facias.*

The *Errors* of the King's Bench cannot be examined but in the *Houſe of Lords,* when the Proceedings are by Original out of Chancery; but when the Action is by Bill in this Court, without any original Writ (as the Proceedings now uſually are) the Errors are, by Virtue of 27 *El. ch.* 8. to be examined in the Exchequer-Chamber. But thence they may be removed into Parliament. [See the *Manner* of the *Proceedings* in *civil* and *criminal* Cauſes, *ch.* 4. & 5. *poſt.*]

VI. The Court of [a] *Common Pleas* (otherwiſe the *Common Bench* is the King's Court held at *Weſtminſter-hall,* or other certain Place, *coram Juſticiariis noſtris apud Weſtmonaſterium*; though in ancient Time Common Pleas were holden in the King's Bench, which was removeable at Pleaſure.

Of the Court of Common Pleas. 3 Black. Com. 37.

[a] 1 Inſt. 71. b. 8 Rep. 145. and Pref. 2 Inſt. 22. 1 Ld. Ray. 485.

Let us view its *Officers* and *Juriſdiction.*

1. Of the *Officers.*

In this Court are *four* Judges, (*viz.*) the *Chief Juſtice* (who is ſtyled *Lord* Chief Juſtice) aſſiſted with *three* other Judges. They are created by [b] Letters Patent *Quam diu ſe bene geſſerint.* [See 12 & 13 *W.* 3. *ch.* 2. And ſee their Oaths, 18 *Ed.* 3. *St.* 4] And by 1 *G.* 3. *ch.* 23. their Commiſſions are to continue in Force, and their Salaries to be paid, notwithſtanding any Demiſe of the Crown.]

[b] 4 Inſt. 100.

The *Lord Chief Juſtice* is placed on the Bench by the Lord Chancellor or Keeper; and the *other Judges* by the Chancellor or Keeper and the Lord Chief Juſtice. [c] The Seal of this Court is committed to the Cuſtody of the Lord Chief Juſtice.

[c] 2 Inſt, 555.

[d] The reſt of the Officers belonging to this Court, are,

[d] 4 Inſt. 101.

The *Cuſtos Brevium*; who files and keeps all Writs returnable here, and at the End of every Term receives from the *Prothonotaries* all the Records of *Niſi Prius* or *Poſtea*, *&c.*

The *three Prothonotaries*; who enter all Pleadings, record and exemplify all common Recoveries, *&c.* They have their Secondaries.

The *Clerk* of the *Warrants*; who enters all Warrants of Attorney for Plaintiff and Defendant, and all Deeds of Indenture of Bargain and Sale acknowledged in Court, or before any Judge thereof out of Court, *&c.*

The *Philizers*; who, having ſeveral Counties of *England* divided amongſt them, make out all meſne Proceſs, as *Capias*, *Alias*, *Pluries*, between the original Writ and the Appearance, and enter the Appearances and Bails put in thereon.

The *Clerk* of the *Eſſoins*; who enters all Eſſoins, and keepeth the Roll thereof, and alſo provides Parchment, and cuts it into Rolls, for entering Judgments, marking the Numbers thereof, and dockets the Judgments of this Court, purſuant to 4 *&* 5 *W. & M. ch.* 20.

Dyer 175. *Four Exigenters*, each being appointed for ſeveral Counties, who make all Exigents and Proclamations in order to an Outlawry upon the Return of the *Pluries Capias*.

The *Clerk* of the *Superſedeas*; who makes out Writs to ſuperſede the Outlawry, upon the Parties appearing to the Exigent.

The *Clerk* of the *Outlawries*; who makes out the *Capias Utlagatum* upon the Return of the Exigent. He is only a Deputy to the Attorney General for the Time being, who is Maſter of this Office.

The *Clerk* of the *Juries*; who makes out all Writs of *Habeas Corpora Jur.* for the Trial of Iſſues.

The *Clerk* of the *King's Silver*; who enters upon Record the Money which the King is to have upon the Fines; or the Poſt-Fines, according to the Value of the Land, as it is rated upon the Writs of Covenant.

The *Chirographer* [or *Cyrographer*;] who engroſſeth all Fines upon Writs of Covenant, makes the Indentures of all Fines levied, and delivers them to the Parties, *&c.* [See his Fees, ſettled by *Weſt.* 2. *ch.* 44. 2 *H.* 4. *ch.* 8. and 23 *El. ch.* 3.]

The *Clerk of the Inrollments* of *Fines* and *Recoveries*. [See 23 *El. ch* 3.]

The *Clerk* of the *Errors*; who allows all Writs of Error brought upon Judgments given in this Court, and makes out the *Superſedeas* upon Writs of Error, and tranſcribes the Records, and tranſmits the ſame out of the Common Pleas into the King's Bench.

The *Clerk* of the *Treaſury*; who keepeth the Rolls of the Court, and makes Copies and Exemplifications thereof, makes up and ſeals all Records of *Niſi Prius*, *&c.*

The *Proclamator* of the Court; the *Keeper* of the Court; four *Criers*, ſubſtitute to the Proclamator.

The *Warden* of the *Fleet*; or of the Priſon proper for all Commitments by this Court.

None are admitted to plead at the Bar, or to ſign any ſpecial Pleadings in this Court, but *Serjeants* at Law.

The *Attornies* are not limited to any certain Number.

2. As to the *Juriſdiction*.

The [a] *Juriſdiction* of this Court is general, and extendeth itſelf throughout all *England*. It hath Juriſdiction in all [b] *civil Cauſes*, real, perſonal, or mixt. *Real*, or concerning Inheritances, by which Fines and Reco-

[a] 4 Inſt. 100.
[b] 4 Inſt. 99, 100.

veries do paſs, and all other real Actions by original Writs. In *perſonal* and *mixt* Actions this Court and the King's Bench, for the moſt Part, have a concurrent Juriſdiction. But this Court hath no Cognizance of *Pleas* of the *Crown*. *Common* Pleas are ſaid to be all Pleas that are not Pleas of the Crown.

Regularly this Court cannot hold any Plea in any Action real, perſonal, or mixt, but by *Writ* out of the Chancery returnable in this Court. But in certain Caſes it may hold Plea by *Bill* (without any Writ in the Chancery) as for or againſt an *Officer* or other Privileged Perſon of this Court, or [c] againſt one having Privilege of Parliament. And this Court, without any Writ, or Plea depending, or Attachment, may upon a Suggeſtion grant *Prohibitions*, to keep Temporal and Eccleſiaſtical Courts within their due Bounds. Alſo this Court hath Juriſdiction for the Puniſhment of their Officers and Miniſters. In a Word, all Actions cognizable by this Court come thither either by *Original*; or by *Bill*, Writ of *Privilege*, or *Attachment*, for or againſt privileged Perſons; out of the *inferior Courts* of Record by Writ of *Habeas Corpus cum Cauſa*, or *Certiorari*; and out of inferior Courts not of Record, by *Pone*, *Tolt*, *Recordare*, *Accedas ad Curiam*, or *Writ* of *falſe Judgment*.

[c] 2 Str. 734. 2 Ld. Ray. 1442. S. C.

See of Writs, ch. 4. poſt.

VII. [d] The Court of *Exchequer* (*Scaccarium Computorum*, from the Reſemblance that the *chequered* Cloth bears to a Cheſs-Board, which covereth the great Table in that Court) is the laſt of the four Courts at *Weſtminſter*. An ancient Court of Record, ſet up to order the Rights and Revenues of the Crown, and for Debts and Duties due to the King in Right of his Crown.

Of the Court of Exchequer.

[d] 2 Inſt. 551. 4 Inſt. 112. 4 Black Com. 43.

This Court conſiſts of [a] *Two* Parts, whereof the *Upper* Part dealeth eſpecially in the *Judicial* hearing and determining all Cauſes belonging to the King's Treaſure; the *Lower* Part (called the *Receipt* of the Exchequer) in receiving and paying Money.

[a] 4 Inſt. 103.

Each hath its proper *Officers*.

[b] The *Upper* Court is governed by the *Lord High Treaſurer*, the Keeper of the King's Treaſure. He hath this Office by the Delivery of a White Staff at the King's Will and Pleaſure. This Office is ſometimes executed by Commiſſion. He is alſo *Treaſurer* of the *Exchequer* by Letters Patent.

[b] 2 Inſt. 104.

The [c] *Chancellor* and *Under-Treaſurer* governs this Court under the Lord High Treaſurer, and hath the Cuſtody of the Seal of this Court.

[c] 2 Inſt. 555 4 Inſt. 104.

[d] It is uſual, under this Seal to grant Leaſes for Life or Years; eſpecially in ſmall Things, and to poor Men. But in Matters of great Concern, it is the ſureſt Way, to take Leaſe under the Great Seal.

[d] 2 Rep. 16, 17. 2 Roll. Abr. 182. 3 Cro. 513, 528.

The *Lord Chief Baron* is the chief Judge of this Court, aſſiſted with *three* other Barons, who are the [e] Sovereign *Auditors* of *England*, and hear and determine all Cauſes in Law or Equity. They are created by [f] Letters Patent, *Quam diu ſe bene geſſerint*. [See the 12 & 13 *W.* 3. *ch.* 2. and ſee their Oath. 4 *Inſt.* 109.] [And by 1 *G.* 3. *ch.* 23. their Commiſſions are to continue in Force, and their Salaries to be paid, notwithſtanding any Demiſe of the Crown.]

[e] 2 Inſt. 381. 4 Inſt. 115.

[f] 4 Inſt. 117. 3 Cro. 203.

There alſo ſits in this Court another Baron called the *Curſitor Baron*, who adminiſters the Oath of all High Sheriffs, Under-Sheriffs, Bailiffs, Auditors, Receivers, Collectors, Comptrollers, Surveyors and Searchers of all the Cuſtoms in *England*.

2 Inſt. 106 a.
4 Inſt. 380.
1 Inſt. 106.

The two [g] *Chamberlains* keep the Keys of the Treaſury, where the Records do lie with the Book of *Domeſday*. They have a Vote in Pricking of Sheriffs.

The King's *Attorney General* is made privy to all extraordinary Matters in this Court, and exhibits in his own Name all Informations for Concealment of Cuſtoms., Seizures, and Receipts; as alſo Informations for Intruſions, Waſtes, Spoils, Encroachments, and Annoyances done upon any of the King's Lands, or Informations upon Penal Statutes, Forfeitures, and Breach of Covenant.

The *ſubordinate Officers* in this *Upper* Exchequer, are,

[h] 4 Inſt. 106. 108. Cowel's Int. v. Remembrancer.
[i] 4 Inſt. 106, 120.
[k] See ante.

The *Remembrancers*, who keep the Records of the Court of Exchequer betwixt the King and his Subjects, and enter the Rules and Orders there made. [h] One is called the *King's Remembrancer*, the other, the *Lord Treaſurer's Remembrancer*. [See 37 *Ed.* 3. *ch.* 4.] Theſe Remembrancers have ſeveral Attornies in their Offices, to do Buſineſs under them. There is alſo a [i] *Remembrancer* of the *Firſt-Fruits*, who takes Bonds of the Beneficed Clergy for Firſt-Fruits and Tenths [k], and makes Proceſs againſt thoſe that do not pay the ſame.

[l] 4 Inſt. 106, 107. Cowel's Int. v. Clerk of the Pipe.

The Clerk of the [l] *Pipe*; in whoſe Cuſtody are conveyed, out of the Offices of the King's and Treaſurer's Remembrancers, (as Water thro' a Pipe into a Ciſtern) all Accounts and Debts due to the King. So as whatſoever is in Charge in this Roll or Pipe, is ſaid in the Law to be duly charged. In the Treaſury of this Office are kept the Great Rolls of the Exchequer, containing the ancient Revenue of the Crown, and the foreign Accounts, which contain Part of the Revenue which is granted by Act of Parliament.

The *Comptroller* of the *Pipe*; which is the Chancellor of the Exchequer.

The *Clerk* of the *Pleas*; in whoſe Office all Officers and privileged Perſons in this Court are to ſue, and to be ſued.

The *Clerk* of the *Eſtreats* or *Extracts*; who every Term receiveth *Eſtreats* out of the Lord Treaſurer's Remembrancer's Office, and writeth them out, to be ſerved.

[a] 4 Inſt. 107.

[a] The *Foreign Oppoſer*, or *Appoſer*; who oppoſeth all Sheriffs and Bailiffs of Liberties of their Green Wax, (*i. e.*) Fines, Iſſues, Amerciaments, Recognizances for Peace or good Behaviour, Recognizances for Appearances in any Court, certified in ſeveral Eſtreats into the Office of the Lord Treaſurer's Remembrancer, who delivereth the ſame to the Clerk of the Eſtreats to be put into Proceſs. And becauſe the Eſtreats annexed to the Writ are under the Seal in Green Wax, they are vulgarly called, Green Wax.

[b] 1 Inſt. 106.
10 Rep. 103.

The [b] *Auditors*; who take the Accounts of the King's Receivers, Sheriffs, Collectors, and Cuſtomers, and audit and perfect them. [See 33 *H.* 8. *ch.* 39.]

Clerk of the *Nichils*, or *Nihils*, who make a Roll of ſuch Sums, as the Sheriff upon Proceſs for the Green Wax returns *Nihil*. [See 5 *Ri.* 2. *St.* 1. *ch.* 13.]

The *Marſhal*; to whom the Court committeth the keeping of the King's Debtors, during Term-Time, to the End that they may provide to pay the King's Debts, or elſe to be further impriſoned.

Clerk of the *Summons*, the *Under-Chamberlains* of the Exchequer, *Secondaries* in the Office of the *King's Remembrancer*, *Secondaries* in the Office of the *Lord Treaſurer's Remembrancer*, *Secondaries* of the *Pipe*, the *Uſher* of the Exchequer.

The [c] *Officers* of the *Receipt* or *Lower* Court (beſides the *Lord High Treaſurer*, the *Treaſurer* of the *Exchequer*, the *Chancellor*, the two *Chamberlains* before-mentioned) are four *Tellers*, the *Clerk* of the *Tallies*, *Clerk* of the *Pells* (from his Parchment-Roll, called *Pellis Receptorum*) two *Deputy-Chamberlains*, two *Uſhers*, a *Tally-Cutter*, four *Meſſengers*. [See 2 *H.* 6. *ch.* 10. Concerning Officers that may make Deputies.]

[c] 4 Inſt. 107, 108.

Thus much of the *Officers*. Now let us view its *Juriſdiction*.

The [d] *Juriſdiction* of the *Judicial* Part of this Court in General, concerneth the Lands, Rents, Franchiſes, Hereditaments, Debts, Duties, Accounts, Goods, Chattels, and other *Profits* and *Benefits* belonging to the *King*.

[d] 2 Inſt. 551. 4 Inſt. 112, 113, 114, 118.

The *Officers* and Miniſters of this Court are privileged to ſue and to be ſued here. So is the King's *Debtor*, and the *Debtor* of the *King's Debtor*; *Priſoners* in this Court; *Accountants*, that have enter'd into their Account. So that all the Officers, their Clerks and Servants, all the King's Tenants and Farmers, all Manner of Debtors or Accountants of the Exchequer are privileged, to ſue and implead one another, or any Stranger, in like Actions as are proſecuted in the Kings Bench or Common Pleas.

Bunb. 34 35.

The *Judicial* Part is a Court both of *Law* and *Equity*; and the *Juriſdiction* of the one Court is as large as the other, both being for the Benefit of the King, or where the King is concerned.

1. The Court of *Common Law* is in the *Office of Pleas*, after the courſe of the Common Law, held *Coram Baronibus* only. [a] Here the Plaintiff ought to be a Tenant or Debtor to the King, or ſome way Accountant to him. The Leading Proceſs is either a Writ [b] of *Subpœna* or *Quo Minus*; the firſt is generally uſed; and both go into *Wales*; where no Proceſs of the *King's-Bench* or *Common Pleas* ought to run, except the *Capias Utlagatum*. [See 1 *Ri.* 2. *ch.* 12. and 33 *H.* 8. *ch.* 39.]

[a] See ante.

[b] See of Writs ch. 4 poſt.

2. The [c] Court of *Equity* is holden in the *Exchequer-Chamber*, before the Lord High Treaſurer, Chancellor and UnderTreaſurer, Lord Chief Baron, and other Barons of the Exchequer. [As the Treaſury is now in commiſſion, the Bills in this Court are directed to the Chancellor of the Exchequer, the Lord Chief Baron, and the other Barons; but the Chancellor never ſits, unleſs the Barons are equally divided in Opinion, in which Caſe the Chancellor comes down and hears the Cauſe, and gives his Opinion.] The Manner of their Proceedings is almoſt according to the Practice of the High Court of Chancery. But the Plaintiff muſt ſet forth in his Bill, that he is a Debtor to the King; but whether he is ſo or no, it is not material. In this Court the Clergy frequently exhibit *Engliſh* Bills againſt ſuch as refuſe to pay them their Tithes, to make the Defendants ſet them forth upon Oath, to prove the Payment of them, *&c.* And here the King's Attorney may exhibit *Engliſh* Bills for any Matter concerning the King. And any Perſon grieved in any Cauſe at Law proſecuted againſt him on the Behalf of the King, or any Patentee of the King, may exhibit his Bill againſt the Attorney General, and others that are intereſted in the Cauſe, to be relieved in Equity.

[c] 4 Inſt 109, 118.

The Leading *Proceſs* is a *Subpœna*, as in the Court of Chancery.

By 1 El. ch. 4. *The Firſt-Fruits and Tenths of the Clergy are within the Survey of the Court of Exchequer.*

[See 13 *El. ch.* 4. 14 *El. ch.* 7. 27 *El. ch.* 3. 7 *Ja.* 1. *ch.* 15. How Accountants *Lands* are liable to the Payment of the King's Debts.]

By 6 H. 4. ch. 3. *Commiſſions may be ſent to inquire of the Accounts of Sheriffs and other the King's Officers.*

4 Inſt. 119.

To ſpeak exactly, there are [d] Seven Courts in the Court of Exchequer, (*viz.*) the Court of Pleas or of Common Law, the Court of Equity, the Court of Accounts, the Court of Receipt, the Court of Exchequer-Chamber, (being the Aſſembly of all the Judges of *England* to debate difficult Matters of Law,) the Court of Exchequer-Chamber upon Errors in the Court of Exchequer, [See 31 *Ed.* 3. *St.* 1. *ch.* 12. 31 *El. ch.* 1. 16 *Ch.* 2. *ch.* 2. *and* 20 *Ch.* 2. *ch.* 4.] The Court of Exchequer-Chamber upon Errors in the Court of King's Bench. [See 27 *El. ch.* 8. 31 *El. ch.* 1.]

Thus far of the Courts at *Weſtminſter*, (*viz.*) the *Chancery*, *King's Bench*, *Common Pleas*, *and the Exchequer*. Theſe are all Courts of *Record*, except the Equity-ſide in the Chancery and the Exchequer.

Of the Court of Chivalry or Court Martial.

[a] 4 Inſt. 123.
1 Inſt. 74. a.
3 Black Com. 68, 103.
4 Black. Com. 264.
[b] 1 Lev. 230. Caſes in Parl. 65, 66.
2 Salk. 553.
7 Mod. 125.
1 Inſt. 74. b.
4 Inſt. 127. 128.
Hawk. Pleas of the Crown, Book 2. ch. 4.
[c] 4 Inſt. 125, 126, 127.
[d] 4 Inſt. 126.
Hob. 121.
See of Evidence, ch. 4. poſt.
[e] 1 Lev. 230.
4 Mod. 128.
Caſes in Parl. 58, 59, &c. contra.
1 Sid. 352, 353, 354.
Hawk. Pleas, &c. Book 2. ch. 4.
[f] 1 Inſt. 261. a. 391. b.
3 Inſt. 48.
4 Inſt 123, 124, 134.
[g] 6 Rep. 47, 48.
12 Rep. 104.
1 Inſt. 261. b.
4 Inſt. 134, 135. 140, 141, 142.

VIII. The *Court* of [a] *Chivalry* (or *Court Martial*) the Fountain of the Martial Law, is next to be conſidered. It is now held at Doctors Commons in *London*.

The *Judges* of the Court were the Lord *Conſtable* of *England*, and the Earl *Marſhal* of *England*. *Marſhal* is derived from *Marc*, in *Saxon* ſignifying a *Horſe*, and *Schalc* a Governor. [b] But now the whole Office is given to the Earl *Marſhal*, except in Matters touching Life and Member, which muſt be before the Conſtable and Marſhal; a Conſtable being appointed for that Turn only.

The Grant of this Office is by Letters Patent, to exerciſe by himſelf or his ſufficient Deputy.

[c] Attendants on this Court are the *Heralds*, created by Letters Patent. Of which three (now four) are called *King's* at Arms; the reſt are *Purſuivants*. Theſe Heralds are Meſſengers of War and Peace, ſkilful in Deſcents, Pedigrees, and Armories, taking Care of the Genealogies of the Nobility and Gentry. Their Learning in Deſcents and Pedigrees, [d] upon juſt Proof, may be a Means to quiet many Controverſies about Titles of Honours, Dignities, and Inheritances. They marſhal the Solemnities of Coronations, Marriages, Chriſtenings, Funerals, Feaſts of Great Perſons, upon Requeſt. [e] They pretend to have the ſole Power of painting Arms, marſhalling Funerals, *&c.*

They were incorporated by *Ri.* 3. and afterwards by King *Philip* and Queen *Mary*.

The [f] *Juriſdiction* of this Court is declared by 13 *Ri.* 2. *St.* 1. *ch.* 2. (viz.) *That it hath Cognizance of Contracts touching Deeds of* Arms *and War out of the Realm, and alſo of things that touch War within the Realm, which cannot be determined or diſcuſſed by the Common Law, with other Uſages and Cuſtoms to the ſame Matters appertaining.* [See 8 *Ri.* 2. *ch.* 5.]

Out of the Realm, (i. e.) In foreign Parts beyond Sea. For upon the Sea the Admiral hath Juriſdiction.

[g] But if the Cauſe of Action done out of the Realm is tranſitory, an Action lies at Common Law, tho' done out of the Realm; or if the Contract made beyond Sea is for doing any Act within the Realm, that Part gives it to the Common Law. An Obligation made beyond Sea may be ſued here in *England* in what Place the Plaintiff pleaſes; tho

it bears Date at a Place beyond Sea. But if the Action is criminal or local, then the Cauſe belongs to this Court.

The Words, *with other Uſages and Cuſtoms*, ſupport the Claim of this Court, to give Relief to any of the Nobility and Gentry, that are abuſed in Matters of Honour; and to keep up the Diſtinction and Degrees of Quality.

[h] The *Proceedings* are according to the Cuſtoms and Uſages of the Court by Witneſſes (and formerly by Combat) and in a ſummary Way by Petition; and in *Caſes omitted* according to the Civil Law and Law of Arms. [i] Therefore upon Attainders, here can be no Forfeiture of Land, or Corruption of Blood.

[h] 1 Inſt. 74. a. & b. 261. a. 4 Inſt. 125, 341.
[i] 4 Inſt. 125.

By 1 H. 4. ch. 14. *All* Appeals, *for Offences done out of the Realm, are cognizable before the Conſtable and Marſhal; but not Appeals of Offences within the Realm.*

[k] All *Appeals* in caſe of Arms or Heraldry from *Grievances* or *Sentences*, are to the King. This Sort of Appeal is different from an Appeal on an Offence. This is a Removal of the Cauſe to a Superior Court.

[k] 4 Inſt. 125, 341.

But this Court is grown much out of Repute, and hath little or no Buſineſs. For,

By 26 H. 8. ch. 13. 35 H. 8. ch. 2. 5 & 6 Ed. 6. ch. 11. *All Treaſons and Miſpriſions of Treaſon committed out of* England *ſhall be inquired of in the* King's Bench *by a Jury, of the ſaid County where the ſaid Bench ſhall ſit; or in ſuch* County *by a Jury, and before ſuch Perſons, as the King ſhall appoint by* Commiſſion.

IX. The *Admiralty Court* (*Curia Admiralitatis*) is holden at *Doctors Commons* in *London*. The Admiralty *Seſſions* for Trial of Malefactors on the Sea is held in *Southwark*, [or in the *Old-Baily*.]

Of the Court of Admiralty.
3 Black. Com. 69, 106.
4 Black. Com. 265.

[a] In the *Admiralty Court* are the *Admiral* (*Admirallus*) his *Deputy Judge* (commonly a Doctor of the Civil Law) Two *Regiſters*, *Advocates*, *Proctors*, and a *Marſhal*.

[a] 1 Inſt. 260. b. 4 Inſt. 147.

[b] It is not allowed to be any Court of Record, becauſe it proceeds by the *Civil* Law; and therefore the Judge has no Power to take ſuch a Recognizance as a Court of Record may. [*Qu.*] Yet this Court may fine and impriſon for a Contempt in the Face of the Court.

[b] 4 Inſt. 135. 1 Roll. Abr. 531. 1 Cro. 685. 1 Ventr. 1. Raym. 78. 12 Rep. 104.

The *Proceſs* and *Proceedings* are in the Name of the Lord Admiral, and by Libel; and the Plaintiff and Defendant enter into [c] Stipulation (or Bail by a Sort of Recognizance) for Appearance, and to abide the Sentence.

[c] 4 Inſt. 135. 1 Roll. Abr. 531.

Beſides the Civil Law, the Maritime Laws of *Rhodes*, and [d] *Oleron* are made Uſe of.

[d] 1 Inſt. 11. b. 260. b See Molloy de Jur Mar.

It hath [e] *Juriſdiction* and *Power* to determine all Maritime Cauſes, or Cauſes ariſing wholly upon the Sea, out of the Juriſdiction of a County.

[e] 1 Inſt. 260. a, & b. 4 Inſt. 134, 139. 1 Roll. Abr. 531, 532. 1 Salk. 31.

A Judgment on a Thing done upon Land, is void. [f] It is no Part of the Sea, where one may ſee what is done on one Side of the Water and the other. [g] So *Note*, That on the Sea below the Low-Water Mark, the Admiral hath ſole and abſolute Juriſdiction. But between the High-Water Mark and Low-Water Mark, The Common Law and the Admiral have Juriſdiction by Turns; one upon the Water, the other upon Land. But if the Water is within a County, the Common Law claims the ſole Juriſdiction.

[f] 4 Inſt. 140, 141.
[g] 5 Rep. 107. 3 Inſt. 113. 4 Inſt. 124, 138.

[h] 4 Inſt. 135, 136, 137.

The Juriſdiction of the Admiral is declared by *Statutes*, [h] which cannot be diſpenſed with by any *Non Obſtante*; becauſe All the King's Subjects have an Intereſt in the Juriſdiction of the Admiralty.

By 13 *Ri.* 2. ch.5. *The Admirals and their Deputies ſhall not meddle with any Thing done within the Realm, but only with Things done upon the Sea.*

By 15 Ri. 2. *ch.* 3. *The Court of Admiralty hath no Manner of Conuſance of any Contract, or of any other Thing done within the Body of a County, either by Land or Water, nor of Wreck of the Sea.*

[i] 5 Rep. 106, 107.
1 Roll. Abr. 531.
See ante.

[i] The Admiral hath no Juriſdiction of *Wreck*, *i. e.* of Goods caſt and left upon the Land by the Sea; but of *Flotſam*, *Jetſam*, and *Lagan* he hath Juriſdiction, for They are in and upon the Sea. But to go on with 15 *Rich.* 2.

Nevertheleſs, of the Death *of a Man and of* Mayhem *done in great Ships, being and hovering in the main Stream of great Rivers only beneath the Bridges of the ſame Rivers next to the Sea, and in none other Places of the ſame Rivers, the Admiral ſhall have Cognizance. And likewiſe to arreſt Ships in great Fleets, for the great Voyages of the King and Kingdom; and ſhall alſo have Juriſdiction in ſuch Fleets, during ſuch Voyages.*

Note, That the Lord Admiral hath greater Juriſdiction in caſe of the *Death* of Man and of *Mayhem* than in other Caſes.

[a] Ld. Ray. 398, 632, 1044.
[b] 1 Ld Ray. 152, 578.
2 Ld. Ray. 806, 982.
[c] 1 Inſt 261. b.
4 Inſt. 134. 135, 139, 140, 141, 142.
6 Rep. 47, 48.
1 Roll. Abr. 528, 529. 532, 533.
[d] 4 Inſt. 134, 139, 142.
Hob. 11, 79, 212, 213.
1 Roll. Abr. 532, 533.
[e] 13 Rep. 52.
4 Inſt. 141.
2 Danv. Abr. 265.
[f] Roll. Abr. 533.
1 Ventr 146, 343.
2 Ventr. 181.
4 Inſt. 148, 149.
1 Salk. 31, &c.
2 Ld. Ray. 805.
1 Ld. Ray. 152.
[g] 2 Str. 858, 937.
1 Ld. Ray. 576.
2 Ld. Ray. 576.
2 Ld. Ray. 1453.

By 2 H. 4. ch. 11. *The* 13 Ri. 2. ch. 5. *is confirmed, and that Statute and the Common Law ſhall be holden againſt the Admiral, and his Deputies. And the Party grieved by the Non-Obſervance of that Statute, ſhall (by Action upon his Caſe) recover double Damages againſt the Proſecutor in the Admiralty; and the Proſecutor ſhall alſo forfeit Ten Pounds to the King, being thereof attainted.*

As to Contracts, the whole is to be done upon the Sea, and no Part within a County, to give the Admiral Juriſdiction; [unleſs it be for Seamen's Wages; [a] or againſt the Ship for Neceſſaries for the Ship, or for Money to buy them, during the Voyage [b], and for which the Maſter hath hypothecated it.] For where [c] *Part* of the Act is done, or is to be done in *England*, and Part out of the Realm, that Part that is, or is to be performed out of the Realm, ſhall be tried by a Jury, if Iſſue be taken upon it. As in a Covenant by Charter-Party, that a Ship ſhall ſail from a Place in *England* to a Place in *Spain*, and remain ſome Days; if the Iſſue or Queſtion is, Whether the Ship ſailed thither, and remained there ſo many Days; it ſhall be tried by a Jury. [d] So if the Contract was made beyond Sea, for doing of an Act, or Payment of Money, within this Kingdom; or if the Contract is upon the Sea, and not for a Marine Cauſe, as to pay Money in *England*. For where Part belongs to the Common Law, and Part to the Admiral, the Common Law ſhall be preferred. But the Admiralty-Court may award *Executions* upon [e] Land, or within a County, for that is not to hold *Plea* of any Thing ariſing upon Land. Upon *Letters Miſſive* or *Requeſt*, it may alſo award Execution upon a Judgment given beyond Sea.

This is the current Opinion among the Common Lawyers concerning the Juriſdiction of the Admiralty. But it is inſiſted on the other Hand by the Civilians, that the Lord Admiral hath Cognizance of Contracts made at Land, touching Navigation and Trade by Sea. [f] It is allowed on both Sides, that the Lord Admiral hath Cognizance of Seamens Wages. [But [g] not of the Wages of a Maſter of a Ship, unleſs the Contract for them is made on the Sea.] [See 4 & 5 *Ann.* ch. 16.] and that

He hath Power to erect Beacons; but it is inſiſted further, that he hath Cognizance of Things done in Ports and Navigable Rivers; as concerning Damages done to Perſons, Ships, Goods, Annoyances of Free Paſſage, unlawful Fiſhing; and alſo Cognizance of Contracts and other Things done beyond Sea, relating to Navigation and Trade by Sea [h].

[h] See 4 Inſt. 134, &c.

[i] The Common Lawyers do not pretend to have Cognizance of *All* Bargains and Contracts made upon the Sea, or beyond Sea, but yield, that *ſome* Contracts are under the Cognizance of the Conſtable and Marſhal, and ſome under the Cognizance of the Lord Admiral.

[i] 4 Inſt. 134.

[k] See 2 *H.* 5. *St.* 1. *ch.* 6. Concerning Appointment of Conſervators of Truces and Safe Conduct in every Port.

[k] 4 Inſt. 152.

By 8 El. ch. 5. *Upon Appeal from an erroneous Sentence given in this Court, the Sentence of* Delegates *appointed by Commiſſion out of* Chancery *ſhall be final.*

As there are many inferior Admiralty Courts, their Appeals are made to the Lord High Admiral in this Court. But the Lord Warden of the *Cinque Ports* [a] is Admiral there, and hath the Juriſdiction of the Admiralty exempt from the Admiralty of *England*.

[a] See Ch. 2. poſt.

By 2 W. & M. Seſſ. 2. ch. 2. Commiſſioners *of the Admiralty, have like Authority and Juriſdiction as the Lord High Admiral.*

By 11 & 12 W. 3. ch. 7. *Piracies and Felonies committed upon the Sea, or where the Admiral hath Juriſdiction, may be* tried *at Sea or upon Land, in any of his Majeſty's Iſlands, Plantations, Colonies, Forts, or Factories, by Commiſſion, according to the Courſe of the Admiralty. The Acceſſories in Piracy may be* tried *in like Manner.*

But ſee 4 *Geo.* 1. *ch.* 11. *infra.* See alſo 18 *Geo.* 2. *ch.* 30. And 8 *Geo.* 1. *ch.* 24. For the more effectual Suppreſſing of Piracy. And alſo 22 *Geo.* 2. *ch.* 33. For amending, explaining, and reducing into one Act of Parliament, the Laws relating to the Government of the King's Ships and Forces by Sea, wherein the Articles for their Government are ſet out, and the Admiralty are empowered to grant Commiſſions for holding Courts Martial for the Trial of Offenders at Sea or in any Port, and many other Regulations are eſtabliſhed relating thereto, too long to be here inſerted.

X. *The Court by Commiſſion*, according to the Statute of 28 H. 8. chap. 15. *muſt be holden before the Admiral or his Lieutenant or Deputy, and Three or Four Perſons more, as ſhall be nominated by the Lord Chancellor. And the ſaid Commiſſioners, or Three of them have Power to inquire of All Treaſons and other Capital Crimes and Offences committed at Sea, or in any other Place where the Admiral hath Juriſdiction, and by a Jury of Twelve Men of the County limited by the Commiſſion. And every Indictment ſo found ſhall be good. And ſuch Order, Proceſs, Judgment and Execution ſhall be had thereupon as againſt ſuch Offenders at Land, according to the Courſe of the Common Law. Alſo the* Trial *of ſuch Offences (if they be denied) ſhall be had by Twelve Men of the County, limited in the ſaid Commiſſion.*

Of the Court by Commiſſion according to the 28 H. 8. ch. 15. 3 Inſt. 112, &c.

The Proceſs and *Proceedings* here are to be in the Name of the King.

[b] The Act of 35 *H.* 8. *ch.* 2. or 5 *Ed.* 6. *ch.* 11. concerning the Trial of Foreign Treaſons, or of Treaſon committed out of the Realm, does not take away the 28 *H.* 8. *ch.* 15. for Trial of Treaſons done upon the *Sea*, though they are done out of the Realm. Beſides, by 11

[b] 1 Inſt 261. b. 3 Inſt. 11, 112, 4 Inſt. 124. 147.

& 12 *W.* 3. *ch.* 7. This Statute of 28 *H.* 8. is declared to be ſtill in Force.

By 1 Ann. ch. 9. *Captains and Mariners belonging to Ships and deſtroying the ſame at Sea, or where the Admiralty hath Juriſdiction, ſhall be* tried *in ſuch Places as ſhall be limited by the King's Commiſſion, and according to the* 28 H. 8.

By 4 Geo. 1. ch. 11. *Pirates, Felons, and Robbers, within the* 11 & 12 W. 3. ch. 7. *may be* tried *according to* 28 H. 8. ch. 15.

[See 11 & 12 *W.* 3. *ch.* 12. Whereby Oppreſſion or other Offences committed by Governors of Plantations, or Colonies beyond Sea, may be tried in *England* in the Court of *King's Bench*, or in any County by the King's Commiſſion. And 3 *Ann. ch.* 20. For the *Trial* of Officers and Soldiers, that either upon Land out of *Great Britain*, or at Sea, hold Correſpondence with a Rebel or Enemy.]

Of the Court of Aſſizes.
[a] 1 Inſt. 153.b.
4 Inſt. 158.
3 Black. Com. 58.

XI. [a] The Court of *Aſſizes* (from *Aſſideo*, to ſit together) is a Court wherein the *Twelve* Judges, (*viz.*) The Juſtices and Barons of the King's Courts at *Weſtminſter*, are empowered by Commiſſion to try all Cauſes Civil and Criminal in every County of *England*, except *Middleſex*, where the King's Courts of Record do ſit, and except where his Courts for his Counties Palatine are held. The Progreſs into the ſeveral Counties is called the *Circuit*. Theſe *Circuits* are *ſix*, to each of which two Judges are appointed. For *Wales*, there are four Circuits, including what is called the *Cheſter* Circuit; And

By 18 El. ch. 8. *The King may appoint Two Perſons learned in the Laws to be Judges in each of the* Welch *Circuits, which had but One Juſtice before, and may grant Commiſſions of Aſſociation*, &c. See 34 & 35 *H.* 8. *ch.* 26.]

The Judges are to be attended by the Sheriff of each County, and his under Officers; if he is abſent, or negligent in his Duty, the Judges may fine him.

[b] 1 Inſt. 293. a. & b.
2 Inſt. 498.
4 Inſt. 184, 185, 291.
Bacon's Elem. 15, 16, 17.
[c] Bacon's Elem. 17, 18, 22, 23, 25.
[d] 4 Inſt. 163, 164.

The Judges of Aſſize came into the Place of the ancient [b] *Juſtices* in *Eyre* (*Juſticiarii Itinerantes*) about the Time of *Rich.* 2. who tried Titles of Lands or Goods, and all Treaſons, Felonies, *&c.* going round the Kingdom once in Seven Years.

The *Judges* of *Circuits* ſit by Virtue of [c] *Five* ſeveral Commiſſions.

A [d] *Commiſſion* is a Delegation by Virtue of the Common Law or of an Act of Parliament, whereby Juriſdiction, Power, and Authority is conferred on others. All Commiſſions of New Invention are againſt Law, until they have Allowance by Act of Parliament.

[e] 2 Inſt. 419, 568.
4 Inſt. 73, 162, 163, 164, 165, 166, 167
9 Rep. 118.
H. P. C. 161.
Crompt. 121, 226.
1 Ventr. 85.
Hawk. P. C. Book 2. ch. 5.

1. [e] By a *Commiſſion* of *Oyer* and *Terminer* (to hear and determine) directed to them and many other Gentlemen of the County. But the Judges are to be of the *Quorum*, ſo as the Reſt cannot act without one of them. [See 13 *Ed.* 1. *St.* 1. *ch.* 29. 2 *Ed.* 3. *ch.* 2. 34 *Ed.* 3. *ch.* 1.] By Virtue of this Commiſſion, they have Power to hear and determine Treaſons, and all Manner of Felonies and Miſdemeanors.

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[d] *Sapientis judicis eſt cogitare tantum ſibi eſſe permiſſum, quantum commiſſum et creditum.* 4 Inſt. 163.

This is the largeſt Commiſſion that they have. It may be either general or ſpecial. *Special, i. e.* to try only particular Perſons or Offences.

They cannot proceed but upon Indictments taken before themſelves, unleſs they have a Commiſſion of Gaol-Delivery too, or a ſpecial Commiſſion. For the Authority of Commiſſioners of *Oyer* and *Terminer* is, *Ad INQUIRENDUM, Audiendum, et Terminandum,* to *inquire*, hear, and determine. They may, upon an Indictment found, proceed the ſame Day againſt the Party indicted. [See 1 *Ann. St.* 1. *ch.* 8.]

2. [f] By a *Commiſſion* of general *Gaol-Delivery*, directed only to the Judges themſelves, and the *Clerk* of the *Aſſize* aſſociate, they have Power to try every Priſoner in the Gaol, committed for any Offence whatſoever, and the ſame Day he is indicted; but none but Priſoners in the Gaol: So that one way or other they rid the Gaol of all the Priſoners in it. They may proceed upon Indictments taken before Juſtices of the Peace, as well as upon Indictments taken before themſelves. [See 27 *Ed.* 1. *St.* 1. *ch.* 3. 4 *Ed.* 3. *ch.* 2. and 10. 1 *Ed.* 6. *ch.* 7. 1 & 2 *Ph. & Mar. ch.* 13. And 2 & 3 *Ph. & M. ch.* 18. For Corporations. See alſo 33 *H.* 8. *ch.* 24. *infra.*]

[f] 2 Inſt. 568. 4 Inſt. 168, 169. H P. C. 158. 7 Rep. 31. Dalt. ch. 73. p. 168. Hawk. P. C. Book 2. ch. 6. Crom. Jur. 125.

3. By a Commiſſion of [a] *Aſſize*. directed to themſelves only, and the Clerk of the Aſſize, to take Aſſizes; upon which Account they are called Juſtices of Aſſize. The Office of theſe Juſtices is to do Right upon Writs of *Novel Diſſeiſin* (called *Aſſizes*) brought before them, by ſuch as are wrongfully thruſt out of their Lands. Theſe Writs were frequent heretofore; but now Mens Poſſeſſions are ſooner recovered by ſealing Leaſes upon the Land; or by bringing Ejectments[b], the Defendant agreeing to confeſs Leaſe, Entry, and Ouſter. [c] Divers Acts of Parliament have given them great Authority in criminal and civil Cauſes.

Hereunto belong Commiſſions of *Aſſociation*, for others to be aſſociate, or to be joined to them as fellow Juſtices; *Writs* of *Admittance* directed to the Juſtices, to admit them; the Writ of *Si non Omnes*, for the reſt to proceed, though the others do not come. And theſe the King may grant with reſpect to Juſtices of *Oyer* and *Terminer*, and Gaol-Delivery. [See 27 *Ed.* 1. *ch.* 3 and 2 *Ed.* 3. *ch.* 2]

Errors before Juſtices of Aſſize ſhall be redreſs'd in the [d] King's Bench, and not in the Common Pleas.

By 8 Ri. 2. ch. 2. *and* 33 H. 8. ch. 24. *None ſhall exerciſe the Office of Juſtices of* Aſſize *or* Gaol-Delivery, *in any County where he was* born *or* inhabits, *in Pain of* 100 l. *This Act does not extend to Officers in Cities or Corporations, or of the Dutchy of* Lancaſter.

Yet the contrary has been often done by a *Non Obſtante* in the Patent. But now it is declared by 1 *W. & M. Seſſ.* 2. *ch.* 2. That the pretended Power of ſuſpending Laws, or the Execution of them by regal Authority only, is illegal.

[*By* 12 G. 2. ch. 27. *The Chief Juſtice and Juſtices of either Bench, the Chief Baron and other Barons of the Exchequer, and any other Perſon learned in the Law, may exerciſe the Office of Juſtice of* Oyer *and* Terminer, *or* Gaol-Delivery, *in any County for which he is appointed, notwithſtanding his having been born or inhabiting within ſuch County.*]

[a] 1 Inſt 263. a. 2 Inſt. 422, &c. 4 Inſt. 158, 161. Magna Char. ch. 30. 12 Rep. 32. Crompt Jur. 204, &c. Hawk P. C. B. 2. ch. 7.

[b] See ch. 4. poſt.

[c] Crompt. Jur. 208, &c. 4 Inſt. 158, 159, 165, 169. F. N. B. 185, 186, 187.

[d] Cromp. Jur.

e 2 Inſt. 420, &c. 4 Inſt. 159, 160, 161.

4. By Commiſſion (or rather Writ) of [e] *Niſi Prius*, directed to the Judges and Clerk of Aſſize, who are therefore called *Juſtices* of *Niſi Prius*. Their Authority is annexed to the Juſtices of Aſſize. It is called a Commiſſion of *Niſi Prius* from a judicial Writ of *Diſtringas*, whereby the Sheriff is commanded to diſtrain the impanelled Jury by their Lands, to appear at *Weſtminſter* at a certain Day in the following Term, to try ſome Cauſe, *Niſi Prius Juſticiarii Noſtri ad Aſſizas Capiendas Venerint, &c.* unleſs the Juſtices of Aſſize come before that Day to ſuch a Place in ſuch a County, where the Cauſe is triable. [The Entry in the Plea-Roll of the Reſpite for Default of Jurors, or Continuance to the next Term, hath the Clauſe *Niſi Prius, &c.* See *Weſt.* 2. or 13 *Ed.* 1. *ch.* 30.] For

Civil Cauſes grown to iſſue (or where Suit is conteſted, and the Fact ready to be tried) in the Courts at *Weſtminſter*, are brought down in the Vacation, before the Day of Appearance appointed for the Jury above, into the County where the Action is laid, for the Eaſe of the Plaintiff, Defendant, Jury, and Witneſſes, to be tried there, which is uſually done in two or three Days. And then upon the Return of the Verdict, given by the Jury, to the Court above, the Judges there give Judgment for the Party, for whom the Verdict is found. The Authority [a] of the Judge of *Niſi Prius* is by the Commiſſion of Aſſize; for by the Statute of *Niſi Prius* 13 *Ed.* 1. *ch.* 30. which gives the Trial by *Niſi Prius*, it is to be before Judges of Aſſize.

a 2 Ld. Ray. 1143.

[See 27 *Ed.* 1. *St.* 1. *ch.* 4. 12 *Ed.* 2. *St.* 1. *ch.* 3. & 4. 14 *Ed.* 3. *St.* 1. *ch.* 6. 7 *Ri.* 2. *ch.* 7. 14 *H.* 6. *ch.* 1.]

By 18 El. ch. 12. *The Chief Juſtices or Chief Baron, or in their Abſence two other Juſtices or Barons,* [*by* 12 Geo. 1. ch. 31. *any one Judge*] *as Juſtices of* Niſi Prius *for the County of* Middleſex, *ſhall try Cauſes upon Writs of* Niſi Prius, *upon Iſſues joined in the* King's Bench, Common Pleas, *or* Exchequer, *in the Term-Time, or four* [*by* 24 Geo. 2. ch. 18. *fourteen*] *Days after each Term.*

Tho' Trials by *Niſi Prius* are for the Eaſe of the Parties, Juries and Witneſſes, by ſaving them the Charge and Trouble of coming up to *Weſtminſter*; yet in Matters of great Weight, or where the Title is intricate, the Court, upon Motion, will retain the Cauſe to be tried there; and then the Jury and Witneſſes in ſuch Caſe muſt come up to the Court at *Weſtminſter* for the Trial of the Cauſe, which is called a *Trial at Bar*. The King hath his Election, to try his Suits at the *Bar*, or in the *Country*, and in what Court he pleaſes.

b 4 Inſt. 170, &c. Dalt. ch. 5.

5. By *Commiſſion* of the [b] *Peace* in every County of their Circuit.

All the Juſtices of the Peace of that County, where the Judges have their Aſſizes, are bound to be preſent. And if they make Default without lawful Impediment, the Judges may ſet a Fine upon them for their Neglect.

Note, That there is a Commiſſion of the Peace, *Oyer* and *Terminer*, and Gaol-Delivery of *Newgate*, held eight ſeveral Times in a Year for the City of *London* and County of *Middleſex*, at *Juſtice-Hall* in the *Old-Baily*, where the Lord Mayor is the Chief Judge.

Theſe are the *five* Commiſſions, by Virtue of which the Judges in their Circuits execute their Authority.

c 4 Inſt. 165. Crompt. Jur. 125.

[c] But if Juſtices ſit by Force of a Commiſſion, and do not adjourn the Commiſſion it is determined; if the Commiſſion has no Time li-

mited for its Continuance. Thoſe that ſit by Virtue of a Commiſſion are not countermanded by any new Commiſſion, unleſs the new Commiſſion be ſhewed unto them, or proclaimed in the County; or unleſs the new Commiſſioners do ſit by Force of the new Commiſſion. [See 2 & 3 *Ph. & M. ch.* 18.]

By 9 Ed. 3. ch. 5. *The Juſtices of* Aſſize, Gaol-Delivery, *and of* Oyer *and* Terminer, *ſhall ſend their Records and Proceſſes to the* Exchequer *every Year at* Michaelmas, *to be kept in the Treaſury*, &c.

By 1 Ed. 6. ch. 7. *No Proceſs or Suit before any Juſtices of Aſſize, Gaol-Delivery,* Oyer *and* Terminer, *Juſtices of the Peace, or other the King's Commiſſioners, ſhall be* diſcontinued, *by the Making or Publiſhing a new Commiſſion, or Aſſociation, or by altering the Names of any of the Juſtices or Commiſſioners; but the new Juſtices or Commiſſioners may proceed, as if the old ones had remained.* [See 11 *H.* 6. *ch.* 6.]

By 1 An. St. 1. ch. 8. *No Commiſſion of* Aſſize, Oyer *and* Terminer, *General* Gaol-Delivery, *or* Aſſociation, Writ of Admittance, *or* Si non Omnes, *or* Aſſiſtance, *or* Commiſſion *of the* Peace, *ſhall be determined by the* Death *of the* King, *but ſhall continue ſix Months, unleſs before ſuperſeded,* [See 7 & 8 *W.* 3. *ch.* 27.]

[See 14 *H.* 6. *ch.* 3. For holding the Aſſizes at *Carliſle* for the County of *Cumberland.* 1 *Geo.* 1. *ch.* 37. For holding the Aſſizes for the County of *Cornwall.* 20 *G.* 2. *ch* 21. For holding the Aſſizes for *Norfolk.* 21 *G.* 2. *ch.* 12. For holding the Aſſizes for *Bucks.*]

Of the Court of the Quarter Seſſions.

a Lamb. Book 4. ch. 19, 20. 4 Black. Com. 268. 4 Burn Juſt. title Seſſions per totum.

XII. The *General* or a *Quarter-Seſſions* of the Peace is a Court of Record, held every Quarter of the Year, in every County, before two or more Juſtices (one *Quorum*) for the Execution of their Authority, given them by the Commiſſion of the Peace, and ſeveral Acts of Parliament. In ſome of the larger Counties the Juſtices divide the Shire into three or four Parts, and keep four ſeveral Seſſions in each Part.

By 2 H. 5. St. 1. ch. 4. *The Quarter-Seſſions is appointed to be kept four Times in the Year* (viz.) *In the firſt Week after* Michaelmas-*Day, in the firſt Week after* Epiphany, *in the firſt Week after the* Cloſe *of* Eaſter, *in the Week after the* Tranſlation *of* Thomas *à* Becket (being the 7th of *July*) *and oftener if Need be.*

But Cuſtom, contrary to the Rules of Law, prevails againſt this Statute in ſome Counties, and the Quarter-Seſſions are kept at other Times.

By 14 H. 6. ch. 4. *The Juſtices of* Middleſex *are not obliged to keep their Seſſions above twice in the Year.*

By 32 H. 8. ch. 43. *Juſtices of the Counties Palatine of* Cheſter *and* Lancaſter *are to keep Seſſions only at* Michaelmas *and* Eaſter.

The Seſſions may laſt two or three Days, yet the Record ought to mention, that the Seſſions was holden at[b] one certain Day (*viz.*) the firſt Day thereof.

The *Place* for keeping the Quarter-Seſſions in the County is uſually in one of the principal Towns in the County, according to the Diſcretion of the Juſtices. This being agreed on, the Seſſions ought to be warned[c] by Warrant of two or more Juſtices (one *Quorum*) directed to the Sheriff, thereby commanding him to ſummon a Seſſions of the Peace, to return a Grand Jury before them or their Fellow Juſtices, at a certain Day and Place, and to give Notice to all Stewards, Conſtables, and Bai-

[b] 4 Rep. 48. 2 Str. 832, 865.

[c] 2 Ld. Ray. 1233.

[d] Lamb. Book 4 ch. 2. Cromp. 122. b.

liffs of Liberties to attend. [d] And ſuch a Precept by any two ſuch Juſtices cannot be ſuperſeded by any of their Fellows, but only by Writ out of Chancery.

By 5 Ed. 6. (not printed) *The Seſſions for* Angleſey *is to be kept at* Beaumaris. *But,*

By 1 Geo. 1. ch. 26. *The Juſtices may adjourn to other Places, for taking the Oaths to the King.*

Let us conſider the *Perſons,* that attend this Court, and its *Juriſdiction.*

1. There muſt attend at this Court,

a 2 Inſt. 674. Dalt. ch. 185. p. 513.

The [a] *Cuſtos Rotulorum,* or his *Deputy*; he hath the keeping of all Bargains and Sales by Deed indented and inrolled, and of the Records of the Seſſions, and of the Commiſſion of the Peace. [See 37 *H.* 8. *ch.* 1. 3 & 4 *Ed.* 6. *ch.* 1.]

[b] Dalt. ch. 185. p. 513, 514. Cont. Lamb. Book 4. ch. 3. Burn, Tit. Seſſ. Hawk. P. C. B. 2. p. 41.

[b] The *Juſtices* of the *Peace*; who are to certify their Recognizances, [See 3 *H.* 7. *ch.* 1. 5 & 6 *Ed.* 6. *ch.* 25.] and Examinations taken by them, and to hear Cauſes, *&c.* [See 12 *Ri.* 2. *ch.* 10. 2 *H.* 5. *St.* 1. *ch.* 4.] If any one does not attend, or does miſbehave himſelf, the Court, as a *Court,* upon an Indictment, may fine and impriſon him. [*Qu.* As to one of themſelves.]

The *Clerk* of the *Peace*; to read the Indictments, to enter the Acts of the Court, and to draw up Proceſs. He is Deputy to the *Cuſtos Rotulorum.*

By 1 W. & M. Seſſ. 1. ch. 21. *The Clerk of the* Peace *is to be appointed by the* Cuſtos Rotulorum *without Fee or Reward, on Pain of forfeiting double Value of the Sum or Reward given, and of both Cuſtos and Clerk being diſabled to enjoy their Places. He is to hold his Office* Quam diu ſe bene geſſerit. *But for miſdemeaning himſelf, the Juſtices in Seſſions may diſcharge him. And then the* Cuſtos Rotulorum *is to chooſe another Reſident in the County, or on Default the Juſtices in Seſſions to appoint one.* [See 27 *H.* 8. *ch.* 16. 10 & 11 *W.* 3. *ch.* 23. 3 *Geo.* 1. *ch.* 18. and 22 *G.* 2. *ch.* 46. *infra.*]

The *Sheriff,* or his Deputy; to return Juries, to receive the Fines ſet by the Court on Delinquents, *&c.*

Coroners alſo muſt *attend,* becauſe they are Parties to Exigents, and in ſome Caſes have Power to commit; ſo the *Gaoler* with his Priſoners, [See 3 *H.* 7. *ch.* 3.] The *Governor* of the *Houſe* of *Correction,* to give a Calendar of ſuch Rogues and diſorderly Perſons, as have been committed, and to receive thoſe that are committed by the Court. [See 7 *Ja.* 1. *ch.* 4.] The *Bailiffs* of *Hundreds* and *Liberties,* to return the Seſſions Proceſs; the *Conſtables* of *Hundreds, &c.* to make a Return of their Warrants, to bring their own Preſentments of what is amiſs in the County, and thoſe Preſentments which they receive from their petty Conſtables; *Treaſurers* of the County-Stock; all Perſons that are *bound by Recognizance* to appear and anſwer for themſelves, or to give Evidence or proſecute; all *Jurors* (of the *Grand* or *Petty* Jury) returned by the Sheriff, on Pain of Loſs of Iſſues or Profits of their Lands.

c 1 Lev. 159.

[c] Freedom from Arreſt upon mean Proceſs is to be allowed to all that attend upon a Court of Record. So that if ſuch a one is arreſted upon *mean* Proceſs, this Court may diſcharge him.

2. The *Juriſdiction*[d] of the Juſtices in Seſſions conſiſts in hearing and determining Felonies, Treſpaſſes, and other Miſdemeanors againſt the publick Peace, mentioned in their *Commiſſion*, or given by *Statutes*[e]. Upon Conviction in Treſpaſs, this Court may fine, *&c.* But tho' they have Power to hear and determine Felonies, they uſually try only Petty Larcenies; other Felonies being of Courſe tried at the Aſſizes.

[d] 1 Ld. Ray. 426.
[e] 2 Str. 1256.

But there are many Offences, which by particular Statutes ought to be proſecuted in this Court[a]; as concerning Alehouſe-keepers[b], and ſelling Ale by an unlicenſed Alehouſe-keeper, Baſtard-Children, Badgers of Grain, Butter and Cheeſe, Bakers, concerning Bridges, Cottages, Foreſtalling, Regrating and Ingroſſing, Game, Highways, Maſters and Apprentices[c], Malſters, Settlements, and Appeals concerning the Poor, Popiſh Recuſants, Raiſing Money for paſſing Vagrants, Wages, Weights, and Meaſures.

[a] See Lamb. ch. 19. and Nelſon and Burn Tit. Seſſions.
[b] 2 Ld. Ray. 1303.
[c] 1 Str. 48, 143. 1 Salk. 67, &c.

Some Things are particularly enjoined to be done in *Eaſter* and *Michaelmas* Seſſions,* and cannot be done in any other. In *Eaſter* Seſſions, Relief for maimed Soldiers is to be raiſed by an Aſſeſſment, the Wages of Labourers taxed, Treaſurers for the County-Stock are to be appointed, and the Prices of the Carriage of Goods are to be ſettled. In *Michaelmas* Seſſions, the Juſtices who are to controul the Eſtreats of Sheriff's muſt be choſen by the *Cuſtos Rotulorum*, or by the Eldeſt of the *Quorum*; or the Prices of Victuals may then be aſſeſſed, or at *Eaſter*.

* Dalt. 185. &c.

[d] One ought not to be indicted and tried the ſame Seſſions. *Qu.*

[d] 3 Cro 438, 448. Dalt ch. 185, p. 515, 517. Contra.

Beſides Trials upon *Traverſe*, *i. e.* where the Party takes Iſſue, or denies the chief Matters of the Indictment, or the Point of the Indictment, the Juſtices make *Orders* upon hearing of Complaints, which if diſobeyed, they may bind the Delinquent to appear and anſwer the Contempt, or immediately commit him to Priſon, till Obedience to the Order is performed. But an Order of the Quarter-Seſſions may be removed by a Writ of *Certiorari*[e] into the *King's Bench*, and quaſhed for Inſufficiencies appearing upon the Order; or it may be ſent back again by *Procedendo*. Strictneſs of Words are not required in an[f] *Order* of Seſſions, as in an Indictment. [See 5 Geo. 2. ch. 19. *which obliges Juſtices at the Quarter-Seſſions, to determine Appeals according to the Merits, notwithſtanding Defects of Form in the original Proceedings; and Perſons ſuing Writs of* Certiorari *to remove Orders made on ſuch Appeals, to give Security to proſecute the ſame with Effect.*]

2 Inſt. 568. 4 Inſt. 164.
[e] See of Writs, ch. 4. poſt.
[f] 1 Vent. 37.

In this Court ſeveral Statutes are to be *proclaimed* by expreſs Command in the ſaid Statutes.

[g] In ſome Counties the Seſſions are uſually adjourned, for Diſpatch of Buſineſs, to a private Chamber; where four Juſtices make Orders concerning Matters of Importance, to promote ſome private Deſign, *&c.* *Quære*, If ſuch Orders are good.

[g] Dalt. ch. 185. p 518.

There is ſometimes kept a *Special* or *Petty* Seſſions by ſome Juſtices at an Inn, *&c.* for the more ſpeedy Diſpatch of Buſineſs in the Neighbourhood; as for licenſing Alehouſes, taking the Accounts of the Overſeers of the Poor, and Surveyors of the Highways, and to get Information of the State of the Highways, and for examining the Regiſter-Books of Rectors, and Vicars, as to *Affidavits* for burying in Woollen, *&c.*

[*By* 22 G. 2. ch. 46. § 14. *No Clerk of the Peace or his Deputy, or Under-Sheriff or his Deputy, ſhall act as a Solicitor, Attorney, or Agent, at any General or Quarter Seſſions for the County or Place where he ſhall execute ſuch Office, under the Penalty of Fifty Pounds.*]

Several *Corporations* have their Quarter-Seſſions within their own Limits. [See of *Juſtices* of the *Peace*, *B.* 1. *ch.* 7. *ante.*]

Of the Sheriff's Turn.
[a] 2 Inſt. 70, 71.
4 Inſt. 260.
Hawk. P. C. B. 2. ch. 10.
4 Black. Com. 270.

XIII. The Sheriff's [a] *Turn* (from *Tour*, a Circuit) is a Court of Record, held in the uſual Place before the Sheriff twice every Year, (*viz.*) within a Month after *Eaſter*, and within a Month after *Michaelmas*, for Criminal Cauſes. Otherwiſe, if held at any other Time, the Preſentments there are void. [See *Magna Charta*, *chap.* 35. and the 31 *Ed.* 3. *St.* 1. *ch.* 15.] It is the King's Leet throughout the County, though it is held in every particular Hundred, [See the Statute of *Marlebridge*, *ch.* 10.] and the Sheriff is Judge of it, as of a Court incident to his Office. The Style of this Court is *Curia viſus Franci plegii Domini Regis tent. apud* A. *coram Vicecomit. in Turno ſuo primo Die*, *&c.*

[b] 2 Inſt. 70.
4 Inſt. 259, 260.

All [b] Eccleſiaſtical Cauſes were anciently determined in the Turn; and the Biſhop, with the Sheriff, did go in Circuit twice every Year, through every hundred in the County.

Thoſe Things are inquirable here, which are inquirable in a Leet. For the Court-Leets were taken out of the Turn. [See *Mag. Chart. ch.* 17. and 2 *Inſt.* 32. 28 *Ed.* 3. *ch.* 9. 1 *Ed.* 4. *ch.* 2. and of the *Court-Leet*, *infra.*]

[c] 8 Rep. 38, 39.

[c] An *Offender* here ſhall be *amerced*, and there ſhall be a *Diſtreſs* or Action of Debt for that Amerciament. But the Sheriff may impoſe a a Fine on any that are guilty of an Offence in the Face of the Court, and on Officers neglecting Duty. And for ſuch Fine may diſtrain or bring an Action of Debt.

Of the County Court.
[d] 2 Inſt. 70, 71.
4 Inſt. 266.
1 Black. Com. 377.
3 Black. Com. 35.
4 Black. Com. 404, 407, 409, 413, 415, 417, 434, 82.
[e] 2 Inſt. 225.
4 Inſt. 266
6 Rep. 11, 12.
[f] 2 Inſt. 312.
4 Inſt. 266.
1 Ventr. 65.
2 Roll. Abr. 317.
2 Danv. Abr. 306.

XIV. The [d] *County*-Court (*Curia Comitatus*) is held from Month to Month by the Sheriff, or his Under-Sheriff, upon a certain Day; the Month being computed by twenty-eight Days, and not according to the Calendar. [See *Mag. Chart. ch.* 35. and 2 & 3 *Ed.* 6. *ch.* 25.]

It may be kept at any Place within the County by the Sheriff, unleſs he is reſtrained by Statute. [7 & 8 *W.* 3. *ch.* 25.]

This Court is no Court of Record [e] but only a Court-Baron. The Freeholders or Suitors of this Court are the *Judges*, not the Sheriff. The firſt *Proceſs* is a *Diſtringas*, or Diſtreſs, till the Defendant doth appear; but no *Capias* can iſſue from this Court.

[f] This Court is for Civil Cauſes, and doth hold Pleas betwixt Party and Party, where the Debt or Damage is under 40*s.* But it ought not to ſuffer the Plaintiff (as is too often practiſed) to divide his Debt into ſeveral Plaints under 40*s.* to empower this Court to hold Plea of it. For in this Caſe the Defendant may have a Prohibition. It hath not Cognizance of Treſpaſs *Vi et Armis*, becauſe a Fine is thereby due to the King, which it cannot impoſe. But by Virtue of a Writ of *Juſticies* the Court may hold Plea of Treſpaſs *Vi et Armis*, and of any Sum, or of all Actions Perſonal above 40*s.* For this Writ is in the Nature of a Commiſſion to the Sheriff, and is *Vicontiel*, (i. e.) belongs to the Sheriff, is triable in the County-Court and is not returnable. In a *Replevin*, the Sum may be above 40*s.* yet if *Freehold* is pleaded by the Defendant, this Court can proceed no further; for Freehold ſhall never be tried without Writ, therefore the Cauſe muſt be removed; as when a Defendant avoweth for *Damage-Feaſant*, and the Plaintiff juſtifieth by Reaſon of Common of Paſture.

[a] 4 Inſt. 266.
See ante.

[a] A *Coroner* is to be choſen here in full and open County by the Freeholders of the County, by Force of the King's Writ; and is to be preſent

ſent in this Court, to pronounce Judgment of Outlawry [b] upon the *Exigent*, after *Quinto Exactus*, at the fifth Court, if the Defendant doth not appear.

[c] *Knights* of the *Shire* for the Parliament, and *Verderors* of the Foreſt, are here likewiſe to be choſen.

[b] See Ch. 4. § 3. and Ch. 5. §. 1. poſt.

[c] 2 Inſt. 559.

By 11 H. 7. ch. 15. *The Offences of Sheriffs and Bailiffs in deceitfully entering Plaints, and not duly warning the Defendants in County-Courts, are examinable by Juſtices of the Peace, and the Offenders ſhall forfeit* 40 s. *for each Offence.*

See 23 *Geo.* 2. *ch.* 33. For the preventing Delays and Expences in the Proceedings in the County-Court of *Middleſex*, and for the more eaſy and ſpeedy Recovery of ſmall Debts in the ſaid County-Court.

XV. [d] The *Hundred*-Court is held before a *Steward*, but the *Suitors* are the *Judges*. It is derived out of the County-Court for the Eaſe of the Subject, and conſequently is no Court of Record, having like Juriſdiction. It may be held every three Weeks. Theſe Courts are *Franchiſes*, and the Sheriff hath nothing to do with them.

Of the Hundred-Court. 2 Black. Com. 34. 4 Black. Com. 404.

[d] 2 Inſt 71. 4 Inſt. 267, 6 Rep. 12. See ante.

XVI. [e] The *Leet* or *View of Frank-Pledge*, (from *Free-Pledge*, Surety for Freemen) is a Court of Record, held before the *Steward* of the Leet, that the King may be certified, by the View of the Steward of the Manners of the People within that Precinct, for the Preſervation of the King's Peace, and the Puniſhment of ſeveral Offences againſt the Publick. For this Reaſon every one muſt be within ſome Leet. None can be of two Leets, unleſs perhaps one hath not a General Juriſdiction. For then the Inhabitants within ſuch a private Leet muſt attend the Sheriff's Turn for all other Matters, that are not within the Cognizance of the private Leet. If one's Houſe ſtands in two Leets, he is ſaid to be Commorant in that where his Bed ſtands. The Precinct of the Frank-Pledge is called *Decenna*; becauſe it commonly conſiſted of ten Houſes. The People did heretofore undergo great Trouble in travelling to the Sheriff's Turn, therefore Leets or Views of Frank-Pledge were granted to Lords of Hundreds and Manors and leſſer Franchiſes, and to Mayors of Cities, *&c.* out of the Sheriff's Turn. [See 12 *Ed.* 4. *ch.* 8.] Upon this Account, there is a Duty in many Leets *De Certo Letæ*, towards the Charge of obtaining the Grant of the Leet. Yet theſe Courts are ſtill the King's Courts, tho' the Profit goes to a common Perſon, or to a Subject.

Of the Court-Leet.

[e] 2 Inſt. 71, 72, 73, 99, 122. 4 Inſt. 261, 263, 265. 2 Cro. 584. 3 Cro. 76. 2 Danv. Abr. 289, 290, 293. Hawk. P. C. B. 2. ch. 10, and 11. 4 Black. Com. 270, 404, 417.

[f] Leets may be held by *Charter* or *Preſcription*. By *Charter*, on the ſame *Days* contained in the Charter. By *Preſcription*, on certain or uncertain Days, according to Uſage. For it is ſaid, that the Statute of *Magna Charta* (which provides that no Leet ſhall be holden but twice in the Year) was in Affirmance of the Common Law, and therefore that one might preſcribe againſt it, or that that Statute, and 31 *Ed.* 3. *St.* 1. *ch.* 15. extend only to the Sheriff's Turn and to thoſe Leets only, that have been ſince granted out of the Turn; not to thoſe that were before the Statutes. But they muſt be kept in a certain and determinate *Place* within the Precinct. A Man may preſcribe for a Leet, to inquire of one or two Articles only, as before hinted.

[f] 1 Inſt 115. a. 2 Inſt. 72. 1 Cro. 125, 245.

The *Steward* is the [a] Judge, as the Sheriff is in the Turn. All *Freeholders* within the Precinct are obliged to come to it, and all *other* People above the Age of twelve Years, and under ſixty, except Peers, Clergmen, Women,

[a] 6 Rep. 12. 8 Rep. 38. 2 Inſt. 120, 121.

Women, and Tenants in Ancient Demeſne. [See Stat. of *Marlebridge* 52 *H.* 3. *ch.* 10.] The *Jury* ought to conſiſt of twelve Freeholders at leaſt, to inquire and preſent all Things preſentable. If there are not twelve Freeholders Reſiants to be ſworn on the Jury, or any Suitors, the Steward may cauſe Strangers, that come within the View or Precinct, to be of the Inqueſt or Jury. No one is bound to attend on the Account of his *Lands* lying within the Precinct, but only in reſpect of his perſonal Reſidency.

The Steward hath Power and Authority in this Court. 1. To elect Officers, as Conſtables, Tithingmen, Haywards, Ale-Taſters; [*Qu.* If the Homage are not Electors of Common Right.[b]] To puniſh Offenders by the *Common Law*, not by Statute, unleſs the Statute gives Authority, [See 18 *Ed.* 2.] but in no Caſe with Death. Petty Treaſons, Felonies, Treſpaſſes *Vi et Armis* are inquirable here by the Jury, and may be preſented in this Court, but are not puniſhable here. They are to be certified by the Steward to the Juſtices of the Peace at the next Quarter-Seſſions;[c] other Offences may be inquired of, preſented, and puniſhed; ſome by *Common Law*, and ſome by *Statutes*.

This Court hath Cognizance[d], by *Common Law*, or by *Statute*, of tipling in Ale-houſes, Miſdemeanors of Ale-Connors; Affrays, Aſſaults whereby Bloodſhed enſueth; Common Barretors, Bawdy-Houſes, Miſdemeanors of Conſtables for neglecting to keep Watch and Ward, and to execute their Office upon Vagabonds and ſturdy Beggars; Defects in Bridges, Cauſeways, and Highways; Deſtroyers of ancient Bounds to diſtinguiſh Pariſhes, Tithings, and Commons; Miſdemeanors of Bakers, that do not obſerve the Aſſize of Bread; Brewers, that do not obſerve the Aſſize of Ale and Beer; Offences of Butchers, Curriers, Cottages and Inmates, Decenners or Suitors reſiant not appearing at the Leet; Eſtrays, Waifs, Treaſure-Trove, and Goods wrecked belonging to the King, not to a Subject; Offences of Eaves-droppers, of thoſe that neglect to hold a Fair or Market, Foreſtallers, Regrators, and Ingroſſers, unqualified Perſons keeping Guns, Dogs, or Engines to deſtroy the Game; unlawful Games, common Hedge-Breakers, thoſe that neglect to make Hue and Cry after Robberies and Felonies committed, Miſdemeanors of Higlers, Innholders, of thoſe that give Lands in Mortmain without Licence, Millers, Nightwalkers, common Nuſances; the Want of Stocks, Pillory, and common Pounds; Pound Breaches, Reſcous, Scolds, Miſdemeanors of Shoemakers, Searchers and Sealers of Leather; thoſe that put Stonehorſes of two Years old into a Common, Offences in Victuallers, falſe Weights and Meaſures, *&c.*

Note,[e] That a Preſentment in a Court-Leet, or Sheriff's Turn, after the Day of Preſentment, ſubjects the Party forthwith to a Fine or Amerciament, and is not traverſable, unleſs it toucheth the Party's Freehold; as that one ought to cleanſe the Highway, by Reaſon of his Tenure. Here the Courſe is to remove ſuch Preſentment into the King's Bench by *Certiorari*, where the Party may traverſe it. Neither the Turn or Leet have Power to try any Manner of Traverſe. [See *Mag. Chart. ch.* 17. 1 *Ed.* 4. *ch.* 2.]

The Freeholders in a Leet may make *By-Laws*, relating to the Publick Good, for Matters within the Leet; and they ſhall bind every one, if they are for the Publick Good, or for the Commonwealth. Otherwiſe if they are for a Private Intereſt, they bind thoſe only that agree to them, and muſt be in Purſuance of a Cuſtom to make ſuch By-Laws.

[b] 1 Ld. Ray. 70.

[c] 4 Inſt. 265.

[d] 2 Danv. Abr. 290, &c. 4 Inſt. 262, &c.

[e] Dyer 13, 14. Finch 386. Kitchin 86, 91, 158. 2 Inſt. 32. H. P. C. 175. 1 L. Ray. 470.

The Method of *Puniſhment* is by *Fine* and *Amerciament*, which are incident to Court-Leets.

[a] A *Fine* here ſignifies a pecuniary Puniſhment, aſſeſſed by the Steward for an Offence or Contempt committed in Court, or by publick Officers out of Court, in Adminiſtration of their Offices. A Fine is always to be aſſeſſed by the Steward, and is not to be affeered; tho' ſometimes it is called an Amerciament. For a Fine the Lord may have an Action of Debt, or diſtrain of common Right. This is the only Court that can fine and not impriſon. [b] An *Amerciament* (*Miſericordia*, for it ought to be aſſeſſed *mercifully*) is a pecuniary Puniſhment, aſſeſſed by the Homage or Jury, for Offences committed out of Court by private Perſons, to be mitagated by *Affeerors* [from *Affeurer*, to tax] affirming the Reaſonableneſs thereof upon their Oaths, where no expreſs Penalty is preſcribed by the Statute. An Amerciament is always to be aſſeſſed by the Homage. And if an Amerciament is agreed on, [c] the Lord may have an Action of Debt for it, or diſtrain for it of common Right, and impound the Diſtreſs, or ſell it at Pleaſure [*Qu.*] But he cannot impriſon for it. A Man cannot be amerced in a Leet for ſurcharging the [d] Common, or for digging in the Common; becauſe this concerns the Private, and not the Publick Intereſt, and belongs rather to the Court-Baron to inquire of it.

[a] Coke's Compl. Copyholder, § 26. 8 Rep. 38, 39, 40. 11 Rep. 43. 45. 1 Inſt. 126. b. 127. a. 2 Danv. 292. 1 Ld. Ray. 70, 71.
[b] 8 Rep. 39, 40, 59. 2 Wilſon 20. 1 Inſt. 126.b. 127. a. Coke's Compl. Cop. § 26.
[c] 8 Rep 41, 42. Coke's Compl. Cop. § 31.
[d] 1 Roll. Abr. 541. 2 Roll Abr. 83.

[e] Every one that hath a Leet or Market ought to have a Pillory, Tumbrel, *&c.* to puniſh Offenders. [See 51 *H.* 3. *St.* 6.] For Want thereof, as well as for other Neglects, the Lord may be fined, or his Liberty ſeized. Stocks are to be provided at the Charge of the Town. For originally they were not to puniſh, but to keep Men in hold.

Note, That the greateſt Part of the Buſineſs of the *Turn*, and *Leet*, hath declined for ſeveral Years, and is devolved on the *Quarter-Seſſions*.

[e] 1 Inſt. 233 a. 3 Inſt. 219. 9 Rep. 50. Kitch. 13. 1 Danv. Abr. 289.

XVII. [f] The *Court-Baron* is a Court which every Lord of a Manor (anciently called a *Baron*) hath within the Precinct of his Manor. It is no Court of Record, and therefore County-Courts, Hundred-Courts, *&c.* are not of Record; becauſe they are but Courts-Baron. A Court-Baron is an inſeparable Incident to a real Manor, not to a nominal Manor, where the real Manor has been once deſtroyed, by granting away the Demeſnes, or Services. It muſt be held by Preſcription, for it cannot be created at this Day. A Court-Leet is not incident to a Manor, but he that hath a Manor may alſo have a Court-Leet, to be held within his Manor by Preſcription or Grant from the King. And that which of a Publick Nature is tranſacted in a Court-Leet, when it is held with a Court-Baron, ſhall be applied to the Court-Leet, as private Matters ſhall be applied to the Court-Baron. [See of *Eſtates* by *Copy of Court-Roll.* *B.* 2. *ch.* 1. *ante.*]

Of the Court Baron

1 Inſt. 58. a. & b. 2 Inſt. 5. 4 Inſt. 268. 4 Rep. 33. 6 Rep. 11, 12, 64, 65, 66. Coke's Compl. Cop. § 31. 2 Black. Com. 91. 3 Black. Com. 33. 2 Black. Com. 404.

A Court-Baron muſt be holden on ſome Part of the Manor. For if it is holden out of the Manor, it is void; unleſs there is a Cuſtom to hold Courts at one Manor for all, where the Lord hath ſeveral Manors.

This Court is of [a] *Two* Natures. 1. By *Common Law*, which is the *Barons* or *Freeholders Court*, or the Court-Baron that is incident to every Manor, of which the Freeholders being Suitors (Men not Women) are the Judges, and the Steward only Regiſter. It cannot be a Court-Baron without Two Suitors at leaſt. [b] A Jury finds that there is ſuch a Manor, but that for twenty Years there has been but one Freehold Suitor; it ſhall not be intended that the Manor is deſtroyed, but that it is ſuſpended *pro Tempore* [*Qu.*] This Court may be kept from three Weeks to three Weeks.

[a] 4 Rep 26. 6 Rep. 11, 12. 1 Inſt. 58. a, 2 Inſt. 119.
[b] 2 Ld. Ray. 864.

Weeks. 2. By *Cuſtom*, which is called the *Cuſtomary Court*, though it is kept but very ſeldom. This doth concern Cuſtomary Tenants and the Copyholders, whereof the Lord or his Steward is Judge. The Court-Baron may be of this double Nature, and the Rolls contain Matter that concerns both, or One may be without the other. But as there can be no Court-Baron at Common Law without Freeholders, ſo there cannot be a Cuſtomary Court without Copyholders, or cuſtomary Tenants. And then, though it is not a Manor in Law without Freeholders, yet it is ſuch a Manor, that the Lord may keep Courts, *&c.* for Copyholders.

This Cuſtomary Court cannot be held out of the Manor.

[c] 2 Inſt. 31.

[d] Bract. Lib. 3 Tract. 2. ch. 35.

[c] The Franchiſes of *Infangthefe* and *Outfangthefe*, to be heard and determined within Courts-Barons, are antiquated or gone. *Fang* in the *Saxon* Tongue ſignifies to take or catch, and *Thefe* a Robber. [d] So that the Words ſignify a Privilege or Liberty, granted unto Lords of certain Manors, to judge any Thief taken within their Fee; whether one of their own Men living *in* the Manor, or one living out of the Manor, that is taken there.

The *Perſons* concerned in this Court are the *Lord*, the *Steward*, the Lord's *Tenants*, and the *Bailiff*.

[e] 4 Rep. 24. 9 Rep. 40, 50, 51. 1 Inſt. 38. b.

[f] 1 Inſt. 58. b. 59. b. 1 Roll. Abr. 499.

The *Lord* is Chief in Place of Authority. [e] His Acts are good tho' an Infant, *Non Compos Mentis*, outlawed in a Perſonal Action, excommunicate, *&c.* And tho' but Tenant for Years, at Will, by Statute-Merchant, *&c.* he is *Dominus pro Tempore*, and a lawful Lord of the Manor for the Time being, not only to make Admittances upon Surrenders and Deſcents, but to grant voluntary Copies of ancient Copyhold Lands, which come into his Hands. Even the Voluntary Grants by Copy, made by ſuch particular Lords, ſhall bind him that hath the Freehold or Inheritance; becauſe all theſe are lawful Lords for the Time being. But Diſſeiſors, Abators, Intruders, and others that have defeazable Eſtates, ſhall not bind others by their Voluntary Grants. A Tenant at Sufferance ſhall not bind them, becauſe he is in by Wrong; tho' Admittances made upon Surrenders or Deſcents, by Diſſeiſors and others in Poſſeſſion that have defeazable Titles, ſhall ſtand good, againſt them that have Right; becauſe it was a lawful Act, and they were compellable to do it. Nay if the Lord of a Manor for the Time being is Leſſee for Life or Years, Guardian or Tenant at Will of a Manor, and does take a Surrender into his Hands, and before Admittance his Eſtate is determined, yet the Lord that cometh in above, ſhall be compelled to make Admittance according to the Surrender; for there was *Legitimus Dominus pro Tempore*. What Cuſtom doth confirm to a Copyholder, the Law will allow him; yet thoſe Acts that are not ſtrengthened by Cuſtom, have no longer Continuance, than the Lord's Eſtate continueth. And therefore if a Lord for Life of a Manor granteth a *Licence* to a Copyholder to alien, and dieth, the Licence is deſtroyed and the Power of Alienation ceaſeth.

[a] Coke's Compl. Copyholder, § 44.

[a] The Lord's *Authority* doth conſiſt chiefly, 1. In puniſhing Offences and Miſdemeanors committed within his Precincts; as for Non-Performance of Cuſtoms, breach of By-Laws, *&c.* 2. In deciding Controverſies about the Title of Copyhold lands lying within his Bounds; where he may redreſs Matters as a Chancellor in Equity. Theſe Authorities concern the Court-Baron, properly ſo called. 3. In admitting Copyholders upon Voluntary Grants, Surrenders, or Deſcents, which may

be done by him [b] out of the Manor, in what Place the Lord pleaſeth. 4. In giving Licence to Copyholders, to alien by Deed, or to demiſe for Years, *&c.*

[b] Ibid.
4 Rep. 62, 27.
1 Inſt. 59. a. 61. b.

The [c] *Steward* (from *Stede* a Place, and *Ward* a Governor) is he that in the Lord's Abſence ſitteth as Judge in Caſes of Copyhold in the Court, (but he is only a Regiſter in the Freeholders Court) to enter Plaints, Pleas, Surrenders, Admittances, Fealties, and to prove Teſtaments, and to commit Adminiſtrations of Perſons dying within the Manor, *&c.* [d] In the Lord's Abſence he may alſo puniſh Offences, determine Controverſies, redreſs Injuries, *&c.* he acts ſometimes in the Lord's Name. Stewards for the moſt Part have Patents Appointments in Writing, for their Offices; yet they may be retained by Parol, or Word of Mouth, and they ſhall continue ſo until countermanded. But in the King's Manors a Steward cannot be retained by Parol. Neither can a Corporation make any ſuch Officer without Writing. Yet if he is retained by Parol by a Corporation, his *Judicial* Act ſhall ſtand good, though his Authority is grounded upon a wrong Foundation. But Acts which he performeth as Cuſtom's Inſtrument (not as Judge; as Voluntary Admittances, *&c.*) can never bind.

[c] Coke's Comp. Cop. § 45.
6 Rep. 48.
1 Ventr. 153.
[d] Coke's Comp. Cop. § 45.
4 Rep. 30.
1 Inſt. 61. a. & b.
Kitch. 165, 166, 167.

[e] A Steward of the Court may take *Surrenders* in any Place without Cuſtom; but he cannot, at any Court holden *out* of the Manor, make *Grants* of Copyhold Eſtates, or *Admittances*, unleſs by Cuſtom, or expreſs Words in his Patent, or by ſpecial Authority given him by the Lord.

[e] 4 Rep. 26, 27.
Coke's Comp. Cop. § 45, 46.
1 Ld. Ray. 763 Contra.

The Office of a Steward may be [f] forfeited by *Abuſer*, *Non-Uſer*, and *Refuſer* to keep Court, *&c.*

1 Leon. 289.
2 Danv. Abr 179, 189, 258.
[f] 9 Rep. 50.
See ante.

An [g] *Under-Steward* is the Steward's Deputy, and his Authority is equal to the Steward's, and though the Under-Steward can take a *Surrender* out of Court, he cannot make any Admittance out of Court, without ſpecial Authority, or particular Cuſtom. A Steward muſt have [h] ſpecial Words in his Patent, to make an Under-Steward, unleſs in caſes of Neceſſity; as where the Office of Stewardſhip deſcends to an Infant, or is granted to a Peer, then in Reſpect of Infancy or the Dignity he may make a Deputy.

[g] Coke's Comp. Cop. § 46.
Kitchin 165, 166, 167.
[h] 9 Rep. 49.

The *Tenants* are the Freeholders and Copyholders.

The [i] *Bailiff* is the Crier, and his Duty is to execute the Proceſs of the Court, to preſent all Pound-Breaches, and all Chattels waifed and ſtrayed.

[i] 1 Inſt. 234. b.
1 Roll. Abr. 339.

As for the *Juriſdiction* of the Court-Baron.

1. The [a] *Freeholders-Court* conſiſts in hearing Plaints of Copyhold Lands (for Copyholders ſhall not implead, except againſt the Lord himſelf, or be impleaded in the King's Courts for their Tenements by the King's Writs, tho' a Copyholder's Leſſee for one Year may bring an Ejectment) and for Debt, Treſpaſs, *&c.* under 40 *s.* (not of Treſpaſs *Vi et Armis*, becauſe they cannot impoſe a Fine) where the Freeholders or Suitors are Judges. [b] Theſe muſt be Twelve; though the Lord may hold a Court-Baron for other Purpoſes, where there are but two Tenants. But if there is Iſſue betwixt Party and Party, there muſt be Twelve; where the Trial by Jury is by Conſent, the *Proceſs* is the ſame as in the County-Court, by Diſtreſs infinite. But if the Defendant in Treſpaſs appears and pleads Freehold, the Court ſhall ceaſe. Every Stranger that comes within the Manor may be ſued there in Debt, Treſpaſs, *&c.* under

[a] Lit. 76.
4 Rep. 26.
1 Inſt. 58. a. 117. b. 118. a.
Coke's Comp. Cop. § 31.
[b] Coke's Comp. Cop. § 31.

der 40 s. Yet if any foreign Plea is pleaded, it hath no Juriſdiction. And though every Copyholder may be impleaded in the Court of the Lord by Plaint, yet the Cauſe may be removed by the *Plantiff* by *Tolt* to the County-Court, and from thence by *Pone* into the Common Pleas; but the *Defendant* may have a *Recordare facias* into the King's Bench or Common Pleas. [c] *Execution* is only by Diſtreſs and impounding till the Party is ſatisfied. There is no Power to ſell, or deliver the Diſtreſs to the Party, neither is the Body to be taken in Execution. By Cuſtom a *Levari Facias* may be awarded. But the Goods cannot be ſold without Cuſtom.

[c] Finch 470, 471. 1 Roll. Abr. 543. 2 Danv. Abr. 296.

1 Inſt. 60. a.

In this Court an Heir of a Copyholder may bring a Plaint in the Nature of an Aſſize of *Mortdanceſtor*; and upon a Recovery there, a Writ of Falſe Judgment doth not lie; but the Remedy is by Petition to the Lord, and he for Cauſe may reverſe the Judgment. And the Court of Chancery will correct the Proceedings in the Lord's Court, if any Thing were done therein againſt Conſcience; and yet no Appeal or Writ of Error lies of ſuch Judgment.

1 Wms. 330.

Note, That Actions are ſeldom entered in this Court-Baron, for it is kept not above twice in the Year. Whereas it was at firſt intended that they ſhould be held every three Weeks.

A common Recovery may be had in this Court, if the Cuſtom of the Manor can ſupport it.

[d] 4 Rep. 26. 11 Rep. 17, 18. 1 Inſt. 58. a. 1 Roll. Abr. 527.

2. [d] The *Copyholders* Court, (or *Cuſtomary-Court*, to be held upon ſome Part of the Manor) is for making *Voluntary* Grants upon Eſcheats and Forfeitures, and for *Grants* and *Admittances* upon Surrenders and Deſcents on Preſentment of the Homage or Jury. The Homage may inquire of all Perſons, that owe Suit to this Court, and make Default, and preſent their Names. It may inquire of the Death of Tenants after the laſt Court, and who is the next Heir, *&c.* of fraudulent Alienation of Lands, to defeat the Lord of his Profits; Of Rent, Cuſtom, or Service withdrawn; Of Lands concealed, or uſed without Licence of the Lord; Of Eſcheats and Forfeitures; Of Encroachments on any of the Lands of the Lord without Licence; with-holding Court-Rolls, Rentals, or other Evidences appertaining to the Lord; of Mortmain; Letting Copyhold-Land for a longer Time than a Year and a Day without Surrender, unleſs it is by Cuſtom that one may let for longer Time; Alienations of Copyhold by Deed; cutting down of Trees by Copyholder without Cuſtom or Licence; Copyholder ſuffering his Houſes to decay, and not repairing them; of Surrenders by Copyholders after the laſt Court to the Uſe of another, and not brought into Court; of Suit not performed at the Lord's Mill by Reaſon of Tenure; of Waſte by Tenant for Life in Houſes, Lands, Woods, Gardens; of Fiſhing, Hawking, or Hunting within the Liberty of the Lord without Licence; taking away Swans or their Eggs. The Homage may alſo inquire of Surcharge of Common with commonable Beaſts, or of putting Beaſts into the Common, that are not commonable; of Treſpaſs in the Common, or Waſte of the Lord, by digging, building, or Incloſure; of Treſpaſſes in Corn, Graſs, Meadow, Paſture, Woods, Hedges; of chaſing Cattle into the Manor, and rechaſing them; Reſcous and Pound-Breach; removing Mere-Stones or Land-Marks; of Bailiff, and Conſtable, or Hayward, neglecting his Office; of By-Laws or Orders not obſerved. [a] For a Court-

[a] 2 Danv. Abr. 457, 458.

Court-Baron may make By-Laws by *Cuſtom*, as well as a Leet; and add a Penalty upon the Breach of a By-Law; which cannot be affeered, for a Penalty differs from an Amerciament.

In this Court there need not any Freeholders.

The Method of *Puniſhment* is by [b] *Amerciament.* For Amerciaments are incident to Courts-Baron, as well as to Courts-Leet.

After the Homage hath preſented *Offences*, the Steward cannot amerce, without three *Affeerors* are ſworn to *affeer* or *moderate* the Amerciament; and then the Lord may have an Action of Debt in his Court-Baron [or rather elſewhere] for an Amerciament affeered (not diſtrain for it without Preſcription) for the Suitors are Judges there, and not the Lord, as hath been ſaid. The Lord cannot amerce any one in his own Court for Treſpaſs done to himſelf; for he cannot be Judge in his own Cauſe. *Fines* are never incident to Courts-Baron as ſuch. Fines are incident to ſome few Manors only, where there are Courts-Leet.

[b] Coke's Compl. Cop. § 26.
1 Roll. Abr. 211.
11 Rep 45.

A *Court* of *Survey* differs only from a *Court-Baron*, inaſmuch as beſides the ordinary Buſineſs of a Court-Baron, every Tenant is ſummoned to bring into Court his Leaſe, Copy, or Title to his Eſtate, to be ſurveyed by the Steward, when the Manor comes to a new Lord, *&c.* [c] But this Power is to be queſtioned. [See Stat. of *Marlebridge*, or 52 *H.* 3. *ch.* 22. 15 *Ri.* 2. *ch.* 12. 16 *Ri.* 2. *ch.* 2.]

[c] 2 Inſt. 142.

Of the Court of ancient Demeſne.

XVIII. [d] The *Court* of *Ancient Demeſne* belongs to a Manor of Ancient Demeſne, and is in the Nature of a Court-Baron, held by the King's Bailiff, or the Lord of the Manor, wherein the Suitors are Judges. It is no Court of Record. The Tenants have *Privilege* not to be ſued out of this Court, but have Juſtice by the Writ of *Right Cloſe* directed to the Bailiff or Lord. This Privilege doth not extend to perſonal Actions, in which the Title of the Freehold does not come in Debate. It extends to real Actions, or where the Realty of their Lands may come in Queſtion. Therefore Ancient Demeſne is a good Plea in Ejectment, Replevin, *&c.* [[e] but this Privilege extends only to *Freehold* Lands held of the Manor, not to *Copyhold* Lands which are Parcel of the Manor.] *

1 Black.Com. 286.
[d] 2 Inſt. 542, 543.
2 Black.Com. 99.
4 Inſt. 269, 270.
5 Rep. 105.
1 Roll. Abr. 321, &c.
See ante.
[e] 1 Ld. Ray. 43.
2 Cro. 559.
3 Lev. 405.

The Demandant in a Writ of Right Cloſe cannot remove the Plea out of the Court of the Lord upon any Account, tho' the Tenant may remove the Plea by *Recordare* for ſeven Cauſes. [See 4 *Inſt.* 269, 270.]

If falſe Judgment is given in this Court, the Demandant or Tenant ſhall have a Writ of falſe Judgment (not a Writ of Error) as it is in other Courts not of Record.

Lands in ancient Demeſne may be *extended* upon *Statutes*, and upon an *Elegit*; becauſe the Title of the Land is not directly put in Plea in the King's Courts. Regularly all general Acts of Parliament extend to ancient Demeſne.

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* *Ancient Demeſne* may be pleaded in Ejectment by leave of the Court, and upon a proper Affidavit. 2 *Burr. Rep.* 1047, 1048.

But the Court will not ouſt themſelves of Juriſdiction, in favour of ſuch a ſtrange wild Juriſdiction as this, without a very ſufficient Affidavit. *Ibid.*

Such Affidavit muſt ſhew, "That the Lands are holden of a Manor, which Manor "is itſelf ancient Demeſne; and that the Matter can be tried in the Court of that "Manor; and that there are Suitors there:" And it muſt ſhew, "That the Demandant has a Freehold." *Ibid.*

Domeſday Book will not ſhew whether the particular Lands are ancient Demeſne: It will only ſhew whether the Manor is ſo or not. 2 *Burr. Rep.* 1048.

XIX. The

Of the Court of the Coroner.
[a] S. P. C. 51. 2 Inſt. 32. 4 Inſt. 271. H. P. C. 170. 4 Black.Com. 271. 1 Burro. 19.
[b] 1 Str. 22.

XIX. The[a] *Court* of the *Coroner* is a Court of Record, to inquire where any one comes to a violent Death by Felony or Miſchance. He can inquire of no other Felony, but of the Death of a Man, and then *Super Viſum Corporis*, which no other can do.

If the dead Body is buried, or ſuffered to lie ſo long that it ſtinks before the Coroner hath viewed it, the Townſhip ſhall be amerced. The Coroner may take up a dead Body out of the Grave, to view it[b], for the taking of an Inqueſt, if there is no Danger of Infection by digging it up. If there is Danger, or if the Body is drown'd, and cannot be found, he ought not to proceed. In ſuch Caſes[c] the Inquiry may be by Witneſſes of the Felony, before Juſtices of the Peace, Juſtices of Oyer and Terminer, or in the King's Bench, if the Felony was committed in the County where that Court ſits. Inquiſitions of one found *Felo de ſe* are traverſable by the Executor or Adminiſtrator, the Inquiſition being removed into the King's Bench by *Certiorari*; and ſo are Inquiſitions in other Caſes in Point of *Offence*. (*Qu.*)

[c] 5 Rep. 110. 3 Inſt. 35. H. P. C. 29, 271. 2 Danv. Abr. 210. 2 Lev. 141, 152. 1 Ventr. 181, 182, 187.

2 Inſt. 32. 3 Inſt. 271. See of Appeals, ch. 5. poſt.

The Coroner may take an *Indictment* upon View of the Body, as alſo an *Appeal* within a Year after the Death of one ſlain, not after the Stroke. [See *Weſt.* 1. *ch.* 10.] He may likewiſe inquire of the Eſcape of the Murderer; and if it is found, that the Murderer eſcaped untaken, the Townſhip cannot traverſe ſuch Eſcape; and if a *Fugam fecit* is found before the Coroner, it is not traverſable[d]. [*Qu.*]

[d] Hawk. P.C. B. 2. p. 54. Contra.

[e] 2 Str. 1097.

He hath no Juriſdiction of Offences committed in the open *Sea* [e], between the high and low Water Mark when the Tide is in, but otherwiſe when the Tide is out; nor within the *Verge* of the King's Courts. [See the *Statutes infra.*]

[f] 2 Danv Abr. 209, 210, 211.

[f] Now as to the View of the Body. It is his Office, ſo ſoon as he is acquainted with the Suſpicion at leaſt of a violent Death, to ſend his Warrant or Precept to the Bailiff, and alſo to the Conſtable and Tithingman of the Hundred, *&c.* to ſummon twenty four ſufficient Men of the four, five, or ſix next Towns adjoining, that at a certain Day they come before him to ſuch a Place, to inquire upon View of the Body of *A.* *&c.* If the Body is buried, it is to be taken up[g], and the Coroner is to record the Names of thoſe that buried it. And if the Body has lain ſo long, that it cannot be judged how it came by its Death, that alſo muſt be recorded, that at the coming of the Juſtices of Aſſize, the Town where, *&c.* may be amerced upon the Sight of the Coroner's Rolls. If the Coroner and Jury are able to inquire of the Death, then they are to preſent the Manner of the Killing, whether the Party was killed by himſelf, or any other, or by ſome Miſchance. And the Coroner, to aſſiſt in the Inquiry, may ſend his Warrant for *Witneſſes* to appear, taking their Examination in Writing under their Hands. And if any one is to be tried for Felony, the Witneſſes muſt be bound by Recognizance, to appear at the next Aſſizes, to deliver their Knowledge of the Fact; and the Felon in the mean Time, is to be committed by the Coroner. The Jury upon Oath having brought in their Verdict, the Coroner muſt return the Inquiſition either of Murder or Manſlaughter by another, or *Felo de ſe*, or of a Killing by Misfortune, *&c.* to the next Gaol-Delivery of that County, or certify the ſame to the King's Bench. [See 3 *H.* 7. *ch.* 1.]

[g] 1 Str. 167. 1 Salk 377.

[a] Cro. 371. 1 Mod. 82. 1 Ventr. 181, 182, 352. 1 Str. 69, 533.

[a] For Miſmanagement in the Coroner, *&c.* the Filing of the Inquiſition may be ſtopped, or the Coroner may be ordered to attend, and amend his Inquiſition. If he hath been guilty of Corruption or Bribery in taking the Inquiſition, a *melius Inquirendum* may be awarded to ſpecial Com-

miſſioners, to take a new one, who ſhall proceed on the Teſtimony of Witneſſes, not upon a View of the Body. If the Inquiſition is good, he that is ſuſpected to have committed the Felony may be tried upon the Inquiſition, as well as upon an Indictment. [See 4 *Ed.* 1. *St.* 2. 3 *H.* 7. *ch.* 1. and 2 *Ph.* & *Mar.* *ch.* 13. where the Duty of a *Coroner* is ſet forth at large.]

[b] The Coroner ought to ſit upon the Body of every Priſoner, that dies in Priſon.

b 3 Inſt. 52, 91.

[See *Greenwood's judicial* and *miniſterial Office of Coroners*; and *Hawk. Pleas of the Crown*, *B.* 2. *ch.* 9.]

By Articuli ſuper Chartas, *or* 28 Ed. 1. ch. 3. *In caſe of Death within the* Verge, *the Coroner of the County ſhall act with the King's Coroner.*

2 Inſt. 549.

By 33 H. 8. ch. 12. § 1. & 3. *All Inquiſitions upon View of Perſons ſlain within any of the King's Palaces* [c] *or Houſes, or any other Houſe or Houſes, at ſuch Time as his Majeſty ſhall happen to be there abiding in his Royal Perſon, ſhall be taken by the Coroner of the King's Houſhold, without the Aſſiſtance of any other Coroner of any County.*

c See of the Ld. Steward's Court, ch. 2. poſt.

By 3 H. 7. ch. 1. *The Coroner is to have upon an Inquiſition found of Murder* 13 s. 4 d. *of the Goods of the Murderer. If he hath nothing, then of the Amerciaments of the Townſhip for the Eſcape, if there was an Eſcape in the Day-Time.* [See *Weſt.* 1. *ch.* 10.] But,

By 1 H. 8. ch. 7. *When one is ſlain by* Miſadventure, *The Coroner ſhall execute his Office without Fee, on Pain of* 40 s.

By 25 Geo. 2. ch. 29. *For every Inquiſition, not taken upon View of a Body dying in a Gaol, which ſhall be taken by any Coroner in any Place contributory to the Rates directed by* 12 Geo. 2. ch. 29. *the Sum of* 20 s. *and for every Mile which he ſhall be obliged to travel* 9 d. *ſhall be paid to him out of the Money ariſing by ſuch Rates.*

And for every Inquiſition taken upon View of a Body dying in a Gaol by any Coroner, ſo much, not exceeding 20 s. *ſhall be paid to him, as the Juſtices at Seſſions ſhall think fit, out of the Money ariſing by the ſaid Rates.*

Provided that over and above ſuch Recompence, the Coroner upon an Inquiſition upon the View of a Body ſlain or murdered, ſhall have the 13 s. *and* 4 d. *as granted by* 3 H. 7.

Coroner taking more than as above limited, guilty of Extortion.

No Coroner of the Houſhold and Verge, of the Admiralty, Durham, London, Southwark, *or any Franchiſe belonging to the City of* London, *nor of any City, Borough, Town, Liberty, or Franchiſe, not contributory to the ſaid Rates, within which ſuch Rates have not been uſually aſſeſſed, ſhall be intitled to any Fee or Recompence given by this Act. But all ſuch Coroners may take ſuch Fees and Allowances as they are intitled to by Law, or as ſhall be given or allowed them by the Perſons by whom they are appointed.*

If any Coroner, not appointed by annual Election or Nomination, or whoſe Office is not annexed to any other Office, ſhall be convicted of Extortion, wilful Neglect of Duty, or Miſdemeanor in his Office, the Court before whom he ſhall be convicted may adjudge him to be amoved from his Office, and thereupon, if choſen by Freeholders, a Writ de Coronatore amovendo & Eligendo *ſhall iſſue.*

If not choſen by Freeholders, then the Perſon or Perſons intitled to the Nomination and Appointment of any ſuch Coroner, ſhall upon Notice of ſuch Judgment of Amoval, nominate and appoint another Perſon to be Coroner in his ſtead.

[See 4 & 5 *W.* & *M. ch.* 22. Concerning the *Pleading* of *Grants* to an Inquiſition returned by a Coroner. And ſee of the *Coroner*, *B.* 1. *ch.* 7. *ante*.

Of the Court of the Clerk of the Market.
[a] 4 Inſt. 273. See ante 203.

XX. The *Court* of the [a] *Clerk of the Market* is to inquire of Weights and Meaſures, whether they are according to the King's Standard or no.

Of the Court of Pie-Powders.
[b] 2 Inſt. 220, 221, 231. 4 Inſt. 272. 6 Rep. 12. 10 Rep. 73. 3 Black. Com. 32.

XXI. The *Court* of [b] *Pie-Powders* (*Curia Pedis Pulverizati*, becauſe for Contracts and Injuries done in the Fair or Market, Juſtice ſhall be done as ſpeedily as the Duſt can fall from the Foot) is incident to every Fair and Market, for by Grant of the Fair or Market it ſhall paſs.

It is a Court of Record, to be holden before the Steward of the Court, who is the Judge there.

As to the *Juriſdiction*.

1. The Cauſe of Action (for Contract, Slander, or Injury) muſt ariſe in the Fair or Market, and not before, nor in a former Fair or Market, nor after the Fair or Market. 2. It muſt be for ſome Matter concerning the ſame Fair or Market; and done, complained of, heard, and determined the ſame Day. 3. It muſt be within the Precinct of the Fair or Market. 4. The Plaintiff, or his Attorney, muſt take an Oath according to 17 *Ed.* 4. *ch.* 2. 1 *Ri.* 3. *ch.* 6. That the Contract, *&c.* was made during the Time of the Fair or Market, and within the Juriſdiction. But that concludeth not the Defendant in pleading to the Juriſdiction. The Trial is by Merchants and Traders in the Fair, and the *Judgment* againſt the Defendant ſhall be *Quod Amercietur*. A Writ of Error lies upon an erroneous Judgment.

But this Court is growing out of Uſe.

[c] 4 Inſt. 272. 1 Roll. Abr. 545. 2 Salk. 604.

There may be a Court of Pie-Powders by Cuſtom or Preſcription [c] without Fair or Market, which may hold Plea of Obligations, by Preſcription.

Of the Court of the Commiſſioners of Sewers.
[a] 4 Inſt. 275. 3 Black. Com. 73. 4 Burn Juſt. tit. Sewers.

XXII. The *Court of the Commiſſioners of* [a] *Sewers*, (from *Sewer*, a Paſſage or Channel for Water) is by Commiſſion under the Great Seal, according to 23 *H.* 8. *ch.* 5. where there is the Form of their Commiſſion and of their Oath. This Commiſſion is granted by the Lord Chancellor, Lord Treaſurer, and the two Chief Juſtices, or any three of them, whereof the Lord Chancellor to be one. This Commiſſion may laſt ten Years, unleſs repealed before that Time; and all Laws made by Virtue thereof ſhall continue in Force one whole Year after the ſaid ten Years, and the Juſtices of the Peace of the County have Power to execute the *Commiſſion* and the Laws for that Year, unleſs a new Commiſſion iſſueth forth in the mean Time.

By 3 Ja. 1. ch. 14. *All Walls, Banks, Ditches, Gutters, Sewers, Gates, Cauſeways, Water-Courſes, Bridges, and Streams, within two Miles of* London, *falling into the River* Thames, *ſhall be ſubject to the Statutes and Commiſſioners of Sewers.*

[b] 10 Rep. 141, 142, 143.

Their [b] *Buſineſs* is to repair Sea-Banks and Walls, to ſurvey Rivers, publick Streams, Ditches, Bridges, and other Defences, by the Coaſts of the Sea and Marſh-Grounds. But they cannot intermeddle, unleſs in Caſes where there is a publick Prejudice. For if they decree a Stream to be ſtraitned, ſo that the Meadow of a particular Perſon is overflowed; an Action will lie. Neither can they make a new River, or try new Inventions, at the Charge of the Country.

They may make a Tax or [c] *Rate* according to the Quantity and Quality of the Lands and Rents at their Diſcretions, upon all that are in Danger; even where one only ought to repair, if he is not able to do it, or where no Fault was in him, the Damage happening by Reaſon of the *extraordinary* Rage of the Waters. And if any Perſon refuſes to pay it, the Commiſſioners may grant a Warrant to diſtrain his Goods and ſell them. Lands alſo may be *ſold* for the Tax or Rate.

[c] 5 Rep. 100. 10 Rep. 139, 140. 2 Str. 1127.

Tho' by the Act the Commiſſioners have Authority to do according to their *Diſcretions*, [d] yet they are bounded by the Rules of Reaſon and Law. For Diſcretion is to *diſcern* betwixt Right and Wrong.

[d] 5 Rep. 100. 2 Inſt. 56, 298.

By 7 Ann. ch. 10. *Any ſix of the Commiſſioners may decree the Sale of Copyhold Lands.*

See 7 *Ann. ch.* 9. For giving the Commiſſioners of Sewers of *London* the ſame Powers, as Commiſſioners for Counties have.

The Commiſſioners may proceed by Jury, View, and Diſcretion, bounded by the Rules of Law, to inquire of any Annoyances, and to remove them, to inquire who have neglected to repair, *&c.* and the Jury may amerce for Neglects. The Commiſſioners may puniſh by Fine for Contempts in Court, or where their Officers neglect their Duty, *&c.* [e] But they cannot impriſon for diſobeying their Orders, as they may do for a Contempt in their Preſence.

[e] 1 Sid. 145.

[See 23 *H.* 8. *ch.* 5. 13 *El. ch.* 9. [f] But the Commiſſioners and their Proceedings are ſubject to the Juriſdiction of the King's Bench, notwithſtanding the Clauſe in the Statute of 13 *El. ch.* 9. which has altered the 23 *H.* 8. *ch.* 5. whereby the Commiſſioners were obliged to certify their Proceedings into Chancery.]

[f] 1 Vent 67. 1 Mod. 44, &c. 1 Sid. 145. 1 Ld. Ray. 469. 1 Str. 609.

Of the Court of Commiſſioners of Bankrupts.

XXIII. For the *Court* of *Commiſſioners* upon the *Statutes* of *Bankrupts*, ſee of *Bankrupts*, *ante*.

Of the Court of Commiſſioners to examine Witneſſes.

XXIV. The *Court* of *Commiſſioners* for [a] *Examination of Witneſſes* is by Virtue of a Commiſſion out of the *Chancery*, *Exchequer*, or the Court of the *Dutchy* of *Lancaſter*, in Caſes of Equity, to examine ſuch Witneſſes as are not able to come to be examined, or that live remote from the Court. The Commiſſioners are named by both Parties in Suit; yet they ought to be indifferent, and endeavour to find out the Truth. For this End they are not bound to the Letter of the Interrogatory. They ought not to diſcover to either Party, or to any other, the Depoſitions, or any Part of them, before Publication is granted by the Court. Neither, after the Examination is begun, ought a Commiſſioner to confer with either Party, to take new Inſtructions. If he doth, an Information will lie againſt him, and he may be puniſhed by Fine and Impriſonment, when the Witneſſes have been examined.

[a] 4 Inſt. 278. 9 Rep. 70, 71.

Of the Foreſt Courts.

XXV. [b] The *Foreſt-Courts* were inſtituted for the Government of the Foreſts. A *Foreſt* has been before deſcribed.[c]

[b] 1 Inſt. 1. b. 2. a. 4 Inſt. 314, 315, 319.

[c] See ante 202.

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[d] *Diſcretio eſt diſcernere per legem, quid ſit juſtum.* 2 Inſt. 56, 298.

The

3 Black. Com. 71.

The *Laws* of the Foreſt are eſtabliſhed by Act of Parliament; and for the moſt part are contained in the Statutes of *Charta de Foreſtâ*, 9 *H.* 3. and *Ordinatio de Foreſtâ*, 34 *Ed.* 1. *St.* 5.

I ſhall ſpeak of the *Officers* of the Foreſt, and the ſeveral *Courts* belonging to a Foreſt.

1. Of the *Officers*.

[d] 4 Inſt. 291. 3 Black. Com. 72.

The [d] Chief *Juſtices in Eyre* (*Itinerantes* from *Iter*, one for the Foreſts on the South Side of the River *Trent*, the other for thoſe on the North Side) are created by Letters Patent under the Great Seal. [See 27 *H.* 8. *ch.* 24.]

[e] F.N.B. 164. 4 Inſt. 291, 292, 293, 317.
[f] 4 Inſt. 316.

The [e] *Regarder* is a Miniſterial Officer, whoſe Office is to view the whole Foreſt, to certify all Treſpaſſes and all Offences concerning the Vert and Veniſon. *Vert* is every Thing that grows, and bears *green* Leaf within a Foreſt, that may cover a Deer. [f] *Veniſon* (*à Venatione*) is any Beaſt of the Foreſt, fit for the Food of Man; as Deer, Wild-Boar, and Hare. He is alſo to certify all Defaults of Officers of the Foreſt. He cannot preſent any Thing but upon his own View. He is appointed either by Letters Patent of the King, or by the Chief Juſtice, or to be choſen by Writ to the Sheriff.

[g] 4 Inſt. 292, 293, 317. 3 Black. Com. 71, 72.

The [g] *Verderors* (*Viridarii à Viridi*, Vert) are Officers, whoſe chief Buſineſs is to look to the *Vert* or Green. They are Judicial Officers, *choſen* in full County by Force of the King's Writ, as they may be *diſcharged* by Writ. They are to keep the Laws of the Foreſt, to inroll Attachments and Preſentments of Treſpaſſes of the Vert and Veniſon, and to do Right and Juſtice. There are commonly four Verderors in each of the King's Foreſts.

[h] 4 Inſt. 293.

[h] *Agiſtors* are thoſe that take Beaſts to *Agiſtment*, (*i. e.*) To depaſture within the Foreſt, where there is any Pannage or Pawnage, (*i. e.*) Maſt of Beech, Acorns, *&c.* Theſe Officers are conſtituted by Letters Patent.

Foreſters are Woodwards and Watchers over the Vert and Veniſon. They are to preſent all Manner of Treſpaſſes done within the Foreſt, to their Knowlege, *&c.*

[a] 4 Inſt. 304, 305.
[b] See ante.

[a] *Rangers* are thoſe who are to rechaſe the Wild Beaſts from the [b] Purlieus into the Foreſt, and to preſent Offences within the Purlieu and the Foreſt, *&c.* But where there is no Purlieu, there are no Rangers.

[c] 4 Inſt. 313.

A [c] *Bedel*, (*Bedeau*, a Bailiff or Apparitor) is to warn the Courts of the Foreſt, execute Proceſs, and make all Proclamations, as well within the Courts as without.

[d] 4 Inſt. 293, 319.

Officers of the Foreſt ſhall not be ſworn on [d] Juries out of the Foreſt.

2. Of the *Courts*.

There are ſeveral *Courts*; of which three, (*viz.*) the Court of Attachments, Swainmote, and Juſtice-Seat, are *incident* to a Foreſt.

[e] 4 Inſt. 289, 298. 3 Black. Com. 71.

1. The *Court* of [e] *Attachments*, or the *Woodmote-Court*; which is to be kept before the Verderors every forty Days throughout the Year, and is therefore called the *Forty-Day Court*. [See 9 *H.* 3. *ch.* 8.] This is a Court of Record. At this Court the Foreſters bring in Attachments, and Preſentments of Offenders againſt Vert and Veniſon; and the Ver-

derors do inroll the ſame. But this Court can only inquire, and not convict. No Man is to be attached by his Body for Vert or Veniſon, unleſs he is taken in the Act within the Foreſt; otherwiſe the Attachment muſt be by his Goods. [See 7 *Ri.* 2. *ch.* 4.]

2. The *Court of* [f] *Regard*, or *Survey* of *Dogs*, is holden every third Year, for Expeditation or laming of Maſtiff Dogs. [See 9 *H.* 3. *ch.* 6.] *Expeditation* is derived of *Ex* and *Pede*, becauſe the Dogs are to be lamed in the Foot.

3. The Court of [g] *Swanimote*, alias *Swainmote*, (from *Swein*, in *Sax.* a Country Swain; and *Mote* or *Gemote*, a Court) is a Court of Record, holden before the Verderors as Judges, by the Steward of the Swainmote, thrice in the Year. [See 9 *H.* 3. *ch.* 8.] The Foreſters ought to preſent their Attachments at the next Swainmote-Court, and the Freeholders within the Foreſt are to appear at the Swainmote, to be upon the Inqueſt or Jury. It may [h] inquire of all thoſe that owe Suit to it; of *Aſſarts*, (from *eſſarter*, to grub up) or Wood-Ground converted to Tillage; of Purpreſtures, Incloſures, and Incroachments within the Foreſt; of taking away or removing Bounds; of making Mines or Clay-pits, or of Turfs for Iron, to the Prejudice of the Commoners; of levying Mills, Houſes, *&c.* without the King's Licence; if there are more Foreſters or Walkers within the Foreſt than uſual; of Oppreſſions and Extortions by Officers; of ſurcharging Common, or of thoſe that put in the Common more Beaſts than they ought; of burning Heath or Fern; of mowing ſeveral Lands by Foreſters; of cutting Vert or felling Wood; of the Abuſes concerning Pannage, or Pawnage; of hunting or deſtroying the Deer, Fox, Hare, Coney, or any Beaſt or Fowl of Warren without Authority; of hunting in the Purlieu without Authority; of Agiſtments, Rents, *&c.*

If at the Swainmote the Preſentment of the Foreſters is found true by the Jury concerning Vert or Veniſon, the Offender ſtandeth thereof convict, [a] and cannot traverſe the ſame.

This Court may inquire and convict, [b] but cannot give Judgment. Therefore a Swainmote without a Juſtice-Seat is of no Force.

4. The *Court* of [c] *Chief Juſtice*, *Juſtice in Eyre*, or *Juſtice-Seat*, is a Court of Record, and hath Authority and *Juriſdiction* to hear and determine by themſelves or Deputies [See 32 *H.* 8. *ch.* 35.] all Pleas and Cauſes of the Foreſts, Parks, Chaſes, and Warrens within the Foreſt; as well concerning Vert and Veniſon, as other Cauſes whatſoever within the ſaid Foreſt, *&c.* [d] The Juriſdiction is local, extends not to Out-dwellers, [See 9 *H.* 3. *ch.* 2.] and therefore the Receipt of an Offender out of the Foreſt cannot be puniſhed there. [e] This Court is to be held every third Year, and is to be ſummoned forty Days before the Sitting; and then it may hear and determine all Treſpaſſes, Claims of Privileges and Liberties within the Foreſt, Claims of Leets, Hundreds, Felons Goods, Waifs, Strays, Fugitives, *&c.* It may proceed upon the Preſentments or Verdicts in the Swainmote. [See 9 *H.* 3. *ch.* 16.] It may be ſummoned to be held within the Foreſt; [f] but afterwards the Chief Juſtice may adjourn it to any Place within the County. He may take a Recognizance in any Place. [g] Here a Preſentment of Indictment found by the Jury, (and not found in the Swainmote) may be traverſed, becauſe it is found but by one Jury.

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[f] 4 Inſt. 289, 298, 308.

[g] 4 Inſt. 289. 3 Black. Com. 72.

[h] Crompt. Jur. 180, 181, 182, 183.

[a] 4 Inſt. 290.

[b] 4 Inſt 289. 2 Bulſt. 298.

[c] 4 Inſt. 291, 298, 319 3 Black. Com. 72.

[d] 4 Inſt. 317.

[e] 4 Inſt. 290, 291.

[f] 1 Roll. Abr. 534. 3 Cro. 409.

[g] 4 Inſt. 290, 291.

h 4 Inſt. 297.

i 4 Inſt. 715,

The *Proceedings* are *de Hora in Horam*, and the Defendant muſt plead preſently. If there is an erroneous Judgment at the Juſtice-Seat, the Record may be removed by [h] Writ of Error into the King's Bench (which Court is above all *Eyres*) and be remedied there.

A [i] Felony committed within the Foreſt, muſt be inquired of before the Judges of the Common Law, not before the Chief Juſtice of the Foreſt. [See *Manwood of Foreſt Laws, per Tot.*]

By 34 Ed. 1. St. 5. ch. 6. *The Juſtice, or his Deputy, may take Fines and Amerciaments for Treſpaſſes.*

[See the Laws relating to the Game, *p.* 432, *&c. ante.*]

Of the Eccleſiaſtical Court.
k 2 Inſt. 488, 601, 602, 4 Inſt. 321.
l 2 Roll. Abr. 217.
2 Inſt. 488, 491.
Dav. 51, 97.
3 Black. Com. 61, 87.
4 Black Com. 418.
2 Burn Eccl. law tit. Courts.

XXVI. the [k] *Eccleſiaſtical Courts,* (*Curiæ Chriſtianitatis,* Courts-*Chriſtian,* or the *Spiritual Courts*) are thoſe which are held by the King's Authority as Supreme Governor of the Church, for Matters which *chiefly* concern Religion. [l] Other Cauſes were given to them by the Favour of Princes. Theſe Courts are not Courts of Record.

The *Laws* and *Conſtitutions* whereby the Church of *England* is governed, are, 1. Divers immemorial *Cuſtoms,* [See 25 *H.* 8. *ch.* 21. § 1.] which may properly enough be called the Common Law. 2. Our own *Provincial Conſtitutions* collected by *Lyndwood,* and the *Canons* made in our Convocations of later Times, eſpecially the Canons made in the Year 1603, in the Reign of King *James* I. 3. *Statutes* or *Acts of Parliament* concerning the Affairs of Religion, or Cauſes of Eccleſiaſtical Cognizance; eſpecially the *Rubricks* (*a Rubro colore,* becauſe anciently writ in red Letters) in our *Common Prayer Book,* founded upon our *Statutes of Uniformity,* (*viz.*) 5 & 6 *Ed.* 6. *ch.* 1. 1 *El. ch.* 2. 13 & 14 *Car.* 2. *ch.* 4. 4. The *Articles* of *Religion* drawn up in the Year 1562, [a] and eſtabliſhed by 13 *El. ch.* 12. (*Qu*). 5. The general *Canon Law,* where all others fail.

a 4 Inſt. 323.

By 25 H. 8. ch. 19. § 7. *Such Canons, Conſtitutions, Ordinances,* being already made, *which be not contrary to the Laws, Statutes, and Cuſtoms of this Realm, nor to the Damage of the King's Prerogative, ſhall be ſtill uſed and executed, as they were before the making of this Act.*

The 25 *H.* 8. *ch.* 21. § 1. is purſuant to this Act. [See of the *Court* of *Convocation, infra.*]

Archbiſhops, Biſhops, ſome Deans and Chapters, Archdeacons and ſome Prebendaries, (or Vicar-Generals, Chancellors, Commiſſaries, and Officials appointed by them), are the *Judges* in theſe Courts; and the Proceedings are in their Names, tho' they are the King's Courts. For tho' every Leet, *&c.* holden by a Subject, is kept in the Subjects Name, yet it is the King's Court.

By 37 H. 8. ch. 17. *A Doctor of the Civil Law, married or unmarried, lawfully deputed, may exerciſe Eccleſiaſtical Juriſdiction, and* Cenſures *thereof, tho' a Layman.*

b 1 Cro. 314, 315.

[b] But this Statute is ſaid to be only affirmative, and not reſtrictive, and therefore, as at Common Law, thoſe that were *under* the Degree of a Doctor might exerciſe Eccleſiaſtical Juriſdiction, in that Reſpect the Statute has made no Alteration. [See 13 *Car.* 2. *ch.* 2.]

The Cenſure of *Excommunication* is pronounced by one in Holy Orders by the Authority of the Lay-Judge.

c 2 Inſt. 488, &c. 599, 600, 601, &c.
4 Rep. 20.
5 Rep. Cawdrie's Caſe.

The [c] *Juriſdiction* of theſe Courts is either *voluntary* or *contentious.* 1. *Voluntary,* or where there is no Oppoſition; which conſiſts in viſiting Churches, the Clergy and Churchwardens of the ſeveral Pariſhes or

Diſtricts; in granting Sequeſtrations, Inſtitution, and Induction to Benefices, Licences and Diſpenſations, ordering real Compoſitions, granting Probates of Wills, Letters of Adminiſtration, Letters *ad Colligendum*, *&c.* 2. *Contentious*, or where there is a Plaintiff and Defendant; which conſiſts in hearing and determining the following Cauſes, (*viz.*) Apoſtacy, Blaſphemy, Idolatry, Hereſy, Schiſm, Breach of Faith, or Perjury in an Eccleſiaſtical Cauſe, Profanation of the Lord's Day and Holidays, not frequenting the publick Prayers, neglect of Sacraments, neglect of Duty in Miniſters, Diſturbance of Divine Service, laying violent Hands upon a Clerk, providing Books and decent Ornaments for the Celebration of Divine Service, Rights of Matrimony, Jactitation of Marriage, Divorces, Alimony, Reſtitution of conjugal Rights, general Baſtardy, Subtraction and Right of Tithes, Oblations, Obventions, Mortuaries, Penſions, Synodals, Procurations, Dilapidations, Rights to Seats in the Church, or to a Place in a Seat, Reparation of Churches and publick Chapels, and of Churchyards, and Rates and Accounts for ſuch Repairs, Quarrelling or Fighting in a Church or Churchyard; alſo of the Bounds of Churchyards [d] and of Pariſhes, if they come in Queſtion *collaterally* in a Suit for a ſpiritual Matter [but not otherwiſe, and [e] then the Courts of Common Law will enforce them to admit ſuch Evidence as the Common Law would allow.] Teſtaments and Codicils proved by Witneſſes, Legacies, Adminiſtrations, Suits for examining Inventories and Accounts of Executors or Adminiſtrators, Simony, Inceſt, Adultery, Fornication, or violent Suſpicion or [a] Fame thereof, Solicitation of Chaſtity, [*Qu.*] if accompanied with Force [b]] Defamations in charging with Offences merely ſpiritual, common Swearers and Drunkards, Filthy Talkers; Money upon Commutations of Penance, which may be ſued for in the Eccleſiaſtical Court, if Payment is refuſed; [c] Fees of Judges, Advocates, Proctors, Regiſters, Apparitors, *&c.* [*Qu.*] [d] if a Prohibition will not lie to ſuch Suits.] Wages for a Curate or a Pariſh-Clerk [e]. (*Qu.*) Rights of naming a Churchwarden, a Pariſh-Clerk [f], *&c.*

5 Rep. 67. 6 Rep. 23. 7 Rep. 44. 2 Roll. Abr. 218, 219, 224. 2 Str. 1056, 960. 1 Str. 666.

[d] 2 Inſt. 608. 613. 2 Str. 1013.

[e] 1 Ld Ray. 221. 2 Salk. 547.

[a] 3 Cro. 129.

[b] 2 Ld. Ray. 809.

[c] 1 Vent. 165.

[d] 1 Ld. Ray. 703.

[e] 2 Str. 1108, contra.

[f] 2 Str. 642. 2 Salk, 536. contra

By 13 Ed. 1. Stat. De Circumſpecte Agatis, * *A* Prohibition *lieth not for Penance corporal or pecuniary* [*but ſee* Articuli Cleri, infra] *injoined for deadly Sin, as Fornication, Adultery, or the* like; *alſo for not fencing the Churchyard, or not repairing the Church, or ſufficiently adorning it, nor for Oblations, Tithes, Mortuaries, Penſions, laying violent Hands upon a Clerk, Defamation, where Money is not demanded, nor for Breach of Faith.*

* 2 Inſt. 487, &c.

By the Articuli Cleri, *or* 9 Ed. 2. *For Tithes* (*not where the Right ariſeth from the Rights of* Patronage, *and the Tithes amount to the fourth Part*, &c.) *Oblations, Obventions, Mortuaries, Commutation of corporal Penance for Money, but not for pecuniary Penance, laying violent Hands upon a Clerk, Defamation, Tithes of a Mill newly erected, no* Prohibition *ſhall be granted.*

[See for the Expoſition of this Statute 4 *Rep.* 20. 2 *Inſt.* 619, *&c.* and ſee the Complaint of the Clergy, 3 *Ja.* 1. and the Anſwers to the Complaint, 2 *Inſt.* 601, *&c.* in what Caſes the Eccleſiaſtical Juriſdiction is allowed, and in what diſallowed. See alſo *F. N. B.* and 2 *Roll. Abr.* Tit. *Prohibition, per Tot.*]

As in Temporal Cauſes the King by his Judges doth hear and determine the ſame by the Temporal Laws; [g] ſo in Caſes Spiritual or Eccleſiaſtical, the King by his Eccleſiaſtical Judges doth determine the ſame by his Eccleſiaſtical Laws. Therefore where the Right is Spiritual, and the Remedy only by the Eccleſiaſtical Law, the Cognizance doth be-

[g] 5 Rep. in Cawdrie's Caſe. 1 Inſt. 96. a. & b.

long to the Eccleſiaſtical Court. But where the Common or Statute Law giveth Remedy (whether the Matter be Temporal or Spiritual) the Cognizance belongs to the King's Temporal Courts; and tho' the Matter is Spiritual, it ſhall be tried by a Jury; and the Court being aſſiſted by learned Advocates in that Profeſſion, may inſtruct the Jury in the Eccleſiaſtical Law, as they uſually do in the Common Law. Thus it is, unleſs the Juriſdiction of the Eccleſiaſtical Court is allowed or ſaved by Statute. [And in ſome Caſes the Spiritual and Temporal Courts have a [h] concurrent Juriſdiction; and where the general Matter of the Suit is within the Cognizance of the Spiritual Court, and a collateral Matter of a temporal Nature ariſes, they may determine that alſo [i]; but then they muſt admit of ſuch Evidence as the Temporal Courts would allow.] [k] If the Eccleſiaſtical Court gives Sentence, in a Matter of which they have Cognizance, though againſt the Reaſon of the Common Law, the Judges ought to give Credit to it, and believe it to be conſonant to the Law of the Church.

So much of the *Laws* and *Juriſdiction* of theſe Courts in general. It remains that I ſet forth, 1. The Eccleſiaſtical Courts *particularly*. 2. Their Proceedings, Cenſures, and Puniſhments.

1. Of the Eccleſiaſtical Courts in *particular*.

1. The *Court* of [a] *Convocation* of the Clergy (aſſembled by Virtue of the King's Writ in a National Synod) conſiſts of the whole Clergy, either preſent in Perſon or by Proxies. The Clergy of the two Provinces of *Canterbury* and *York* do ſit at the ſame Time, act by mutual Conſent. There is an *Upper* Houſe, where the Archbiſhops and Biſhops ſit; and a *Lower* Houſe, where Deans, Archdeacons, and Proctors for the Chapters and dioceſan Clergy do ſit. In the Province of *York* two Proctors are ſent to the Convocation, for every Archdeaconry; but in the Province of *Canterbury* two only for every Dioceſe. As there are two Houſes of Convocation, ſo there are two Prolocutors or Speakers; one of the Biſhops ſometimes in the Upper Houſe, choſen by that Houſe; another in the Lower Houſe, choſen there and preſented to the Upper Houſe. The Archbiſhop is the Preſident, and prorogues and diſſolves it at the Direction of the King. For the Convocation is under the Power and Authority of the King.

The *Juriſdiction* of the Convocation may be exerciſed, in making Canons with the King's Licence and Aſſent, in examining and cenſuring heretical or ſchiſmatical Books or Perſons. But then an Appeal doth lie to the King in *Chancery*, or to his Delegates; as hath been lately reſolved. It is the legiſlative Power in the Church, and the Canons that are made concerning the Church with the Royal Aſſent, bind the Clergy but not the [b] Laity.

By 25 H. 8. ch 19. § 1. *The* Convocation *ſhall be aſſembled by the King's Writ, and the Clergy ſhall not, in their Convocations, attempt, alledge, claim, or put in Ure any Conſtitutions or Canons, or enact, promulge and execute any ſuch Canons, unleſs they have the King's Aſſent and Licence, to make, promulge, and execute the ſame, upon Pain of Impriſonment and Fine.*

This Statute is [c] declaratory of the Common Law.

By 8 H. 6. ch. 1. *The Clergy of the Convocation, their Servants and Families, ſhall have ſuch Privilege in coming, tarrying, and going, as the Commons called to Parliament.*

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2 Inſt. 488, 611, 612, 614, 618, 632. 1 Mod. 132, 133.

[h] 1 Ld. Ray. 323.

[i] 1 Ld. Ray. 221. 2 Salk. 547.

[k] 4 Rep. 29. 5 Rep. 7. in Cawdrie's Caſe. 7 Rep. 43. 1 Roll. Abr. 526. 2 Roll. Abr. 219. 2 Str. 960.

[a] 4 Inſt. 322, 323. 2 Roll. Abr. 225. 3 Black. Com. 67. 1 Black. Com. 279. 2 Burn Eccl. law tit. Convocation.

[b] 12 Rep. 72. 2 Roll. Abr. 226. Moor 783. Godb. 163. Vaugh. 327. 2 Ventr. 44. Salk. 672.

[c] 4 Inſt. 323.

By 24 H. 8. ch. 12. *When a Cauſe or Suit concerns the King, the Party grieved may appeal from any Eccleſiaſtical Court to the Prelates aſſembled in Convocation, to be finally determined.* [See 1 *El. ch.* 1.]

2. The *Prerogative Court* of the Archbiſhop of *Canterbury* is held at *Doctors Commons* in *London*, [d] wherein all Teſtaments and laſt Wills are proved, and Adminiſtrations upon the Eſtates of Inteſtates granted, where the Party dies beyond Sea, or dies within his Province, leaving *Bona Notabilia.* [e] *Bona Notabilia* are when one dieth leaving Goods and Chattels at the Time of his Death, of the Value of five Pounds or more, lying in another *Dioceſe*, or *peculiar* Juriſdiction, within the Province, beſides that in which he lived and died [*ſed vide infra.*] If one hath a Debt upon a [f] Specialty, as upon a Statute, Recognizance, or Bond, *&c.* (for theſe are Goods and Chattels) lying in another Dioceſe, he is allowed to have *Bona Notabilia*; and the Probate of the Will, or Adminiſtration of the Goods of the Inteſtate, belongs to the Archbiſhop of the Province, as Ordinary by his Prerogative; or *Sede Vacante* to the Dean and Chapter, as Guardians of the Spiritualities. The *Bona Notabilia* are regularly valued at [a] five Pounds. But in the Dioceſe of *London*, it is ten Pounds by Compoſition. If the Penalty of a Bond, *&c.* is only of the Sum of five Pounds, and not the Condition, though the Bond is forfeited, this ought not to be taken for *Bona Notabilia.* If the Goods are under five Pounds, [*Qu.*] or if they are above five Pounds, and the two Dioceſes, or the peculiar Juriſdictions, are not ſubject to the ſame Archbiſhop, *(viz.)* when one is under the Archbiſhop of *Canterbury*, and the other under the Archbiſhop of *York*, there muſt be ſeveral Probates, or Adminiſtrations, granted for the Goods in each Juriſdiction. And ſo it is when a privileged Perſon in one of our *Univerſities* dies poſſeſſed of Goods and Chattels within the Univerſity, and alſo within a particular Dioceſe, the Probate or Adminiſtration muſt be taken before the Chancellor of the Univerſity, and the other Ordinary. If one dies in a *Journey* in another Dioceſe, and hath more than the Value of five Pounds about him, this is not to be reckoned *Bona Notabilia* [b], but the Teſtament is to be proved, or the Adminiſtration is to be granted, by the Ordinaries of each Place. [*Qu.*]

By 93 Canon of James the 1ſt, Bona Notabilia *are to be accounted at* five *Pounds at leaſt* (*if not by Compoſition at a greater Sum*) *lying in another* Dioceſe *or* peculiar Juriſdiction, *within the Province, beſides that wherein one died. It being decreed and declared, that he who hath not Goods in diverſe Dioceſes to the ſaid Sum or Value, ſhall not be accounted to have* Bona Notabilia.

I mention this *Canon*, becauſe [c] our Law doth take Notice of it inaſmuch as Probates of Teſtaments, and Adminiſtrations, belong to the Eccleſiaſtical Law.

[But notwithſtanding this Canon, which ſeems in the firſt Branch of it to favour the Notion that the Place of the Party's Reſidence and Death gives the Ordinary a Juriſdiction, which Notion ſeems alſo to be in ſome Meaſure countenanced by ſome Dictums in the old Books above referred to, the later Determinations have now eſtabliſhed the Law [d] in this Caſe to be, That the Reſidence or Death of the Party does not give any Juriſdiction, but only *Bona Notabilia*, or perſonal Effects, to the Value of five Pounds or more, being at his Death within diverſe Dioceſes, as is expreſly declared by the laſt Branch of the above Canon, and that therefore the Death of the Party beyond the Seas, or upon the high Seas, doth not give the Archbiſhop any Juriſdiction; but in that Caſe, as well as where the Party dies in *England*, the Adminiſtration or Probate muſt be granted by the Ordinary of the Dioceſe or Peculiar where his Effects are (without any reſpect to the Place of his Death); or if he hath *Bona Notabilia* in more than one, then by the Metropolitan. And indeed, in order to make the two Clauſes of the above Canon conſiſtent, it muſt be intended that the Makers thereof took it for granted that the Party muſt have Goods to the Value of five Pounds within the Dioceſe wherein he died, if he had to that Value in any other, and the old Books ſeem to go upon the ſame Suppoſition.]

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[d] 4 Inſt. 335. 1 Roll. Abr. 908. 2 Black. Com. 509. 3 Black. Com. 65.

[e] Can. 93. 3 Burn Eccl. law tit. Prerogative Court. 4 Inſt. 335.

[f] Dyer 305. 1 Roll. Abr. 908, 909.

[a] 4 Inſt. 335.

[b] Can. 92.

See Can. 92.

[c] 1 Roll. Abr. 909, 910

See ante.

But the Forms of the Probates out of this Court recite the Party's having Goods and Chattels to the Value of Five Pounds, or *Bona Notabilia*, in diverſe *Dioceſes* and *Juriſdictions* generally; ſo that it is inſiſted, that it is ſufficient to make *Bona Notabilia*, if the Party left Goods to the Value of five Pounds in diverſe Archdeaconries, or [a] Peculiars, though within the ſame Dioceſe. If the Archbiſhop grants Probate of a Will, or Letters of Adminiſtration, when it does not belong to him to do it, it is not [b] void, but voidable only by Sentence; becauſe the Metropolitan hath Juriſdiction over the whole Province. Whereas if there are *Bona Notabilia*, and the Will is proved, or Adminiſtration is granted by an inferior Ordinary, in whoſe Juriſdiction Part of the Goods lie, this is void in itſelf without any Reverſal by Sentence, as hath been ſaid, becauſe the inferior Ordinary hath no Pretence to Juriſdiction in another Dioceſe.

The Probate of every [c] Biſhop's Teſtament, or granting Adminiſtration of his Goods, doth belong to his Archbiſhop, though he hath not *Bona Notabilia*.

By 4 Ann. ch. 16. *Probate of Wills and Letters of Adminiſtration of the Goods of Workmen in Yards and Docks, ſhall be granted in the Dioceſe where they die, and Wages for Work done ſhall not be accounted* Bona Notabilia.

In this Court are tried all Cauſes of Inſtance for *proving* or *revoking* ſuch Wills, or for granting or revoking ſuch Adminiſtrations; [See 23 *H.* 8. *ch.* 9.] And all Cauſes concerning *Accounts* upon the ſame; as alſo Cauſes concerning [d] *Legacies*, bequeathed in ſuch Wills. But of late ſuch Legacies are ſuffered by this Court to be ſued for in the inferior Eccleſiaſtical Court, under whoſe Juriſdiction the Executor dwells. [e] The Executor may be ſued in the Court where he proves the Will, though he does not live in that Dioceſe. [See for the *Fees* of the Probate of Wills and Adminiſtrations the [f] 21 *H.* 8. *ch.* 5. and 31 *G.* 2. *ch.* 10. as to Seamens Wills.]

By 25 H. 8. ch. 19. *The* Appeal *from this Court is to the King in Chancery; who appoints Delegates by Commiſſion to hear and determine the Appeal.* [See of the Court of *Delegates*, *infra*.]

Therefore if the Delegates revoke a Will, [g] they cannot grant Letters of Adminiſtration; for their Power is to hear and determine the Appeal.

The *Archbiſhop* of *York* hath the like *Court*.

3. [h] The *Court of Arches (Curia de Arcubus)* becauſe it was anciently held in *Bow-Church*, (or in the *arched* Church of St. *Mary*'s in *Cheapſide*, *London*) is the next Eccleſiaſtical Court. The *Judge* is called the

[a] 1 Roll. Abr. 908. 1 Cro. 718, 719. 4 Inſt. 335. 1 Lev. 78. See ante.

[b] 5 Rep. 30. 8 Rep. 135. 1 Cro. 457.

[c] 4 Inſt. 335.

[d] 1 Vent. 233.

[e] 1 Ld. Ray. 453. 2 Strange 847.

[f] 3 Inſt. 149, &c. 4 Inſt. 336.

[g] 2 Bulſtr. 3 & 4. cont. 2 Roll. Abr. 233. See ante.

[h] 4 Inſt. 337. 3 Black. Com. 64, 65.

of the *Arches*; though properly the Dean of the *Arches* is the Judge of a Deanery conſiſting of thirteen peculiar Pariſhes exempted from the Biſhop of *London*; whereof *Bow-Church* (*Eccleſia de Arcubus*) is the Chief. Theſe Peculiars are annexed to the Officialty. The Juriſdiction throughout the Province more properly belongs to the Principal Official.

1 Burn Eccl. law, tit. Arches
2 Burn Eccl. law, tit. Deans and Chapters.

The Perſons concerned in this Court are the Judge, Advocates, (All Doctors of the Civil Law) Regiſters, Proctors, *&c.*

The *Judge* hath extraordinary *Juriſdiction* in all Eccleſiaſtical Cauſes, except what belongs to the Prerogative Court. Alſo all Manner of *Appeals* whatſoever from any Biſhops or their Chancellors, Commiſſaries, Deans and Chapters of Cathedral or Collegiate Churches, Archdeacons or their Officials, firſt or laſt, are directed hither. Alſo all Appeals from the Commiſſaries of the Archbiſhop of *Canterbury* are made to the Judge of the Court of Arches. [See the 24 *H.* 8. *ch.* 12.] But he cannot *cite* any Perſon out of the Dioceſe of another, unleſs it be on Appeal, *&c.* [See 23 *H.* 8. *ch.* 9.]

The Archbiſhop of *Canterbury* hath his Court of *Audience*; the Auditor whereof hath in all Things like *Juriſdiction* with the principal Official or Dean of the Arches. He has anciently been Vicar General of the Archbiſhop in Things ſpiritual, by Virtue of a ſpecial Commiſſion. But theſe Offices are uſually united in one Perſon, who keeps his Court in *Doctors Commons*, as *Vicar General*, *Principal Official* of the *Arches* and *Audience*,[a] though the Offices of principal Official and Vicar General are diſtinct, as before obſerved, and may be given to different Perſons. As Vicar General, he may execute by himſelf or Commiſſaries all Eccleſiaſtical Juriſdiction in every Dioceſe becoming vacant within the Province of *Canterbury*, and viſit the ſame, and puniſh ſuch Offences as are preſented to him. There is ſomething like a Court of Audience kept within the Archbiſhop's Palace; but he meddleth there only with Matters of voluntary Juriſdiction, as Confirmation, Election and Conſecration of Biſhops, granting the Guardianſhip of the Spiritualties of Biſhops *Sede Vacante*, Admiſſion and Inſtitution to Benefices, *&c.*

a Lyndwood De Sequeſt. Poſſ. & Fruct. cap. Frequens, v. Vicarius Generalis.

The Archbiſhop of *York* hath likewiſe his Court of *Arches* and *Audience.*

By 25 H. 8. ch. 19. *The* Appeal *from the* Arches *is to the King in* Chancery.

4. The *Court* of [b] *Faculties* belongeth to the Archbiſhop of *Canterbury*, and the *Judge* is called *Maſter of the Faculties.*

b 4 Inſt. 337. 2 Burn. Eccl. law, tit. Faculty Court.

He holdeth no Plea of contentious Juriſdiction. But his *Power* lies in granting *Diſpenſations*; as to marry, to eat Fleſh on Days prohibited (and every Dioceſan may make the like Grants;) [See 5 *El. ch.* 5. 3 *Car.* 1. *ch.* 4.] to be ordained Deacon under Age; that the Son may ſucceed the Father in a Benefice; that one may have two or more Benefices incompatible, *&c.* In this Court are regiſtered the Certificates of Biſhops and Noblemen granted to their Chaplains to qualify them for Diſpenſations for Pluralities and Non-Reſidence.

By 25 H. 8. ch. 21. *The Archbiſhop of* Canterbury *may grant Diſpenſations to the King, and likewiſe Licences to all others, of Things that formerly uſed to be licenſed. Howbeit, of Cauſes not uſed to be licenſed, no Diſpenſations ſhall be granted, without the Approbation of the King and Council.*

Licences of Things whereof the Tax did heretofore extend to 4 l. *ſhall ſhall be alſo confirmed by the King's Great Seal, and inrolled in* Chancery. *But all others may be granted by the Archbiſhop without ſuch Confirmation, unleſs the Party deſires to have it ſo confirmed, and then, the Fee for the Seal ſhall be* 5 s. *and not above. And all Acts done by Virtue of ſuch Licences, ſhall be good in Law.*

This Act ſhall not inhibit the Archbiſhop of York, *nor other Biſhops, to diſpenſe, as they are wont to do, by the Common Law or Cuſtom.*

During the Vacation of the See of Canterbury, *the Guardian of the Spiritualties ſhall grant Diſpenſations.*

[See 21 *H.* 8. *ch.* 13. Concerning *Pluralities*, and *Non-Reſidence*, *&c.* and of an *Archbiſhop*, *B.* 1. *ch.* 3. *ante.*]

5. The *Court* of [a] *Peculiars* of the Archbiſhop of *Canterbury*, is that which hath a peculiar Juriſdiction in ſeveral Pariſhes in the City of *London*, and in other Dioceſes, *&c.* within his Province; in all fifty-ſeven. They are called *exempt* Juriſdictions, not becauſe they are under no Ordinary, but becauſe they are not under the Ordinary of the Dioceſe, *&c.* for the Juriſdiction is annexed to the Court of Arches; and the Judge thereof may originally cite in theſe Particulars belonging to the Archbiſhop.

By 25 H. 8. ch 19. Appeals *from Places* exempt, *which were before to the See of* Rome, *ſhall be henceforth into the* Chancery, *and ſhall be determined before Commiſſioners or Delegates appointed under the Great Seal.*

Note, That there are *Royal* Peculiars and *Free Chapels*, as well as *Archbiſhops* Peculiars. There are alſo ſome peculiar Eccleſiaſtical Juriſdictions belonging to the King, which belonged to ſome Monaſteries and Religious Houſes.

From theſe peculiar Courts the Appeal lies immediately to the King in his Chancery. [See 25 *H.* 8. *ch.* 19.]

There are ſome Peculiars belonging to a *Dean* and *Chapter* or *Prebendary*, exempt from Archdeacons only. This extraordinary Power was derived from the Biſhop, of ancient Compoſition. Theſe may be viſited by the Biſhop in his primary or triennial Viſitation. In the mean Time an Official of the Dean and Chapter or Prebendary is the Judge.

From hence the Appeal lies to the Biſhop of the Dioceſe.

6. The [b] *Conſiſtory Courts* of the Archbiſhops and of the Biſhops of every Dioceſe are held in their Cathedral Churches for hearing of all Eccleſiaſtical Cauſes within the Dioceſe. The Biſhop's Chancellor is the *Judge*, [c] ſuppoſed to be ſkilled in the Civil and Canon Law. The Cauſes are managed by Proctors, a Regiſter taking the Minutes or Acts of Court. In Places of the Dioceſe far remote, and diſtant from the Biſhop's Conſiſtory, the Biſhop appoints a *Commiſſary* (*Commiſſarius Foraneus*) to judge in all Cauſes within a certain Diſtrict, and a Regiſter to enter his Decrees. [d] He is ſaid to be a ſuperfluous Officer. (*Qu.*)

The Biſhop has of Common Right the Power of Inſtitution into Benefices, of diſpenſing in common Caſes, and of a primary and triennial Viſitation over his whole Dioceſe. Theſe he exerciſes in Perſon, or by his Chancellor. [See of a *Biſhop*, *B.* 1. *ch.* 3. *ante.*]

By

[a] 4 Inſt. 338. Godolphin's Repert. Canonicum, p. 119. Can 94. 3 Burn Eccl. law, tit. Puculiar. 3Black. Com. 65.

[b] 4 Inſt. 338. 3Black. Com. 64. 2 Burn. Eccl. law, tit. Conſiſtory.

[c] 3 Cro. 65. 2 Roll. Abr. 286.

[d] Terms of the Law, Cowell's Interp. Blount's Law Diction. v. Commiſſary.

By 24 H. 8. ch 12. *From the Biſhop, or his Chancellor, or Commiſſary, the* Appeal *is to the Archbiſhop of either Province reſpectively.*

[See of the Juriſdictions of ſome *Deans* and *Chapters*, p. 30. ante.]

7. [e] The *Court* of the *Archdeacon* is the moſt inferior Court; and is holden in ſuch Places as the Archdeacon, either by Preſcription or Compoſition, hath Juriſdiction in Spiritual or Eccleſiaſtical Cauſes within his Archdeaconry.

The *Judge* of this Court is called the *Official*.

The Archdeacon, (or the Official in his Name) may viſit annually (and by Cuſtom twice in a Year) the Clergy and Laity within his Juriſdiction. He *commonly* hath the Power of granting Licences and Faculties, Probate of Wills, and Power of granting Letters of Adminiſtration, either concurrently with the Biſhop, or excluſively. He has the Cuſtody and Sequeſtration of all vacant Benefices, and the Right of Induction of all Incumbents, *&c.* But theſe Powers are uſually transferred to his Official by Patent.

It is queſtioned whether an Archdeacon, as an Archdeacon, hath any original Juriſdiction; or any Juriſdiction without Title by Preſcription or Covenant. [See of an *Archdeacon, B.* 1. *ch.* 3. ante.]

By 24 H. 8. ch. 12. *From the Archdeacon's Court the* Appeal *is to the Biſhop or Dioceſan. But when the Cauſe is commenced before an Archdeacon of any Archbiſhop, or his Commiſſary, the Appeal muſt be to the Court of* Arches. *From thence to the Archbiſhop himſelf. But by* 25 H. 8. ch. 19. *to the* King *in Chancery.*

8. The [a] *Court* of *Delegates* is ſo called, becauſe the Judges are *delegated*, and ſit by Force of the King's Commiſſion under the Great Seal upon Appeals to the King in three Caſes. 1. When a Decree or Sentence is given in an Eccleſiaſtical Cauſe by the Archbiſhop or any of his Officials. 2. When any Decree or Sentence is given in any Eccleſiaſtical Cauſe in Places exempt, or Peculiars, belonging to the King or to an Archbiſhop. 3. When a Sentence is given in the Court of Admiralty according to the Civil Law. [See 25 *H.* 8. *ch.* 19. 8 *El. ch.* 5.]

[b] If the Delegates in Eccleſiaſtical Cauſes are ſpiritual Perſons, they may proceed to Excommunication. If they are all Laymen, the Fault is not in the Law, but in the Nomination.

Note, That all *Appeals* from a *definitive* Sentence muſt be within fifteen Days, by 24 *H.* 8. *ch.* 12. 25 *H.* 8. *ch.* 19. If the Appeal is from an *interlocutory* Decree, it ought to be made within *Ten* Days by the *Canon* Law: But Appeals from a Sentence given in the [c] *Court* of *Chivalry*, or *Court Martial*, in a Cauſe of Arms, are not within theſe Statutes.

9. There is a *Court* of [d] *Commiſſioners of Review*; which Commiſſion the King may grant as ſupreme Head, to review the definitive Sentence in the Court of Delegates, notwithſtanding the 24 *H.* 8. *ch.* 12. and 25 *H.* 8. *ch.* 19. for there are no Words in thoſe Statutes to reſtrain him; and the *Pope*, as Supreme Head by the Canon Law, uſed to grant a Commiſſion of Review after ſuch a definitive Sentence. [See 26 *H.* 8. *ch.* 1. 1 *Eliz. ch.* 1.] Beſides a Commiſſion of Review may be granted; becauſe though the King grants Juriſdiction in Eccleſiaſtical

[e] 4 Inſt. 339.

[a] 4 Inſt. 339. 2 Roll. Abr. 232, 233. 3 Black. Com. 66, 69, 85. 2 Burn Eccl. Law, tit. Delegates.

[b] 4 Inſt. 327.

[c] 4 Inſt. 341.

[d] 4 Inſt 341. 1 Cro. 571. 3 Black. Com. 67. 1 Burn. Eccl. Law, tit Appeal, ſect 6.

2 Wms. 300.

Cauſes to his Subjects by Virtue of a Statute, he does not deprive himſelf of his own original Power. This Commiſſion is not a Matter of Right, but purely in the Diſcretion of the Crown. It has been often refuſed to be granted.

2. The *Proceedings* and *Puniſhments* in the Eccleſiaſtical Courts are different from the Proceedings and Puniſhments in the Temporal Courts, and for different Ends and Purpoſes. Therefore I ſhall give ſome Account of them.

As to the Proceedings in the Eccleſiaſtical Courts.

The *Proceedings* in the Temporal Courts are according to the Common and Statute Laws. But the Eccleſiaſtical Courts proceed according to the Courſe of the Civil and Canon Laws, by *Citation*, [See 23 *H.* 8. *ch.* 9.] *Libel* or *Articles*, [See 2 *H.* 5. *ch.* 3. and 2 *Inſt.* 616.] *Anſwer* upon Oath, Proof by *Witneſſes* and *Preſumptions*, [See 2 *Inſt.* 608. 1 *Ventr.* 291. In what Caſes one Witneſs ought to be allowed] A *definitive Sentence* without a Jury; and after that for Contempt of the Sentence by *Excommunication*; and if the Sentence is diſliked, by *Appeal*.

An Appeal (*Appellatio*) is a removing of a Cauſe in an Eccleſiaſtical Court to a ſuperior Eccleſiaſtical Court. Hereby the Sentence is ſuſpended, 'till the Appeal is heard and determined.

[a] 4 Inſt. 340. 2 Roll. Abr. 233.

[a] All Acts done after the ſaid Appeal, in Prejudice of the Appellant, are to be reverſed. And though one is excommunicated while the Appeal is depending, he may bring Actions at Common Law.

See Clerk's Prac. in Cur. Ec. tit. 310.

In *criminal* Cauſes, the Proceedings of the Eccleſiaſtical Courts are by *Inquiſition*, or *ex Officio Mero*; or by *Accuſation*, or *ex Officio Promoto*; or by *Denunciation*, or Preſentment of Churchwardens in Viſitations, *&c.*

As to the *Puniſhments* in the Eccleſiaſtical Courts.

[b] 2 Inſt. 622.

[b] The Temporal Courts inflict *Puniſhment* upon the Body, or by pecuniary Mulcts, or by Forfeiture of Lands and Goods. But the Eccleſiaſtical Courts inflict Cenſures and Puniſhments *pro Salute Animæ*, and to reform the inward Man. The Eccleſiaſtical *Puniſhments* are *Purgation, publick Penance, Excommunication, Interdict, Suſpenſion, Deprivation,* and *Degradation.*

3 Black. Com. 342, 100, 447. 4 Black. Com. 361. 3 Burn Eccl. Law, tit. Purgation.

Purgatio vulgaris. 4 Black. Com. 336.

1. *Purgation* is the clearing one's ſelf of a Crime, whereof he is generally ſuſpected, and of the ſame accuſed before a Judge; as upon a common Fame of Incontinency, *&c.* If the Party denied the Fact, the Judge enjoined him Purgation, or to clear himſelf by his own Oath, [See *infra.*] and by the Oath of four, five, or ſix creditable Neighbours, more or leſs. The Oath of the Perſon ſuſpected, was to aſſert his own Innocency, and the Oath of his Compurgators, that they *believed* what he ſwore to be true. If he purged and cleared himſelf after this Method, he was to be diſmiſſed, and declared innocent. If he failed in ſuch Purgation, by refuſing to make Oath of his own Innocency, or could not find the Number of Compurgators enjoined, he was to be puniſhed by publick Penance, as if he had been duly convicted by Confeſſion or Witneſſes. [c] *Wager* of *Law* by the Defendant and eleven of his Neighbours, is ſomething like it. But now,

[c] 1 Inſt. 294. b. 295. a. See of Trial, ch. 4. poſt.

By 13 Car. 2. ch. 12. *It ſhall not be lawful for any Perſons exerciſing Spiritual or Eccleſiaſtical Juriſdiction, to tender or adminiſter unto any*

Perſon the Oath ex Officio, *or* any Oath, *whereby he may be charged or compelled to confeſs, or accuſe, or to purge himſelf of any criminal Matter or Thing, whereby he may be liable to Cenſure and Puniſhment.* [See 16 *Car.* 1. *ch.* 11.]

So that by this Statute the *Oath*, as to the Party accuſed, is taken away. But this is only as to *that Part* of the *Form* and Method of Purgation; for the Statute breaking in upon the Canon Law, or an Eccleſiaſtical Cuſtom, cannot fairly be extended further. Here is ſtill a *Legal* Purgation left, tho' not the *Canonical*. For it remains that the Party accuſed ſhould declare his Innocency *without* Oath; and that the Compurgators may ſtill ſwear as to their *Belief*, that what he ſays is true or falſe. Though ſome maintain, the Oath being taken away, the Foundation of the whole Proceedings, and all the Proceedings of Purgation upon common Fame do fall too.

But ſubſequent Practice, ſince the Statute, at Archiepiſcopal, Epiſcopal, and Archidiaconal Viſitations (contemporary Expoſitions upon the Meaning of the Statute) ſhews the contrary Opinion of thoſe that could beſt judge of the Intent and Deſign of our Legiſlators. Beſides, if this Branch of the Eccleſiaſtical Diſcipline ſhould be taken away, and common Fame is of no Force to ground a Proſecution, many ſhameleſs Lewdneſſes, and ſcandalous Immoralities muſt go unpuniſhed, and be ſuffered to reign and triumph. *Ideo Quære.*

[a] If in a Penal Law the Juriſdiction of the Ordinary is ſaved, a Clerk or a Layman ſhall not be compelled to take an Oath, becauſe it may be an Evidence againſt him at the Common Law upon the penal Statute.

[a] 2 Inſt. 657, 658.

2. Publick *Penance* is a Puniſhment impoſed for a Crime, by ſtanding in ſome publick Place, and making an Acknowledgment of it, to ſatisfy the Church for the Scandal given by an evil Example. In the Caſe of Inceſt, Adultery, &c. the Sinner is uſually enjoin'd to do publick Penance in the Cathedral or Pariſh Church, or publick Market, barefoot and bareheaded, in a white Sheet, and to make an open Confeſſion of his Crime in a preſcribed Form of Words, &c. For ſmaller Faults a publick Satisfaction or Penance is to be made in the Court, or before the Miniſter and Churchwardens, or ſome of the Pariſhioners; as in Caſes of Defamation, &c.

4 Black. Com. 105.
3 Burn Eccl. Law, tit. Penance.

Penance may be changed into a Fine, or Sum of Money, to be given to pious Uſes, which is called *Commuting*. [b] But the Judge ought not directly or indirectly to take any Thing hereof to his own Uſe, or for the Aſſeſſment thereof, or entering the publick Act. If he doth, it is Extortion. *Quære*, If he takes only his cuſtomary Fees.

[b] 3 Inſt. 150. 4 Inſt. 336.

3. [c] *Excommunication* is an Eccleſiaſtical Cenſure, by which a Chriſtian is excluded from the Communion of the Church in ſacred Rites and Privileges, and from the Company of the Faithful; or at leaſt from receiving the Sacraments. The firſt is called the *Greater* Excommunication, the *ſecond*, (*viz*) an Excluſion from the Sacraments only, is the *Leſſer* Excommunication, which is ſeldom put in Practice: In either Caſe the Offender is diſabled to do any judicial Act, as to ſue, to be a Witneſs, &c. though he may be ſued. But every Excommunication does not diſable one. For if a Mayor and Commonalty, or any other Corporation Aggregate, bring an Action; an Excommunication of the Mayor

[c] 1 Inſt. 133 b. 134. a. 3 Black. Com. 101, 102. 2 Burn Eccl. Law, tit. Excommunication.

Mayor, *&c.* ſhall not diſable them; becauſe they ſue and anſwer by Attorney [and in their corporate Capacity.] Otherwiſe it is of a ſole Corporation. [d] If Executors or Adminiſtrators are excommunicated, they are diſabled to ſue as Executors, [*Qu.*] becauſe they which converſe with a Perſon excommunicated, are excommunicated alſo. [e] If a Biſhop is Defendant, an Excommunication by the ſame Biſhop againſt the Plaintiff, ſhall not diſable him; for it ſhall be intended for the ſame Cauſe, if another is not ſhewn. An Excommunication againſt an [a] Appellant, while the Appeal is depending, is void, as before obſerved.

[d] 1 Inſt. 134. a. contra. Finch, ch. 15. p. 168.
[e] 1 Inſt. 134. a. 8 Rep. 68.
[a] 4 Inſt. 340. 2 Roll. Abr. 233.

[b] If the Ordinary excommunicates one for any Thing where he hath not Cognizance of the Cauſe, the Party hath his Action againſt him, or the Ordinary may be indicted.

Dr. & Stud. Dial 2. ch. 32. 2 Inſt. 527, 623.

In ſome Caſes Offenders incur Excommunication, *Ipſo Facto,* by Act of Parliament, [c] but it takes no effect till they be convicted at Law, and the Conviction is tranſmitted to the Ordinary. [But *Ipſo Facto* does not mean that he ſhall be excommunicate without any Sentence or Denunciation, and a Conviction at Law may be a good Ground for the Spiritual Court to go upon, but is not neceſſary where it was a Crime, before the Statute, connuſable in the Spiritual Court; and the Caſe above referred to hath been ſince denied to be Law [d].]

[c] Dyer 275. 1 Ventr. 146.
[d] 2 Ld. Ray. 850. Wilſon v. Graves. K.B. Hill. T. 30 G. 2.

An Excommunication is generally pronounced for *Contempt*, in not appearing upon Summons; or after Admonition, for not obeying a Decree, *&c.* It is publiſhed in the Church by Virtue of an Inſtrument under the Seal of the Court by the Miniſter; [e] and then if the Offender does not ſubmit within forty Days after the ſaid Publication, he may be impriſoned by Virtue of the Writ of *Significavit* or *Capias Excommunicatum*, upon the Certificate of the Biſhop, *&c.* to the King in Chancery. Upon this Writ one may have an *Alias* and *Pluries*; and if they are not anſwered, an Attachment againſt the Sheriff may go, directed to the Coroners, returnable in the King's Bench. This is by the Common Law. [See 5 *El. ch.* 13. *infra.*] And the Excommunication and Impriſonment ſhall continue, till the Party is reconciled to the Church, and diſcharged by *Abſolution*, and the Writ *De Excommunicato Deliberando*, upon the Certificate of the Biſhop, *&c.* to the King in Chancery, that the Party hath made his Satisfaction to the Church.

[e] F. N. B. 62, 63. 2 Inſt. 189. 8 Rep. 68. 3 Black. Com. 102.

None can *certify* Excommunication but the [f] Biſhop, unleſs the Biſhop is beyond Sea, or *in Remotis*; or unleſs the Certificate is by one that hath ordinary Juriſdiction, and is immediate Officer to the King's Courts; as the Archdeacon of *Richmond*, or a Guardian of the Spiritualties when the See is vacant. If the Biſhop certifieth the Excommunication under Seal, and dieth before it is received, it is nothing worth. But his Succeſſor ought to certify it. And tho' the Biſhop is in his Dioceſe, the Certificate of the Chancellor or Vicar General, of a Contumacy or Contempt to the Church, directed to the King in his Chancery, and reciting that the Biſhop is *in Remotis*, ſhall not be traverſed. But the Court may inſiſt to be informed of it by Writ out of the Chancery, and not depend wholly on the Surmiſe of the Party. The Biſhop may certify an Excommunication made by his Commiſſary; for the Commiſſary acts in the Right of the Biſhop. But in the Certificate of an Excommunication, the Cauſe of the Excommunication muſt be ſpecially ſhewn or ſet forth. It is not ſufficient to ſay, that it was denounced *for manifeſt Contempt*, *&c.* [the Judges will ſee by it whether the Eccleſiaſtical Court hath Cognizance of the principal Cauſe.

[f] F. N. B 62, 64. 8 Rep. 68. 1 Inſt. 134. a

A Biſhop elect, after Confirmation, and before his Conſecration, may certify an Excommunication; for the Power of the Guardian of the Spiritualties ceaſes after his Election by the King's *Conge d' Elire*, and Confirmation.

An Excommunication certified under the Seal of the [a] Commiſſary or Official, will not be allowed. An Excommunication may be certified by the [b] Delegates of Appeals. [See of the *Courts* of the Univerſities, *ch.* 2. *poſt.*

[a] 1 Inſt. 134. a. 8 Rep. 68. 1 Roll. Abr. 883.
[b] 4 Inſt. 327. Dyer 371.

[c] If the Sheriff doth deliver Offenders committed upon the Writ of *Significavit*, without Order of Law; upon Complaint of the Biſhop, *&c.* into Chancery, a Writ ſhall be awarded to the Coroners, to apprehend the Party excommunicated, and an Attachment, to cauſe the Sheriff to appear and anſwer the Contempt.

[c] F. N. B 64.

By 5 El. ch. 23. *Writs* De Excommunicato Capiendo *ſhall iſſue out of the Court of Chancery in Term-Time, and be returnable in* K. B. &c.

If in the Excommunicato Capiendo *the excommunicated Party hath not a ſufficient* Addition, *according to* 1 H. 5. ch. 5. *Or if in the* Significavit *it is not contained, that the Excommunication proceeds upon a Cauſe or Contempt, of ſome original Matter of* Hereſy, *refuſing to have his Child* baptized, *to receive the* Sacrament, *to come to* Divine Service, *or for* Error *in Matters of Religion or Doctrine,* Incontinency, Uſury, Simony Perjury *in the Eccleſiaſtical Court, or* Idolatry; *he ſhall not incur the Penalties in this Act, (viz.)* For his Contempt in not rendering himſelf Priſoner upon the *Capias, &c.* [See the Act at large.]

[d] So that this Statute does not require the *Capias* with Proclamations and the *Penalties* in *other* Caſes beſides the *ten* Caſes mentioned in the Statute. But the Court hath inſiſted, [e] that the Crime muſt be ſpecified in the Writ; and even in a Cauſe of Defamation, that the defamatory Words ſhould be recited; that it may appear to the Judges, whether the Spiritual Court hath Cognizance of the Cauſe, upon which the Party was excommunicated. [f] For no Excommunication can be pronounced for a Temporal Cauſe, but by Act of Parliament.

[d] 2 Inſt. 661. 3 Cro. 196, 197, 199.
[e] 2 Inſt. 615, 623. 1 Ld. Ray. 619. 1 Str. 43, 76, 1 Roll. Abr. 883. 2 Ld. Ray. 817. 2 Str. 946, 1067.
[f] 2 Inſt. 527.

Thoſe that die under the Sentence of Excommunication, cannot receive Chriſtian *Burial.* [See the *Rubrick* in our Liturgy.]

4. An *Interdict* is an Eccleſiaſtical Cenſure, by which *Perſons* are prohibited to hear Divine Service, or to have the Sacraments adminiſtred to them, or Burial; or when Divine Service is forbidden to be had in ſuch a *Place* or Places. An Interdict of *Perſon* followeth the Perſons, wherever they remove. An Interdict of *Place* is only with regard to ſuch a Church or Place; and then the Perſons may be received into another Church, but not into their own. There is alſo a *mixt* Interdict, when both the People, and the Church, *&c.* are ſubjected to this Cenſure.

2 Burn Eccl. Law, tit. Interdict.

But this Cenſure hath been of long Time diſuſed.

5. *Suſpenſion* is a Cenſure, whereby Eccleſiaſtical Perſons are forbidden to exerciſe their *Office*, or to take the *Profits* of their Benefices, or where they are forbidden *both* of them, in Whole or in Part, for a certain Time, or for ever. Hence it is ſaid, there is a Suſpenſion *ab Officio* or *Beneficio*, or *ab Officio et Beneficio.* Clergymen are only liable to this Cenſure. But there is a Suſpenſion, which relates alſo to the Laity, (*viz.*) A Suſpenſion *ab Ingreſſu Eccleſiæ*, or from the hearing of Divine Service there. [See 5 & 6 *Ed.* 6. *ch.* 4.

3 Burn. Eccl. Law, tit. Suſpenſion.

Can. 113. *Irregularity* is a Canonical Impediment, ariſing from ſome infamous Crime or Defect of Body or Mind, to take Orders; or if already in Orders, to miniſter in the ſame. This Cenſure is out of Uſe, tho' it is inflicted by a late Canon.

2 Burn Eccl. Law, tit. Deprivation. 6. *Deprivation* is an Eccleſiaſtical Cenſure, by which a Clergyman is deprived of his Benefice.

2 Burn Eccl. Law, tit. Degradation. 7. *Degradation* is an Eccleſiaſtical Cenſure, whereby a Clergyman is deprived of his Orders. It is otherwiſe called *Depoſition*. A Sentence may not only be given for this Purpoſe, but the Clerk may be ſolemnly ſtripped of his Clerical Habit.

From all theſe Puniſhments *Appeals* may be made to higher Courts, as in other Eccleſiaſtical Caſes.

Thus much of the ſeveral *Kinds* of Courts of the *largeſt* Extent, or of thoſe that are diſperſed throughout the Kingdom.

CHAP. II.

Of the ſeveral Kinds of Courts that are *particular*, *limited* or *exempt* Juriſdictions, (*viz.*) Of the *Marſhalſea*, Of the *Lord Steward*, &c. to inquire of *Felony* by Confederacy, *&c.* Of the *Lord Steward of the King's Houſe*, concerning Treaſons, Felony, Bloodſhedding, *&c.* Of the Courts within the *Principality of Wales*, Of the *Duchy-Chamber* of *Lancaſter*, Of the Courts of the *Counties Palatine*, Of the Court of the Biſhop of *Ely*, Of the Courts of the *Cinque Ports*, Of the Courts of the *Stannaries*, Of the *Mayor* of the *Staple*, Of the Courts within or near the City of *London*, Of the Courts in *other* Cities, Towns Corporate, Boroughs, *&c.* Of the Courts of the *Univerſities* of *Oxford* and *Cambridge*.

THE *particular* Courts and *limited* Juriſdictions or thoſe which are not diſperſed throughout the Kingdom, are, The Court of the *Marſhalſea*, The Court of the *Lord Steward*, &c. to inquire of Felony by Confederacy, *&c.* Of the *Lord Steward of the King's Houſe*, concerning Treaſons, *&c.* The Courts within the *Principality* of *Wales*, Of the *Duchy-Chamber* of *Lancaſter*, Of the *Counties Palatine*, Of the Biſhop of *Ely*, Of the *Cinque Ports*, The Courts of the *Stannaries*, Of the *Mayor* of the *Staple*, The Courts within or near the City of *London*, The Courts in *other* Cities, Towns Corporate, Boroughs, *&c.* The Courts of the *Univerſities* of *Oxford* and *Cambridge*.

a 2 Inſt. 548. [a] Of theſe particular Courts, let it be again obſerved, That ſuch Juriſdictions, derogating from the General Courts of the Common Law, are always to be taken ſtrictly.

I. The *Court* of the [b] *Marſhalſea* is a Court of Record at Common Law, ordained to hear and determine Suits betwixt thoſe of the King's Houſhold and others within the *Verge* (ſo called *à Virgâ*, a Rod, which the Marſhal carries) or within *twelve* Miles of the King's Lodgings. Tho' the King goeth out of the Bounds of the Verge for his Recreation, if the Houſhold continues where they were, this is no removing. When the King goeth in Progreſs, there the King moveth with his Houſhold. [See 13 *Ri.* 2. *St.* 1. *ch.* 3.]

Of the Court of the Marſhalſea, &c.

[b] Crompt. Jur. 102. 2 Inſt. 548, 549. 4 Inſt. 130. 6 Rep. 20, 21. 10 Rep. 71, 72, 73, 74, 75, &c. Kitch. 199. &c. 3 Black. Com. 76. 4 Black. Com. 273.

This Court is held in *Southwark*, and hath a Priſon belonging to it, called the *Marſhalſea*. This *Marſhalſea* is to be underſtood of the Houſhold, not of the King's Marſhalſea; for that belongeth to the *King's Bench*.

The *Judges* of this Court are, the *Steward* of the Court, and *Marſhal* of the King's Houſhold. Their Offices are for Life. And though the Marſhal be one of the Judges, he ſees too that the Execution be done.

As to the *Juriſdiction* of this Court, it is ſettled by Statute. For,

By Articuli ſuper Chartas, *or the* 28 Ed. 1. ch. 3. *The* Steward *and* Marſhal *of the King's Houſe ſhall not hold Plea of Freehold, neither of Debt, nor of Covenant, nor of any Contract, but only of Debts and other Things of the People of the ſame Houſe; Of* Contracts *and* Covenants *that one of the King's Houſe ſhall have made with another of the ſame Houſe, and in the ſame Houſe; Of* Treſpaſs *done within the* Houſe, *and of other Treſpaſſes done within the* Verge.

This is the proper Juriſdiction of this Court.

[c] So that they cannot hold Plea but of *three* Actions, (*viz.*) *Debt*, *Covenant*, and *Treſpaſſes*. In Debt and Covenant both the Parties muſt be of the King's Houſhold. In Treſpaſſes it is ſufficient if one of the Parties is of the King's Houſhold. But though the Act ſpeaketh generally of Treſpaſſes, yet Treſpaſſes *Vi et Armis* are only to be underſtood; as Battery, taking away Goods; not Treſpaſſes *Quare Clauſum fregit*, Treſpaſs and Ejectment, Treſpaſs upon the Caſe, nor any other perſonal, nor any real or mixt Action.

[c] 2 Inſt. 548. 10 Rep. 74, 75.

By 5 Ed. 3. ch. 2. *and* 10 Ed. 3. St. 2. Error *here ſhall be amended in the* King's Bench.

The *Court* of the King's *Palace* at *Weſtminſter* was erected by King *Charles* the Firſt by Letters Patent, and made a Court of Record; the Liberty whereof extends twelve Miles round *Whitehall*. The Juriſdiction was ſince confirmed by King *Charles* the Second.

But this Court is now held by Virtue of Letters Patent of King *Charles* the Second, dated the 4th *Day* of *October* in the 16th *Year* of his Reign.

The *Judges* are the *Steward* of the King's Houſe, and the *Knight-Marſhal*, and the *Steward* of the Court, who is always a Lawyer.

In this Court twelve Miles round *Whitehall* they have *Juriſdiction*, to hold Pleas of all Manner of perſonal Actions whatſoever; as Debt, Treſpaſs, Battery, Slander, Trover, Actions on the Caſe, *&c.*

The *Proceedings* of this Court are by Attachment or *Capias* (which may be had at ſeveral Places within the Liberty) upon which the Defendant is to give Bond with Sureties for his Appearance at the next Court; and upon his Appearance he muſt put in Bail, to anſwer the Condemnation of the Court. The reſt of the Proceedings are according to the Courſe of the Common Law. If the Cauſe is conſiderable, it is uſually removed into the King's Bench or Common Pleas by an *Habeas Corpus, cum Cauſâ*; otherwiſe a Cauſe is brought to Trial in three or four Weeks.

For the *Fees* of the *Marſhalſea* or *Palace-Court*, See the *Complete Solicitor. p.* 389.

Of the Court of the Lord Steward, &c. to inquire of Felony by Confederacy. [a] 4 Inſt. 133. 3Black. Com. 76. 4Black. Com. 273. 3 Inſt. 38. See ante 338.

II. The *Court* of the [a] *Lord Steward, Treaſurer*, and *Comptroller* of the *King's Houſhold, to inquire of Felony by Confederacy, Conſpiring*, and *Imagining* (by the King's ſworn Servants under the Degree of a Lord) to murder the King, or any Lord, or other of the King's Privy Council, or the Steward, Treaſurer, or Comptroller of the King's Houſhold, is held by Virtue of 3 *H.* 7. *ch.* 14.

Of the Court of the Lord Steward of the King's Houſe, &c. [b] 2 Inſt. 549. 4 Inſt. 133. 3 Inſt. 140. See ante 401.

III. The [b] Court of the *Lord Steward of the King's Houſe*, or, in his Abſence, of the Treaſurer and Comptroller of the King's Houſe and Steward of the *Marſhalſea*, hath *Juriſdiction*, to inquire of, hear, and determine all Treaſon, Miſpriſion of Treaſon, Murders, Manſlaughters, Bloodſhed, and other malicious Strikings, whereby Blood ſhall be ſhed, in any of the Palaces and Houſes of the King, or in any other Houſe, where his Royal Perſon ſhall abide, held by Virtue of 33 *H.* 8. *ch.* 12.

Of the Courts within the Principality of Wales. 3Black. Com. 77.

IV. The *Courts* within the *Principality* of *Wales*, and their Juriſdiction, are ſettled by Acts of Parliament. The *Principality* conſiſteth of twelve Counties, beſides the Shire of *Monmouth*, and other Lordſhips and Manors united to *Salop, Herefordſhire*, and *Glouceſterſhire*.

By 34 & 35 H. 8. ch. 26. *There are General or* Quarter-Seſſions *in each County*, County-Courts, Hundred-Courts, Turns, Leets, Courts-Baron, Corporation-Courts, *&c.*

There ſhall be kept a Seſſions *twice every Year in every of the twelve Counties of* Wales; *which Seſſions ſhall be called the* King's Great Seſſions *of* Wales. *The* Juſtices *of thoſe Courts ſhall have their Offices by Letters Patent under the Great Seal, to be executed by themſelves or Deputies. And theſe Juſtices may hold* Pleas *of the* Crown *in as large a Manner as the King's Bench, and alſo* Pleas *of* Aſſizes, *and all* other *Pleas and Actions, real, perſonal, and mixt, in as large a Manner as the Lord Chief Juſtice, and Juſtices of the* Common Pleas, *&c. They ſhall alſo hear and determine all criminal Offences whatſoever committed within their ſeveral Limits, according to the Laws of* England. *Alſo* Recoveries *and* Fines *may be taken before the ſaid Juſtices, of Lands within their Authority, as is uſed before the Chief Juſtice of the Common Pleas.*

Errors *and Judgments before any of the Juſtices in the Great Seſſions in Pleas real or mixt, ſhall be redreſſed by* Writ *of* Error *out of the* Chancery *of* England, *returnable before the Juſtices of the* King's Bench, *as other Writs of Error are in* England.

No Execution of any Judgment given in any Baſe Court ſhall be ſtaid by any Writ *of Falſe* Judgment. *But if upon Purſuit of the ſaid Writ, the Judgment ſhall be reverſed, the Party ſhall be reſtored to all that he loſt by the ſaid Judgment, according to the Laws of* England.

[See the Statute at large, by which the *Juriſdiction* of the Courts are plainly declared and eſtabliſhed, and their *Proceedings* ordered to be according to the Laws of *England*. See alſo 27 *H.* 8. *ch.* 26. 18 *El. ch.* 8. and 11 & 12 *W.* 3. *ch.* 9. For preventing frivolous Suits in the Principality of *Wales*.]

The King's Writ ought not to go into this Principality, tho' a *Quo Minus* out of the *Exchequer* is often ſent thither. [But ſee Of *Arreſts*, *ch.* 4. *poſt.* and ſee 1 *Ed.* 6. *ch.* 10. 5 *El. ch.* 23. § 11.]

V. The *Court* of the *Duchy-Chamber* of *Lancaſter* is held at *Weſtminſter*.

Of the Court of the Duchy of Lancaſter.

The [a] *Officers* of the Duchy-Court are the Chancellor, who keeps the Seal of the Duchy at *Weſtminſter*; the Attorney-General, four Counſellors, a Receiver-General, Clerk of the Council, Auditors, Surveyors, Meſſenger. There is an Attorney of the Duchy in the Chancery, and another in the Exchequer.

[a] 4 Inſt. 206, 212.
3 Black. Com. 78.

The [b] *Juriſdiction* of this Court is for or concerning Lands holden of the King in Right of his Duchy, within or without the County Palatine of *Lancaſter*; [See 1 *Ed.* 4.] or concerning Bonds and Aſſurances of the ſame; or concerning the Revenue of the Duchy. [c] But whatever belongs to the Juriſdiction of the Duchy, may be determined in the Court of Exchequer. [d] Where the Duchy claims Juriſdiction in reſpect of the Perſons, as becauſe the Suitors dwell within the County-Palatine; or where the Duchy retains Bills concerning Lands lying out of the County-Palatine, or within the Precincts of the Duchy, but not holden of it; a Prohibition may be awarded.

[b] 2 Danv. Abr. 286.
[c] Hardr. 171.
[d] Hob. 77, 78.
1 Vent. 157, 158.

The [e] *Proceedings* in this Court are as in the Court of Chancery by *Engliſh* Bill, *&c.* and by Decree. But this Court is not a Mixt Court, as the High Court of Chancery. In ſome Caſes this Court claims its proper Cuſtoms, and admits a ſmall Mixture of the Common Law.

[e] Plowd. 72.
Cromp. Jur. 134.
4 Inſt. 206.

By 1 H. 7. *The Duchy is ſeparated from other Inheritance of the Crown, and ſettled in* H. 7. *and his Heirs.*

Note, That the Act ſays *his Heirs*, [f] without ſaying Kings of *England*. [See 37 *H.* 8. *ch.* 16. 2 & 3 *Ph. & M. ch.* 20.]

[f] Plowd. 222.
4 Inſt. 206. 209, 210.

By 32 H. 8. ch. 20. 1 Ed. 6. ch. 14. 1 El. ch. 4. § 38. (The Statutes of Monaſteries and Chantries) *All Lands*, &c. *Parcel of the Duchy given to the King, are within the Survey of the Duchy.*

[See 16 *Car.* 1. *ch.* 10. 16 & 17 *Car.* 2. *ch.* 9.]

VI. [g] A *County Palatine* is an exempt Juriſdiction, where the King's Writ runneth not. [See 5 *El. ch.* 23. *ſ.* 11.] It is ſo called *à Comitatu et Palatio Regis*, becauſe the Owners thereof were Companions of the King in his Palace, and had *Jura Regalia*, or King-like Rights and Authority. For they might pardon Treaſons, Murders, Felonies, and Outlawries thereupon. But many of theſe Rights are taken away from thoſe that have Counties Palatine, and are annexed to the Crown. [a] Counties Palatine probably were erected at firſt, becauſe they were adjacent to the Enemies Countries heretofore; as *Lancaſter* and *Durham* to *Scotland*, and *Cheſter* to *Wales*; that the Inhabitants might have Adminiſtration of Juſtice at home, and remain there to ſecure the Country from Incurſions. In the erecting of them theſe Things were to be obſerved, (*viz.*) to have a Chancery, Writs under Seal, to depute Juſtices, as well touching Pleas of the Crown, as all other Pleas touching the Common Law, Execution of Writs, making Officers, and all other regal Rights belonging to a County-Palatine.

Of the Courts of the Counties Palatine.
1 Black. Com. 116.
3 Black. Com. 78.
[g] Cromp. Jur. 137. a.
2 Inſt. 557.
4 Inſt. 205.
Dav. 60.
[a] 1 Ventr. 155.
4 Inſt. 204.

[b] The King may make a County-Palatine by his Letters Patent without Parliament.

[b] 4 Inſt. 204.
Cromp. Jur. 139, b.

By 27 H. 8. ch. 24. *None but the King ſhall have Power to pardon Treaſons or Felonies, or Outlawries for the ſame, to make Juſtices of Aſſize,* *Peace or Gaol Delivery, notwithſtanding any Grant or Preſcription.* [But ſee of the County-Palatine of *Lancaſter*, *poſt*.] *And all Writs, Indictments, and Proceſſes in every County-Palatine, or other Liberty, ſhall be made in the King's Name,* Teſte *the Owner of ſuch County-Palatine or Liberty. And in every Writ or Indictment, the Offence ſhall be made and ſuppoſed to be done only againſt the King's Peace.*

See 11 & 12 *W.* 3. *ch.* 9. For preventing frivolous and vexatious Suits in Counties Palatine.

[c] 4 Inſt 213.

All Pleas of Lands, *&c.* and all Contracts, Cauſes, and Matters ariſing within the Countys-Palatine, are to be heard and judicially determined within the ſaid Countys-Palatine, except in caſe of Error, foreign Plea, or foreign Voucher. [c] But the Plaintiff in the Courts at *Weſtminſter* may alledge Things tranſitory to be done in any County, though actually done in a County-Palatine, and the Defendant cannot plead to the Juriſdiction of the Court, that they were done within the County-Palatine. Yet if the Plaintiff ſuppoſes the tranſitory Cauſe of Action to be in the County-Palatine, that may be pleaded to the Juriſdiction. Otherwiſe it is of Things local.

[d] 4 Inſt. 212, 213. 2 Salk. 500.

[d] No *Inhabitant* of the ſaid County-Palatine ought to be compelled by any Writ or Proceſs to appear or anſwer out of the ſame in any Cauſe; except for Treaſon or Error. [But ſee of Arreſts, ch. 4. poſt.]

[e] 4 Inſt. 205. Cromp. Jur. 139. a.

The County-Palatine ſhall have Forfeitures of Lands and Goods for High Treaſon by the [e] Common Law, not ſuch as are given by Act of Parliament after the Erection of the County-Palatine.

Where the Statute is general, Countys-Palatine ſhall be bound by it.

[f] 1 Saund. 74. [g] 4 Inſt. 220. [h] 2 Ld. Ray. 837.

There are *three* Counties-Palatine, and *three Courts* to exerciſe the Juriſdiction which belongs to them, (*viz.*) The Court of the County-Palatine of *Lancaſter*, the Court of the County-Palatine of *Cheſter*, the Court of the County-Palatine of *Durham*. [f] Theſe are reckoned amongſt the ſuperior Courts. Beſides which there is a like Court belonging to the Biſhop of *Ely*, who hath royal Juriſdiction within the Iſle of *Ely*, which is in ſome Statutes called the County-Palatine of *Ely* [g] [but it is now generally agreed [h] not to be a County-Palatine, and that the Court there is only in the Nature of an inferior Court.] I ſhall ſpeak of them ſingly, though what I ſhall ſay of one, may often give Light to underſtand the Nature of others.

[a] 1 Vent. 157. Dav. 62.

1. The County-Palatinate of *Lancaſter* is by [a] Act of Parliament.

[b] 2 Lev. 24. 1 Ventr. 156, 157.

In the County-Paline of *Lancaſter* there is a [b] *Court* of *Equity*.

[c] 1 Ventr. 155.

The Chancellor is the Judge of it. [c] The Chancellorſhip both of the County and Duchy have a long Time been in one Perſon, but they have diſtinct Capacities; ſo that it is the ſame Thing, as if they were in two different Perſons.

[d] 2 Danv. Abr. 286.

[d] Lands held of the Duchy of *Lancaſter*; and lying in the County-Palatine may be ſued for in the Court of Equity.

[e] 4 Inſt. 204. [f] 4 Inſt. 205. See p. 243. ante.

There are alſo *Courts* of [e] *Law* for Civil Actions and Pleas of the Crown, and *Juſtices* therein appointed. [f] *Recoveries* of Lands in the County-Palatine are to be had in the Court of the County-Palatine, and cannot be had at *Weſtminſter*.

[g] 4 Inſt. 205, 221. Crompt. Jur. 137. a. 1 Ld. Ray. 698.

[g] If Iſſue is joined in the King's Bench, or Common Pleas, triable in the County-Palatine of *Lancaſter*, it ſhall be tried in the County of *Lancaſter*, and remanded thither. And where Part of an Action ariſeth at

Common Law, and Part in a Franchiſe, the Common Law ſhall be preferred.

By 27 H. 8. ch. 24. *The Juſtices of* Aſſize *and* Gaol Delivery *and of the* Peace *for the County-Palatine of* Lancaſter, *are aſſigned by Commiſſion under the Seal of* Lancaſter.

[See concerning the Duchy of *Lancaſter* the 2 & 3 *Ph. & M. ch.* 20. And concerning Writs of *Significavit* and *Excommunicato Capiendo*, 5 *El. ch.* 23. *ſ.* 11.]

2. [h] The County-Palatine of *Cheſter* is by *Preſcription.* And the King's Writ ought not to come, or to be allowed, within the ſaid County-Palatine, but under the Seal of the County-Palatine, except Writs of Proclamation. [See 1 *Ed.* 6. *ch.* 10.]

[h] 4 Inſt. 211, 212, 213, 215. Crompt Jur. 137. 1 Danv. Abr. 750. 1 Black. Com. 116. 3 Black. Com. 78.

In the Court of *Exchequer* at *Cheſter* (the *Chancery* Court for the County-Palatine) the *Chamberlain* of *Cheſter* (who hath the Juriſdiction of a Chancellor) is *Judge* in *Equity* and in Matters of the *Common Law*, within the ſaid County. For this Court of Chancery is a mixt Court, as the High Court of Chancery at *Weſtminſter*. He is alſo a Conſervator of the Peace by Virtue of the ſaid Office. There is alſo a *Vice-Chamberlain*, who is the Chamberlain's Deputy. But the Chaimberlain or his Deputy, cannot decree any Cauſe wherein he himſelf is Party, but he may complain in the High Court of Chancery. If a Defendant dwells out of the County-Palatine, one of the County Palatine may complain in the High Court of Chancery of *England*, for Matter of Equity touching Lands or Goods. For when particular Courts fail of Juſtice, the general Courts ſhall give Remedy.

The *Juſtice* of *Cheſter* hath alſo a Court and Juriſdiction, to hear and determine Matters of the Crown and Common Pleas within the ſaid County-Palatine. [See 18 *El. ch.* 8. And of Fines and Recoveries levied, as well within the County-Palatine of *Cheſter*, as the City of *Cheſter*. 2 & 3 *Ed.* 6. *ch.* 28. 27 *El. ch.* 9. 43 *El. ch.* 15.]

[See 4 *Inſt.* 213, 214. Concerning *Writs of Error* directed to the *Chamberlain* in the *Exchequer*, for any Matter wherein he proceedeth according ro the Courſe of the Common Law, or to the *Juſtice* of *Cheſter*. But ſee alſo 32 *H.* 8. *ch.* 43. and 2 *Salk.* 500. and ſee 5 *El. ch.* 23. *ſ.* 11. concerning Writs of *Significavit* or *Excommunicato Capiendo*]

3. [a] The County-Palatine of *Durham*, being Parcel of the Biſhoprick [and called the Biſhoprck] of *Durham*, is by *Preſcription*, where the King's Writ runneth not; for it is a royal Franchiſe.

[a] 4 Inſt. 216, 219. 1 Roll Abr. 540. 1 Black. Com. 116. 3 Black. Com. 78.

The Juriſdiction of the *Biſhop* of *Durham* extends to all Places betwixt the Rivers *Tine* and *Teeſe*; and to the Manors of other Men, as well as to the Demeſnes of the Biſhop. [See 17 *Ed.* 2. *St.* 1. *ch.* 1.]

In the County-Palatine of *Durham* there is a Court of [b] *Chancery* and a Chancellor. It is a mixt Court both of Law and *Equity*; but it differeth from other Courts herein, that if an erroneous Judgment is given, either in *Chancery* upon a Judgment there according to Common Law, or before the *Juſtices* of the Biſhop, a Writ of Error ſhall be brought before the Biſhop himſelf. [The Juſtices are now the King's Juſtices, and the Writ of Error muſt be returnable in the *King's Bench*.] And if he gives an erroneous Judgment thereon, a Writ of Error ſhall be ſued out, returnable into the King's Bench. If the Biſhop (who ought to do Right to others) does Wrong within his County-Palatine, Juſtices

[b] 4 Inſt. 218. Crompt. Jur. 138.

ſhall be aſſigned to hear and determine the Caſe; for he cannot be Judge in his own Cauſe.

Fines may be levied here, [See 5 *El. ch.* 27.] and *Recoveries* ſuffered. [See 27 *El. ch.* 9.]

By 27 H. ch. 8. 24. *The* Biſhop *of* Durham, *and his Temporal* Chancellor *of the County-Palatine, are Juſtices of the Peace within the ſaid County-Palatine.*

See 5 *El. ch* 23. *ſ.* 11. Of Writs of *Significavit* and *Excomm. Capiend.*

Alſo 31 *El. ch.* 9. For Writs upon Proclamations and Exigents, *&c.*

[c] 4 Inſt. 220. Dav. 61. 2 Ld. Ray. 837. 1 Black. Com. 119. 3 Black. Com. 78.

4. [c] *The Royal Franchiſe* of *Ely* is called the *County-Palatine* of *Ely*, in ſeveral Acts of Parliament. [See 33 *H.* 8. *ch.* 10. 5 *El. ch.* 23.] King *Henry* I. granted to the Biſhop of *Ely* and his Succeſſors *Jura Regalia* within the Iſle of *Ely*. This Biſhop hath this Royal Juriſdiction by *Preſcription*, grounded upon the ſaid Grant, as well in Pleas of the Crown, as in Common Pleas before his *Juſtices*.

By 27 H. 8. ch. 24. *The* Biſhop of *Ely, and his* Steward, *are Juſtices of Peace within the Iſle of* Ely.

See 5 *Eliz. ch.* 23. *ſ.* 11. *Concerning the Writs of Significavit* and *Excommunicato Capiendo.* In which Statute the County-Palatine of *Ely* is called an exempt Juriſdiction as well as *Wales*, the Counties-Palatine of *Lancaſter*, *Cheſter*, *Durham*, and the *Cinque Ports*, where the King's Writ doth not run, *&c.*

Of the Courts of the Cinque Ports.

[d] Crompt. Jur. 134, 137. 1 Cro. 911. 2 Cro. 543. Hard. 475. 3 Black, Com. 79.

[a] 2 Inſt. 557. 4 Inſt. 222, 223.

VII. [d] The *Cinque Ports*, within the County of *Kent*, have each of them Franchiſes and Liberties; and the King's Writ doth not run there, as before affirmed. But this is ſaid to extend no farther than to Civil Cauſes between Party and Party. And yet a *Quo Minus* lies to the Cinque Ports. [And ſee of Arreſts, chap. 4. poſt.] The Inhabitants thereof have theſe Privileges in reſpect to their Attendance in the Ports, for the Defence of the Kingdom.

The firſt privileged Ports were but [a] *three*, (*viz.*) *Dover*, *Sandwich* and *Rumney*. Afterwards two Ports more were added to them (*viz.*) *Haſtings* and *Hythe*. Of this Number *five* theſe Ports were called the *Cinque Ports*. But two more, (*viz.*) *Winchelſea* and *Rye* were added to theſe five; and though now there are ſeven Ports or Havens, yet they hold their former Name of the Cinque Ports.

Within the Cinque Ports there are ſeveral *Courts*. One before the Conſtable of the Caſtle of *Dover*, and *other Courts* within the Ports themſelves held before the Mayors and Jurats; and another called *The Court of the Cinque Ports at SHEPWAY.*

[b] 2 Inſt. 556. 557, 558. 4 Inſt. 223. F. N. B. 240, Crompt. Jur. 139.

[b] There is a *Lord Warden* or Keeper of the Cinque Ports; who is alſo *Admiral*, and hath the Juriſdiction of the Admiralty; and is exempt from the Admiralty of *England*. He is alſo *Conſtable* of the Caſtle of *Dover*, and hath Juriſdiction to hold Plea by Bill concerning the Guard of the Caſtle, *&c.* according to Common Law. So that the Conſtable and Lord Warden hath two Juriſdictions. His *Juriſdiction* as *Conſtable*, is limited by *Articuli ſuper Chartas*, or 28 *Ed.* 1. *ch.* 7. For he hath no general Juriſdiction within the Cinque Ports. The Conſtable of *Dover* and Lord Warden is the immediate Officer to the King's Courts, for the Execution of the King's Writs within the Cinque Ports. The King's Courts write to him, and he is to certify the King's Courts of the Record which is before the Mayor and Jurats upon their Certificate to him. So

if one hath Judgment in the King's Courts, and the Defendant hath no Lands or Goods but in the Cinque Ports, the Plaintiff ſhall have a Writ directed to the Conſtable of *Dover*, to make Execution.

[c] The Juriſdiction of the *Cinque Ports* is general, and extends to perſonal as well as real and mixt Actions, which touch the Freehold. But if Part of the Land is within the Cinque Ports, and Part without, the whole Writ ſhall abate. And ſo in like Caſes.

[c] 4 Inſt. 224.

All [d] Plaints againſt the Mayor and Jurats of the Cinque Ports ought to be determined at *Shepway*, before the Warden of the Cinque Ports.

[d] 4 Inſt. 224.

[e] If an erroneous Judgment is given in the Cinque Ports before any of the Mayors or Jurats, it ſhall be redreſſed according to the Cuſtom, by Bill, in the Nature of a Writ of Error, before the Conſtable of *Dover*, and the Warden of the Cinque Ports, at the Court of *Shepway*; and the Mayor and Jurats ſhall be fined, and the Mayor removed from his Place, though the Court is a Court of Record.

[e] 2 Inſt. 557. 4 Inſt. 224. Crompt. Jur. 138.

[See 5 *El. ch.* 23. *ſ.* 11. Concerning Writs of *Significavit* and *Excommunicato Capiendo.*]

Note, [f] That there is a great Difference between the *Principality* of *Wales*, the *Counties-Palatine*, and the *Cinque Ports*. For though in the Cinque Ports the King's Writ doth not run, yet they have not *Jura Regalia*, and are Parcel of the County of *Kent*. So that if a Writ is brought againſt one for Land within the Cinque Ports, and he appears and pleads to it, and Judgment is given againſt him in the Court of Common Pleas, this Judgment ſhall bind him; for the Land is not exempted out of the County, and the Tenant may waive the Benefit of his Privilege. But if ſuch Judgment is given in the Common Pleas in a *Præcipe*, of Lands that lie in *Wales* or in the Counties Palatine of *Lancaſter*, *Cheſter*, or *Durham*, though the Tenant did admit the Juriſdiction of the Court in ſuch a Caſe, the Judgment againſt him, as to ſuch Lands is void: For *Wales* was originally no Part of *England*, and the Counties Palatine are exempted from the Juriſdiction of the King's Courts, have *Jura Regalia*, and plenary Juriſdiction; and ſo are known to the King's Courts. For they take Notice of all the Counties in *England* for the Directions of Writs. In the Cinque Ports the Privilege extendeth only to certain particular Towns, whereof the King's Courts cannot judicially take any Notice. Therefore the Privilege ought to be pleaded to the Writ. For there is a Difference betwixt a Franchiſe to demand Cognizance, [a] and a Franchiſe where the King's Writ runneth not. In the firſt Caſe the Defendant ſhall not plead it, but the Lord of the Franchiſe muſt demand Cognizance, but in the laſt Caſe the Defendant muſt plead.

[f] 2 Inſt. 557. 4 Inſt. 223. 2 Cro. 692. 3 Cro. 247, 248.

[a] 2 Ld. Ray. 836, &c. See 208. a. te.

Of the Courts of the Stannaries.

VIII. [b] The *Courts* of the *Stannaries*, or the Stannary-Courts, in *Cornwall* and *Devonſhire*, are ſo called *à Stanno*, from the *Tin* in thoſe Counties; and the Tinners are called *Stannatories*. The Privileges of the Tinners are declared, limited, and expounded by an Act of Parliament (*not printed*) made the 50th *Ed.* 3.

[b] 4 Inſt. 229, 232, &c. 3 Black. Com. 80.

All [c] *Labourers in and about* the Stannaries are to have the Privilege of the Stannary-Court, *while they work there*; and are not to be impleaded in any other Court, for any Cauſe ariſing within the Stannaries, except for Pleas of Land, Life, and Member.

[c] 4 Inſt. 231, 232, 233, 234.

The *Officers* of this Court are the Lord Warden, the Under-Warden, and the Steward.

[d] 4 Inſt. 229.

The [d] *Juriſdiction* of this Court is guided by ſpecial Laws and Cuſtoms, and by Preſcription; and is fully ſettled by 16 *Car.* 1. *ch.* 15. Here the Words *In Locis ubi operantur* are expounded.

[e] 4 Inſt. 231.

[e] They have no Juriſdiction of any *local* Action ariſing out of the Stannaries. *Tranſitory* Actions betwixt Tinner and Tinner, though not concerning the Stannaries or ariſing therein, if the Defendant be found within the Stannaries, may be brought in theſe Courts, or at Common Law. [f] But if one Party only is a Tinner, ſuch tranſitory Actions, which concern not the Stannaries, nor ariſe therein, cannot be brought there.

[f] 4 Inſt. 229, 230, 231. Plowd. 327. 12 Rep. 9. 1 Roll. Abr. 745.

No *Writ* of *Error* lieth upon a Judgment in the Stannary-Courts. But Judgment ſhall be reverſed by *Appeal* to the Steward of the Stannary-Court where the Matter lieth; from the Steward of the Stannary-Court to the Under-Warden of the Stannaries; and from him to the Lord-Warden of the Stannaries; and from him to the King's [or Prince of *Wales*'s when there is one] Privy-Council. [See 16 *Car.* 1. *ch.* 15. at large.]

Of the Court Mayor of the Staple.

IX. The *Court* of the Mayor of the *Staple* is appointed to keep the Peace, arreſt the Offenders in Staples for Debt, *&c.* and to impriſon and puniſh them after the Law of the Staple. [g] So that the Court in the Staple-Market is incident to that Market. It is guided by the *Law-Merchant* in a ſummary Way, which is the Law of the Staple.

[g] 4 Inſt. 237, 238. 2 Black. Com. 60, 160, 342. 4 Black Com. 421, 424.

A Staple-Court is held at the Wool-Staple in *Weſtminſter*, the Bounds beginning at *Temple-Bar*, and extending to *Tuthill*.

In other Cities and Towns, the Bounds are within the Walls: Where there are no Walls, the Bounds of the Staple ſhall extend through all the City or Town.

[a] 4 Inſt. 237.

[a] The *Officers* of this Court are the Mayor, and two Conſtables. [See 27 *Ed.* 3. *St.* 2. *ch.* 21. for the *Juriſdiction* of this Court.]

By 36 Ed. 3. ch. 7. *Merchant-Strangers may either ſue before the Mayor of the Staple, according to the Law Merchant, or at the Common Law.*

Theſe Courts are much out of Uſe.

[See, Of *Eſtates* by *Statute Merchant* and *Staple*, *B.* 2. *ch.* 1. And of *Statutes*, *B.* 2. *ch.* 3. *ante.*]

Of the Courts within or near the City of *London*.

X. The *Courts within or near the City of* London, are the *Huſtings*, the *Sheriffs* Courts, the Lord *Mayor*'s Court of *Equity*, the Court of the *Mayor* and *Aldermen*, the Court of *Requeſts*, the Court of *Orphans*, the Court of *Common Council*, the Court of *Wardmote*, the Court of *Hall-mote*, the Court of the *Chamberlain* for Apprentices, the Court of the *Conſervator* of the *Water* and *River* of *Thames*, *&c.* the Court for *Policies of Aſſurance*, the Court of the *Tower* of *London*, the Court at *White-chapel*, the Court at *St. Martin's le Grand*, the Court of the *Preſident*, *Cenſors* and *Commonalty* of the College of *Phyſicians*.

[b] 2 Inſt. 322. 4 Inſt. 247. Terms of the Law, v. Huſtings. 3 Black. Com. 80.

1. The [b] *Huſtings* (from *Hus, Sax.* for a Houſe, and *Dhing* for *Things Cauſes*, or *Pleas*, (ſo that it is the Houſe of *Cauſes*) is the higheſt Court of Record, holden at *Guildhall* for the City of *London* before the Lord Mayor and Sheriffs (or in the Sheriff's Abſence by ſix Aldermen) of all Pleas, real, perſonal, and mixt. It is as it were diſtinguiſhed into two Courts; one Week the Judges ſit upon Pleas real, and the next

Week upon perſonal or mixt Actions. But real Actions are grown out of Uſe. [See Statute of *Glouceſter*, or 6 *Ed.* 1. *ch.* 11. and *ch.* 4. *poſt.* Of an Action.]

Judgment of Outlawry in the *Huſtings*, is not given by the Mayor who is Coroner, but by the Recorder.

If an[c] erroneous Judgment is given in the *Huſtings*, the Party who thinks himſelf grieved, may ſue a Commiſſion out of *Chancery* directed to ſome Perſons to examine the Record, and thereupon to do Right.

2. The[d] two *Sheriffs* do each of them keep a Court of Record within the City by Preſcription. Theſe Courts are kept at *Guildhall*, and in each Court a Steward is the *Judge*. They have belonging to theſe Courts two Priſons, called *Counters*. The one in *Woodſtreet*, the other in the *Poultry*.

They have *Juriſdiction* to hold Plea in all Perſonal Actions.

The *Proceſs* in theſe Courts is by Summons, Arreſt, Foreign Attachment (or by Attachment of *Foreigners* Goods or Money found within the City in the Hands of the Plaintiff or of a third Perſon) to make the Defendant appear, and give Bail to anſwer the Condemnation. He in whoſe Hands the Goods are attached, is called the *Garniſhee*, becauſe he has had *Garniſhment*, (from *Garnir*, to inſtruct) or Warning not to part with the Goods or Money, but to appear and anſwer the Creditor's Suit. If the Foreigner appears and pleads, he is called the *Enterpleader*. If the Defendant does not appear, the Goods or Money may be condemned. There may be alſo a *Sequeſtration*, upon an Action of Debt, of Goods in a Houſe, Shop or Warehouſe, when there is no one within, by hanging a Padlock upon the Door, and making a Return thereof. Here the Proceedings are almoſt the ſame as upon Foreign Attachment. See, Of *the Sheriff's Court in London*, and for the Practice there, eſpecially upon *Foreign Attachment* and *Sequeſtration*, *The Complete Attorney*, and *The Complete Solicitor*.]

Beſides their particular Cuſtoms, the Proceedings, are according to the Rules of the Common Law. An Action is uſually tried here in Four Court Days; and if either Party ſhall have a Witneſs that cannot ſtay in *London* till the Day of Trial, his Depoſition may be taken in Writing, and allowed.

A Cauſe may be removed by *Habeas Corpus* to *Weſtminſter-Hall*. [a] But if an *erroneous* Judgment is given, the Cauſe may be removed by Writ of Error to the *Huſtings* before the Lord Mayor and Sheriffs.

3. The[b] *Lord Mayor's Court* of *Equity*, wherein the *Proceedings* are much like thoſe in the High Court of *Chancery*. There is a Practice called *marking* a Cauſe before the Lord Mayor, as thus——After a Verdict given for the Plaintiff in the Sheriff's Court, the Defendant may get the Cauſe marked before the Lord Mayor (being like an Injunction) to ſtay Judgment and Execution, 'till the Matter is examined in Equity. Alſo the Cuſtom is, that if a Plaint of Debt is entered in the Sheriff's Court, upon Suggeſtion of the Defendant, the Lord Mayor may ſend for the Parties, and for the Record, and examine the Parties upon their Plea, and if he finds that the Plaintiff is ſatisfied, he may award that the Plaintiff ſhould be barr'd, but not after Judgment.

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[c] F. N. B. 23, 24. 1 Roll. Abr. 745. 2 Saund. 228.

[d] 4 Inſt. 247, 248.

[a] F. N. B. 22. 4 Inſt. 247, 248.

[b] 4 Inſt. 248. The Compl. Attorney, p. 74, 75.

4. The Court of the *Lord Mayor and Aldermen* is a Court of Record, and is held in *Guildhall*, the Recorder being *Judge* thereof. But the Lord Mayor and Aldermen may ſit as Judges with him.

The *Proceedings* are by Action and Arreſt, or elſe by an Attachment of the Defendant's Goods.

The two *Counters* are the proper Priſons, as well for this as for the Sheriffs Court.

3 Black. Com. 81. 4 Black. Com. 434. 5. The *Court* of Requeſts, commonly called the *Court* of *Conſcience*, is kept at *Guildhall*, and is eſtabliſhed for recovering Debts not exceeding 40*s*.

By 3 Ja. 1. ch. 15. *Every Citizen and Freeman of* London, *and every other Perſon inhabiting there, being a Tradeſman, Victualler, or Labourer, who hath a Debt due to him, not amounting to* 40 s. *(See the next Statute) by any other Citizen, may cauſe the Debtor to be ſummoned to the* Court *of* Requeſts *at* Guildhall, *to appear before the Commiſſioners there, or any Three of them; who, if the Party does not appear, may order him to be committed to one of the Counters. But if he appears, they may proceed ſummarily, and examine the Parties and Witneſſes upon Oath, and forthwith make an Order, which the Plaintiff and Defendant muſt obey, under Penalty of Commitment to the Counter, 'till they ſhall perform ſuch Order. If any ſuch Perſon commence any Suit elſewhere for any ſuch Debt againſt any other ſuch like Perſon, upon the Defendant's Oath or other ſufficient Teſtimony that he was, at the Time of the Action brought, an Inhabitant in the City of* London, *or the Liberties thereof, as aforeſaid, and it ſhall appear that the Debt ſued for amounts not to* 40 s. *The Judge of the Court ſhall not allow to the Plaintiff any Coſts of Suit, but ſhall award to the Defendant his ordinary Coſts.*

This Act ſhall not extend to any Debt for Rent upon Leaſe, or other real Contracts, or concerning Teſtaments, Matrimony, or any Thing belonging to the Eccleſiaſtical Court.

By 14 Geo. 2. ch. 10. *It ſhall be lawful for every Citizen of* London, *and every other Perſon inhabiting within the ſaid City, or the Liberties thereof, and every Perſon who ſhall rent or keep any Shop, Shed, Stall, or Stand, or ſeek a Livelihood in the ſaid City, or Liberties thereof, which ſhall have any Debt owing unto him,* not exceeding 40 s. *by any Perſon inhabiting, or ſeeking a Livelihood within the ſaid City, or Liberties thereof, during their reſpective inhabiting within the ſaid City or Liberties thereof, or ſeeking a Livelihood as aforeſaid, to cauſe ſuch Debtor to be ſummoned by any of the Officers of the ſaid Court of Requeſts for the time being, by Writing left at the Dwelling-houſe, Lodgings, Shop, Shed, Stall, or Stand, or any other Place of ſeeking a Livelihood, of ſuch Debtor, or by any other reaſonable Notice to be given to the ſaid Debtor, to appear before the Commiſſioners of the ſaid Court of Requeſts, holden in the* Guildhall *of the ſaid City, and that the ſaid Commiſſioners, or any three of them, or more, ſhall, after ſuch Summons as aforeſaid, have Authority by this Act, from time to time, to ſet down, or cauſe to be ſet down ſuch Orders between ſuch Party, Plaintiff, and his Debtor, Defendant, touching ſuch Debt not exceeding* 40 s. *in Queſtion before them, as they ſhall find to ſtand with Equity and good Conſcience; all ſuch Orders to be regiſtered in a Book as they have been accuſtomed to be; which Orders ſo made, as well the Plaintiff, as the Defendant, ſhall perform and keep in all Points.*

And if any Perſon ſhall contemptuouſly affront, inſult, or abuſe all or any of the Commiſſioners of the ſaid Court, during the Time of their ſitting, it ſhall be lawful for the Commiſſioners then ſitting, or any three of them, to certify under their Hands and Seals the Name of the Perſon ſo offending, and the Nature of his Offence, to the Lord Mayor of the ſaid City, for the time being, who is required to ſummon ſuch Perſon ſo offending before him; and upon his Appearance, and the Fact alledged being proved upon the Oath of one credible Witneſs, or in Default of his Appearance, the ſaid Lord Mayor ſhall proceed to puniſh the Perſon ſo offending as aforeſaid, by Fine or Impriſonment, or both; provided that the Fine on any one Perſon do not exceed 20 s. *and that the Impriſonment be for no longer than ten Days. And upon the Non-payment of the ſaid Fine, it ſhall be lawful for the ſaid Lord Mayor to iſſue a Warrant under his Hand and Seal, for levying the ſaid Fine on the Goods of the Offender, and to cauſe Sale to be made thereof in caſe they ſhall not be redeemed in five Days, rendering to every ſuch Perſon the Overplus (if any there be) upon Demand, after deducting the reaſonable Charges of ſuch Diſtreſs and Sale; which Fine when levied or received, ſhall be paid into the Hands of the Churchwardens, or Overſeers of the Poor of the Pariſh, wherein every ſuch Offender ſhall inhabit, towards the Support of the Poor.*

6. The [a] *Court of Orphans*, a Court of Record, is eſtabliſhed for the Care and Government of Orphans. The Lord Mayor and Aldermen have the Cuſtody of Orphans (under Age and unmarried) of Freemen or Free-women of *London* that die, though they did not inhabit in *London*; and the keeping of all their Lands and Goods. And if they commit the Cuſtody of an Orphan to another Man, he ſhall have the Writ of Raviſhment of Ward, if the Orphan is taken away, or the Mayor and Aldermen may impriſon the Offender, till he produces the Infant.

Executors and Adminiſtrators are to exhibit true Inventories before the Lord Mayor and Aldermen in this Court, and muſt give Security to the Chamberlain by Recognizance for the Orphan's Part; which if they refuſe to do, the Court may commit them to Priſon till they obey. And if any Orphan ſue in the [a] Eccleſiaſtical Court or elſewhere for a Legacy, Account, or Duty due to him by the Cuſtom, a Prohibition will lie. But an Infant may waive the Benefit of ſuing in the Court of Orphans, and file a Bill in Equity againſt any one for Diſcovery of the perſonal Eſtate.

If any one without the Conſent of the Court of Aldermen [b] marries ſuch an Orphan under the Age of twenty-one, tho' out of the City, they may fine him, and impriſon him for Non-payment.

[See of a *Guardian*, *B.* 1. *ch.* 6. *ante.* Of Corporations, *B.* 1. *ch.* 8. *ante.* Concerning the Chamberlain of *London*, and 2 *Danv. Abr.* 311, 312. and ſee 5 *W.* & *M. ch.* 10. An Act for the Relief of Orphans of the City of *London.*]

7. The Court of [c] *Common Council* conſiſts of the Lord Mayor, Aldermen, and ſuch as are choſen in every Ward out of the Commonalty, to repreſent the whole Commonalty of *London.*

In this Court they make Acts for the better Government of the City, for the better Execution of the Laws of the Kingdom, or for the Publick Good, and for the Advancement of Trade; [d] But theſe Laws muſt not be contrary to the Publick Laws and Statutes. Such Laws being made

[a] 4 Inſt. 248, 249. 2 Danv. Abr. 311. tit. Cuſtoms of London.

[a] 5 Rep. 73. 4 Inſt. 249.

[b] 1 Lev. 32. 1 Vent. 178.

[c] 4 Inſt. 249. 5 Rep. 62, 63. 8 Rep. 123, 125.

[d] See ante.

made by the Lord Mayor, Aldermen and Commonalty, do bind within the City and Liberties thereof.

[c] 4 Inſt. 249. 9 Rep. 66.

8. The Court of the [c] *Wardmote* (Ward-Court) reſembles the Country Leets. Every Ward being as a Hundred, and the Pariſhes as Towns. There are twenty-ſix Wards, divided for the Government of them amongſt the Aldermen of the City.

In every Ward there is an Inqueſt of twelve men, or more, ſworn every Year to inquire of and to preſent Nuſances, and ſuch Perſons as have not paved or amended the Streets and Lanes, *&c.*

[f] 4 Inſt. 249.

9. The Cout of [f] *Hall-mote* (Hall-Court) is the Court which every Company in *London* keeps in their Hall, for the better Regulation of their Company.

[g] 4 Inſt. 250. 8 Rep. 126. 1 Str. 663. 2 Ld. Raym. 1410. S. C. [h] See ante.

10. The Court of the [g] *Chamberlain* for *Apprentices* is for the Inrollment of Indentures of Apprentices [h]. For an Apprentice may refuſe to ſerve, if his Indentures are not inroll'd; and may ſue out his Indentures in this Court, [*Qu.* If not in the Mayor's Court] and be diſcharged of his Maſter. And here Apprentices are made free. One may be free of *London* by *Service* of an Apprenticeſhip; by *Birthright*, being the Son of a Freeman; by *Redemption*, by *Order* of the Court of Aldermen.

The *Chamberlain* is *Judge* in all Complaints, either of the Apprentice againſt his Maſter, or of the Maſter againſt the Apprentice; and puniſheth the Offenders at his Diſcretion.

[a] 4 Inſt. 250.

11. There is the Court of the [a] *Conſervator* of the *Water and River of Thames*, &c. wherein the Lord Mayor of *London* hath the Rule and Government of the Water and River of *Thames*, and the Iſſues, Breaches, and Lands overflown, *&c.* from *Stains Bridge* to the Water of *Yendal* and *Medway*; and hath Authority to puniſh ſuch as uſe unlawful Nets, or other unlawful Engines in Fiſhing, or take Fiſh under Size unſeaſonably, *&c.* [See 4 *H.* 7. *ch.* 15. 3 *Jac.* 1. *ch.* 14. 7 *Ann. ch.* 9. and of the *Court* of the *Commiſſioners* of *Sewers*, *ch.* 1. *ante.*]

[b] 4 Inſt. 250.

12. The Court for [b] *Policies* of *Aſſurances* [not now in Uſe] is founded upon Acts of Parliament. For,

By 43 El. ch. 12. *and* 13 & 14 Car. 2. ch. 23. *The Lord Chancellor or Lord Keeper ſhall award a ſtanding Commiſſion (to be renew'd yearly or oftener) for the hearing and determining all ſuch Cauſes as ariſe from Policies of Aſſurance that are entered in the Office of Aſſurance of* London. *The Commiſſioners, or the greater Part of them, ſhall have power to ſummons the Parties, examine Witneſſes upon Oath, to hear and decree all ſuch Cauſes in a brief and ſummary Way, and commit to Priſon ſuch as diſobey their Decrees. But the Party grieved by ſuch Decree may, within two Months after, exhibit his Bill in* Chancery *for the Re-examination thereof, ſo as he firſt ſatisfies the Decree*, &c.

[c] 4 Inſt. 251.

13. The Court of the [c] *Tower* of *London* is holden within the Precinct of the Tower of *London* before the *Steward*, by Preſcription, of Debt, Treſpaſs, and other Actions of any Sum. Part of the *Tower* Liberty is within the City of *London*, and Part in the County of *Middleſex*. It hath Authority over ſeveral Hamlets in the County of *Middleſex*. There is alſo another Court at *St. Catharine's* for that Liberty, which is

alſo a *Royal* Juriſdiction for *Eccleſiaſtical* Cauſes; and therefore an Appeal lies from thence to the King in his Chancery.

14. The Court of *Stepney* at *Whitechapel*, (commonly called *Whitechapel Court*) is a Court of Record. Writs to this Court are directed thus: *Seneſchallo Curiæ noſtræ de Recordo infra Manerium de Stepney et Hackney in Com. Middleſex. Hamlettas et Libertates eorundem, necnon Capitali Ballivo Præhonorabilis. . . . . Manerii ſui de Stepney prædict. et eorum Cuilibet Salutem.* This Direction is double, becauſe there is a Gaol for Defendants arreſted in that Liberty by Writs of Superior Courts, [*Qu.*] as well as by Proceſs of this Court. [This Court is not within the City of *London*, but in the County of *Middleſex.*]

15. The Court for *St. Martin's le Grand, by Alderſgate*, is a Court of Record for the Trial of all Perſonal Actions. It is a Liberty within the Deanery of *Weſtminſter*, and ſubject to the Liberty thereof, and hath a peculiar Juriſdiction within itſelf.

16. For the *Court of the Preſident, Cenſors and Commonalty of the College of Phyſicians* within the City of *London*, and ſeven Miles compaſs, ſee the Letters Patent of Incorporation in 14 & 15 *H.* 8. *ch.* 5. See alſo 1 *Mar. Seſſ.* 2. *ch* 9. and Dr. *Bonham's* Caſe, 8 *Rep.* 107, 108, *&c.*

1 Ld. Raym. 454.

See 3 *H.* 8. *ch.* 11. For appointing Phyſicians and Surgeons in the City of *London*, and Precinct of ſeven Miles. 34 & 35 *H.* 8. *ch.* 8. For impowering any Perſons to adminiſter outward Medicines, or to cure outward Sores, or give Drinks for the Stone, Strangury, or Agues.

There are other Courts within the City of *London*, but they are mentioned in other Places; or are not much to our Purpoſe; as the *Court* of the Governors and Corporation for the Bounty of Queen *Anne*, for the Augmentation of ſmall Livings; of the *Eaſt-India* Company, *Bank*, *South-Sea*, *&c.* [See of the Court of the *Coroner*, of the *Seſſions* of *Oyer* and *Terminer* and Gaol Delivery for *Newgate*, held at *Juſtice-Hall* in the *Old Bailey*, *&c. ch.* 1. *ante.*]

Note, *That by* 27 Eliz. (not printed) *The two chief Burgeſſes of* Weſtminſter *may hear, determine and puniſh (according to the Laws of the Land and lawful Cuſtoms of the City of* London) *Matters of Incontinency, common Scolds, Inmates, common Nuſances, and likewiſe commit ſuch Perſons as ſhall offend againſt the Peace.*

There is alſo a *Court* of Record kept Weekly in the Borough of *Southwark* for the Liberty thereof.

Of the Courts in other Cities Towns Corporate, Boroughs, &c.

XI. There are *Courts* holden in other *Cities*, *Towns Corporate*, and *Boroughs*, throughout *England*, together with many Courts belonging to Caſtles, *&c.* But becauſe theſe are private and ſufficiently known, I ſhall only ſay ſomething in general of inferior Courts.

[a] Where a Power to hold Pleas, *&c.* is granted by Letters Patent to a Corporation, proper Officers and Proceſs are incident to the Grant; for they cannot hold a Court without them.

[b] It ought to appear by the Style of the Court, by what Authority it is held, whether by Cuſtom or by Letters Patent.

[c] Nothing ſhall be intended to be within the Juriſdiction of an inferior Court, but what is expreſſly alledged to be ſo.

[d] If an Obligation is made out of the Juriſdiction of the Court, though the Action brought upon it is *tranſitory* as to other Courts, as the Courts at

[a] 1 Roll. Abr. 461, 526.

[b] 1 Roll. Abr. 797. 1 Cro. 489. Hob. 63.

[c] 1 Sid. 331. 1 Lev. 104. 2 Ld. Raym. 1310. 1 Saund. 74.

[d] 2 Inſt. 229. 1 Roll. Abr. 545, 546, 547. 2 Roll. Abr. 317. 2 Danv. Abr. 299, 300, 301. 1 Ld. Ray. 211.

at *Weſtminſter* which have a general Juriſdiction, yet inferior Courts have not any Juriſdiction of any Thing that ariſes out of the Juriſdiction, and therefore have not Power to hold Plea thereof. So if Payment at the Day is pleaded to a Bond, it muſt be alledged to be within the Juriſdiction. For an inferior Court cannot inquire of thoſe Things, which are out of its Juriſdiction. But the common Practice of ſuch Courts is otherwiſe. [See *Weſtm.* 1. or 3 *Ed.* 1. *ch.* 35.]

[c] 1 Lev. 104. 1 Vent. 72.

[c] If Part of the Cauſe ariſes within the inferior Juriſdiction, and Part without, the inferior Court ought not to hold Plea.

* Skinn. 350. Salk. 674. Carth. 274.

The Courts at *Weſtminſter* will not, *ex Officio,* take Notice of the Cuſtoms of inferior Courts*.

[See of a Liberty to *hold* Pleas, and to have *Cognizance* of *Pleas, B.* 2. *ch* 2. *ante*].

By 4 & 5 Ann. ch. 16. *All the Statutes of* Jeofails *ſhall be extended to Judgments, which ſhall be enter'd upon Confeſſion,* Nihil dicit, *or* Non ſum informatus, *in* any *Court of Record.*

Of the Courts of the Univerſities.

[a] 4 Inſt. 227. Prynn's Animadv. on 4 Inſt. p 156. 3 Black. Com. 83. 4 Black. Com. 274. [b] 9 Rep. 30.

XII. The *Courts* of the [a] *Univerſities* of *Oxford* and *Cambridge* are of a particular Nature. They are granted by Charters, and are confirmed by Authority of Parliament. For,

By 13. *El* ch. 29. it is enacted, 1. *That* each *of the Univerſities ſhall be incorporated by a certain Name, tho' they were ancient Corporations before.* 2. *That all Letters Patent and Charters hitherto granted ſhall be good, effectual and available in Law, as amply, fully and largely*[b], *as if the ſaid Letters Patents were recited* verbatim *in the ſaid Act.* 3. *That the Chancellor, Maſters and Scholars of either of the ſaid Univerſities ſhould enjoy all Manors, Lands, Tenements, and Hereditaments, all Liberties, Franchiſes, and Privileges, View of Frank-Pledge, Law-days, and all other Things which either of the ſaid corporated Bodies have enjoy'd, or of Right ought to have enjoy'd, according to the Intent of the ſaid Letters Patent.* 4. *That all Letters Patent of the Queen's Highneſs, or of any her Progenitors or Predeceſſors, and all Liberties, Franchiſes, and all other Things whatſoever, therein expreſſed, given, or granted, ſhall be eſtabliſhed and confirmed, any Statute, Law, Uſage, Cuſtom, or Conſtruction to the contrary notwithſtanding*; ſaving *the Right of all* others *than of the Queen's Majeſty, her Heirs and Succeſſors.*

By Letters Patent (not confirmed by Act of Parliament) dated the 30 of *March,* 11 *Car.* 1. and granted to the Univerſity of *Oxford,* old Privileges are explained, and larger granted.

The *Courts* are called the *Chancellors* Courts, who are uſually Peers of the *Realm,* and are appointed over the whole Univerſity. But the Courts are kept by their Vice-Chancellors, their Aſſeſſors, or Deputies. The Cauſes are managed by Advocates and Proctors.

Theſe Courts have *Juriſdiction* in all Cauſes Eccleſiaſtical and Civil, (except *Mayhem, Felony,* and *Freehold*), where a Scholar, Servant, or Miniſter of the Univerſity is one of the Parties in Suit. [But ſee the Grant of *H.* 4. in *Prynn's Animadv. p.* 368, 369.]

[c] 3 Cro. 73. Hetl. 25. Hardr. 505, 508.

Their [c] *Proceedings* are in a ſummary Way, according to the Practice of the Civil Law; and the Judges in their *Sentences* follow the Juſtice and Equity of the Civil Law; or the Laws, Statutes, Privileges, Liberties and *Cuſtoms* of the Univerſities; or the *Laws* of the *Land,* at their Diſcretion.

If there is an *erroneous* Sentence in the Chancellor's Court of the Univerſity of *Oxford*, an *Appeal* lies to the *Congregation*, thence to the *Convocation*; and from thence to the King in *Chancery*; who nominates Judges Delegates, to hear the Appeal. The Appeal is of this Nature in *Cambridge*.

The Chancellor of the Univerſity of *Oxford*, or his Vice-Chancellor, may inflict Eccleſiaſtical Cenſures of the greater Excommunication on Offenders, even for temporal Offences; and [d] certify the Excommunication into the High Court of Chancery, to obtain the Writ *De Excommunicato Capiendo*, as if the Offender had been excommunicated in an Eccleſiaſtical Cauſe, and certified by a Biſhop. The Univerſity of *Cambridge* hath alſo this Privilege.

[d] F. N. B. 64.

Note, The following Reſolutions concerning the Privileges of the Univerſities.

They have no Privilege in Cauſes that concern or relate to a Freehold, [a] or for Recovery of the Poſſeſſion of a [b] Term without claiming Title to the *Freehold*.

[a] 1 Vern. 212.
[b] 3 Cro. 87, 88.
2 Danv. Abr. 169.

[c] By Charter confirmed by Act of Parliament, Cognizance is granted to the Univerſity, of all Suits ariſing any where, in Law or Equity, againſt a *Scholar*, *Servant*, or *Miniſter* of the Univerſity, depending before the Juſtices of the *King's Bench*, *Common Pleas*, and others therein mentioned, and *before any other Judge*, tho' the Matter concern the King. If an *Indebitatus Aſſumpſit* is brought by *Quo Minus* in the *Exchequer* againſt a Scholar or other privileged Perſon, the Univerſity ſhall have Conuſance. For the Court of Exehequer is included in the general Words. *Qu.* If thoſe Words extend to a Court of [d] Equity, for mere Matters of Equity; as to execute Agreements in *Specie*; becauſe the Univerſity can only impriſon or excommunicate? Or whether in other equitable Caſes, the Claim muſt not be put in by Way of *Plea*?

[c] 3 Cro. 73.
Hetl. 25.
Hard. 505. 508.
2 Inſt. 130.

[d] Hard. 506, 509.
2 Ventr. 362.
1 Vern. 212.
2 Vern. 484.
Chan. Caſes 237 Contra Cary's Rep. 65.

A Scholar, &c. cannot [e] waive his Privilege, and have a Prohibition in the Courts of *Weſtminſter*; for the Univerſity has the Right of the Conuſance of the Plea, where one is a privileged Perſon; and a Stranger is forced to ſue a privileged Perſon in their Courts, by Reaſon of that Right veſted in them.

[e] 3 Cro. 73.

[f] If a Debtor and Accountant to the King ſues a Scholar by Bill in Equity in the Exchequer; or if an [g] Attorney ſues a Scholar by Writ of Privilege, it is ſaid that the Univerſity ſhall not have Conuſance, for a general Grant ſhall not take away the ſpecial Privilege of any Court. (*Qu.*)

[f] Hard. 189.
[g] Lit. Rep. 304.
3 Leon. 149.
2 Danv. Abr. 164.

A Scholar, &c. ought to be only [h] one of the Parties in Suit. If another that is not privileged, is joined with him (as Obligor or Obligee in a Bond, &c.) he ſhall not have Privilege.

1 Ld. Ray. 342.
[h] Hetl. 28.
1 Ventr. 298, 299.

[i] The Privilege of the Univerſity is not to be allowed to a Townſman, on purpoſe to excuſe him from an Office in the Town, if he keeps a Shop and follows a Trade, though he is matriculated as Servant to a Scholar. For this ſeems to be fraudulent.

[i] 2 Ventr. 106

It hath been diſputed, whether the Wife [k] of a Head of a College or Hall, or his Children ſhould have the Benefit of the Privilege of the Huſband or Father, though it will be allowed to his Servant. But both Caſes ſeem to ſtand upon the ſame Reaſon. *Quære*, If the Privilege will be allowed in an action againſt a [l] *College*?

[k] 3 Cro. 73.
1 Roll. Abr. 580.

[l] 1 Mod. 163, 164.

Cognizance may be demanded by *Certificate* only, without ſpecial

Pleading, upon an *Indictment* of a privileged Perſon for an Aſſault or Battery. This hath been allow'd at the *Oxford* Aſſizes upon my Motion.

[m] Hard. 505, &c.
2 Danv. Abr. 174.
2 Str. 810.
See 2 Wilſon 406 to 413.

[m] The Vice-Chancellor (as well as the Chancellor) by his Attorney or Deputy, appointed by Writing, may by his Certificate demand Cognizance, tho' the Vice-Chancellor himſelf is but a Deputy. For a Bailiff may properly demand Conuſance; and upon Notice of the Patent, the Court ought to ſuperſede.

[n] 8 Rep. 118.
1 Roll. Abr. 492.
Hob. 87.
1 Vent. 3.

[n] If Conuſance of Pleas be granted to one *Licet ipſemet ſit pars*, he ſhall not have Cognizance in an Action in which he himſelf is Party becauſe he ſhall not be his own Judge. But if it be granted further, that if he is Party, he may make another Judge, or that another ſhall be the Judge where he is Party, the Conuſance ſhall be allowed.

[a] 2 Inſt. 548.

Tho' I have ſaid, that particular Juriſdictions derogatory to the general Courts of Common Law are to be taken [a] ſtrictly; yet it ſeems reaſonable, that ſuch Privileges, as are granted for the Advancement of Religion and Learning, ſhould have a favourable Conſtruction, and be excepted out of the general Rule.

2 Ld. Ray. 1347.

And yet the Courts of *Weſtminſter* will not take Notice, unleſs it be ſhewn, that the Courts of the Univerſities proceed according to the Rules of the Civil Law; but will intend that their Proceedings are agreeable to the Rules of the Common Law.

[b] 3 Leon. 214.
2 Inſt. 330.

It is ſaid, that the Univerſities have only [b] *Cuſtodiam Aſſizæ Panis et Cerviſiæ, et correctionem et punitionem eorundem*; not *Aſſiſam ipſam* (*i. e.*) not Authority to appoint another Aſſize than what is ſet down by Statutes; but to ſee that the Statutes be executed, and to puniſh Offences againſt the ſaid Statutes. [See 51 *H.* 3. *St.* 1. & 6. 31 *Ed.* 1. 7 *Ed.* 6. *ch.* 5. 2 *W.* & *M. Seſſ.* 2. *ch.* 14. 11 & 12 *W.* 3. *ch.* 15. 12 & 13 *W.* 3. *ch.* 11. § 19. In which laſt Statute the Right of marking Meaſures for Ale and Beer is acknowledged to be in the two Univerſities.]

The Univerſity of *Oxford* hath by a Grant of 29 *Ed.* 3. The Aſſize and Eſſay of Wine and Ale, as well as the Cuſtody of it.

By the Charter granted 14 *H.* 8. The Chancellor, his Commiſſary, and his Deputy (*i. e.* The ProVice-Chancellor) are *Juſtices of the Peace* for the *Vill* of *Oxon*, and *Counties* of *Oxon* and *Berks*. So that their Authority does not depend only upon the common Commiſſion; they being Juſtices of the Peace by Virtue of their Offices.

I have now finiſhed the Account of *general* and *particular* Juriſdictions. I ſhould therefore proceed to give a ſhort Scheme of the *Proceedings* in our Courts. But becauſe a Man may oftentimes have a Remedy *without* going to Law, ſomething muſt be ſaid firſt concerning ſuch Remedies.

[c] Vide ante.

[There have been of late Years ſeveral Courts erected for the more eaſy and ſpeedy Recovery of ſmall Debts upon the Plan of the Court of Requeſt held at *Guildhall*[c], as by 22 *G.* 2. *ch.* 47. For the more ſpeedy and eaſy Recovery of ſmall Debts within the Town and Borough of *Southwark*, &c. 23 *G.* 2. *ch.* 27. and 24 *G.* 2. *ch.* 42. Within the City and Liberty of *Weſtminſter*, &c. 23 *G.* 2. *ch.* 30. Within the *Tower Hamlets.* 24 *G.* 2. *ch.* 16. Within the City of *Lincoln*, &c. 25 *G.* 2. *ch.* 34. Within the Town of *Birmingham. ch.* 38. Within the Borough of *St. Albans. ch.* 43. Within the Town of *Liverpool. ch.* 45. Within the City of *Canterbury.* 26 *G.* 2. *ch.* 7. Within the Borough of *Boſton*, &c. 31 *G.* 2. *ch.* 23. and 32 *G.* 2. *ch.* 6. Within the Hundred of

Brixton in the County of *Surry*. And 31 *G.* 2. *ch.* 24. Within the Borough of *Great Yarmouth*, and its Liberties. And ſee 23 *G.* 2. *ch.* 33. For the preventing Delays and Expences in the Proceedings in the County-Court of *Middleſex*; and for the more eaſy and ſpeedy Recovery of ſmall Debts in the ſaid Court. By 3 *G.* 3. *ch.* 19. within the Hundreds of *Bradford*, *&c.* in *Wilts*. By 4 *G.* 3. *ch.* 40. at *Doncaſter*, and by *ch.* 41. at *Kendal*. by 5. *G.* 3. for the Hundreds of *Blackheath*, *&c.* in *Kent*, amended by 10 *G.* 3. *ch.* 29. by 5 *G.* 3. *ch.* 9. at *Chippenham*, *&c.* in *Wilts*. by 6 *G.* 3. *ch.* 16. at *Bath*. and by *ch.* 20. at *Derby*. by 10 *G.* 3. *ch.* 20. at *Lynn*. and by *ch.* 21. at *Poulton*, in *Com. Lanc.* &c. &c. &c.

CHAP. III.

Of Remedies without *Suit in Courts. As* 1. *By Act of* Law *in Things* perſonal *and* real, *wherein of a* Remitter. 2. *By Act of* one *of the Parties, in Things perſonal and real, wherein of* Entry, Deſcent, *and* Diſcontinuance. 3. *By Act of* all *Parties, wherein of* Accord, Arbitrement, *and* Umpirage.

THERE is oftentimes a Remedy to be had without applying to the Courts of Juſtice; and this may be obtained by Act of *Law*, by an Act of *one* of the Parties, and by the Act of *all* Parties.

Of Remedies without Suit in Courts.

1. By Act of *Law* the Party may have Remedy *without* Suit in Court. 1. In Things *perſonal*, as if the [a] Debtor makes the Debtee Executor, He may detain ſo much of the Goods and Chattels, as will pay his Debt. 2. In things *real*, as where one's Entry is taken away by Deſcent or Diſcontinuance, if he comes to the Poſſeſſion without Folly or Covin, he ſhall be *remitted*. A [b] *Remitter* is where a Man hath two Titles to Lands or Tenements, and is ſeiſed of them by his latter Title, which proving defective, he is reſtored to the former or ſurer Title by Operation of Law. A Remitter muſt be to a precedent Right*. For regularly to every Remitter there are two Incidents (*viz.*) an ancient Right, and a defeaſible Eſtate of Freehold, coming together.

[a] Plowd. 543. Office of Executor, p. 204, &c.

[b] Lit. 659. 1 Inſt. 347. b. 348 a. 3 Black. Com. 19, 189.

2. By the Act of *one* of the Parties. 1. In reference to Things *perſonal*; [c] as if one does wrongfully take or detain my Wife, Child, Servant, or Goods, wherein the *Property* is not *altered* by Sale [d] in a *Fair* or *Market-Overt*, I may lawfully retake them, though not in a riotous Manner. But an Inn-keeper or Alehouſe-keeper may juſtify the detaining of a Horſe or other thing from me, till I have paid him his Reckoning. [But ſee 11 & 12 *W.* 3. *ch.* 15.] So a Taylor may detain my Clothes, 'till he is paid for the making. 2. In reference to Things *real*; as I may remove a [e] Nuſance done to my Freehold, if it can be

[c] Lit. 497, 498. 3 Inſt. 134. 8 Rep. 147. 11 Rep. 82. Bacon's Elem. 75. Kely. 132.

[e] Finch, B. 3. ch. 2. p 188. 2 Inſt 405. 4 Rep. 63. 5 Rep. 101. 8 Rep. 147. 9 Rep. 54.

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* *Quod prius eſt, verius eſt.* 1 Inſt. 347. b.

done

55, 113.
1 Roll. Abr. 737, 738, &c.
Lit. 496.

[f] Lit. 385, &c.
1 Inſt. 237. b. 238. a. 239. a.
3 Black. Com. 176, 177.

[b] Lit. 592, &c.
1 Inſt. 325. a. &c.
2 Inſt. 681.
3 Rep. 84.
8 Rep. 71.
1 Roll. Abr. 632, 633, 634.
3 Black. Com. 171.

done without Riot. So I may diſtrain Goods or Cattle upon my Eſtate for Non-payment of the Rent, or Cattle *Damage-feaſant* upon it. I may alſo maintain Poſſeſſion of my Lands againſt one that would turn me out; or I may regain my Poſſeſſion by *Entry*, when I have a Right of Entry or Title to Lands, and my Entry is not taken away by Law (*viz.*) by *Deſcent* or *Diſcontinuance*. 1. By [f] *Deſcent*, as where a Diſſeiſor dieth ſeiſed in Fee or Fee-tail of Houſes or Lands (for a Dying ſeiſed for Term of Life doth not take away an Entry) and the Law caſteth the Houſes or Lands upon his Heir. Here by Reaſon of the Deſcent (which is much favoured) the Right of Entry is taken away, and the Diſſeiſee, or he that hath Title is driven to his Action. So then, to take away an Entry there muſt be a Dying ſeiſed either in Fee-ſimple or Fee-tail, and alſo a Deſcent. [See 32 *H.* 8. *ch.* 33 [a] whereby the Title of *Deſcents* to take away *Entries* and *continual Claim* is made almoſt uſeleſs.] 2. By [b] *Diſcontinuance*, where an Alienation is made or ſuffered of Lands or Tenements by Tenant in Tail, or by any one that is ſeiſed in Fee-ſimple, Fee-Tail, or for Life in another's Right, whereby the Iſſue in Tail, or the Heir or Succeſſor, or thoſe in Remainder or Reverſion, are driven to their Action, and cannot *Enter*. This happens, becauſe the Perſon made a larger Eſtate of the Land than he ought. A Diſcontinuance may be five Ways (*viz.*) By Feoffment, Fine, Recovery in a *Præcipe*, Releaſe with Warranty, Confirmation with Warranty. And this was to the Prejudice of Wives, Heirs, Succeſſors, or thoſe in Reverſion or Remainder. So that where the Entry is taken away by Law, one cannot be his own Judge, but muſt have Recourſe to the Law. But many Perſons are reſtrained by *Statutes* from making a Diſcontinuance. For,

[c] 2 Danv. Ab. 579, 580.

By 11 H. 7. ch. 20. [c] *A* Wife *is reſtrained to make certain Alienations of the Lands of her deceaſed Huſband.*

[d] 3 Rep. 50.
2 Inſt. 681.
8 Rep. 71.
2 Danv. Ab. 581.
See of Leaſes, B. 2. ch. 3. ante.

By 32 H. 8. ch. 28. [d] *The* Huſband *is reſtrained from Alienations of the Wife's Inheritance or Freehold.*

By 1 El. ch. 19. 13 El. ch. 10. 1 Ja. 1. ch. 3. *All* Eccleſiaſtical *Perſons, Deans and Chapters, Maſters and Fellows of Colleges, Maſters of Hoſpitals,* &c. *are diſabled to alien or diſcontinue their Eſtates.*

Of Things that lie in Grant, there can be no Diſcontinuance; nor by Exchanges, or Letters Patent; becauſe they do not require Livery of Seiſin.

The Titles of *Diſcontinuance* and *Remitter* were great and large Titles in our old Law Books; but now they are made very narrow by theſe Statutes, and 27 *H.* 8. *ch.* 10. of Uſes as to Remitters; and ſome *Aſſurances*, that at the Common Law were Diſcontinuances are now made Bars, as Fines with Proclamations by 4 *H.* 7. *ch.* 24. and 32 *H.* 8. *ch.* 36. as to the Iſſue in Tail; tho' ſtill they are Diſcontinuances in ſome Caſes as to him in Remainder or Reverſion.

3. By the Act of *all* Parties there may be a Remedy without Suit. As by their own immediate *Accord*, or by referring the Controverſy to the Determination of Neighbours and Friends by *Arbitrement* or *Umpirage*.

[e] Terms of the Law, verb. Accord.

1. [e] *Accord* (*Concordia*) is an Agreement between two at leaſt, to give and accept ſomething in Recompence for a Treſpaſs, *&c.* done by one to the other. If this Agreement is executed, it is a good Bar in Law, in ſome Caſes of perſonal Injuries, to any Action for the ſame Treſpaſs or

Injury. Accord, with [f] Satisfaction, is a good Plea in Perſonal Actions, where Damages only are to be recovered, not in real Actions. Therefore a Right or Title to Freehold Lands cannot be barr'd, by Acceptance of any collateral Satisfaction or Recompence. It muſt be by Releaſe, Confirmation, *&c.* But becauſe the Action of *Ejectione Firmæ* and Treſpaſs are ſo woven together, that they cannot be parted, as an Accord is a good Plea in Treſpaſs, it muſt be ſo in Ejectment. [*Qu.*]

[a] If one is bound in an Obligation, to deliver Goods, or to do any collateral Thing, the Obligee cannot, by Accord betwixt them, give Money in Satisfaction thereof; for the Contract being made by Writing, to do ſuch a collateral Act, it cannot be altered without Writing. But when one is bound to pay Money, he may give Goods or other valuable Thing in Satisfaction; becauſe all Things are eſtimated and valued by Money, and not Money by Things. If a Contract without Deed is to deliver Goods, or to do any other collateral Thing, there Money may be paid by Accord, in Satisfaction of ſuch a Contract. For as a Contract upon Conſideration may commence by Words, ſo by an Agreement by Words, for any valuable Conſideration, the Contract may be diſſolved.

Note, That the beſt and ſafeſt Way to plead an Accord, is to plead it by Way of [b] Satisfaction, and not by Way of Accord. For if it be pleaded by Way of Accord, a preciſe Execution [c] thereof in every Part muſt be pleaded: But by Way of Satisfaction you need not ſay any more, but that you paid the Plaintiff ſo much in full Satisfaction of the ſame Treſpaſs, which the Plaintiff received in Satisfaction. In all Caſes where Arbitrement is a good Plea, Accord with Satisfaction is a good Plea.

2. [d] *Arbitrement* (*Arbitrium*, *Laudum*, *Compromiſſum*) or an *Award*, is the Determination of two or more Perſons at the Requeſt of two Parties at leaſt, who are at Variance, for ending the Controverſy without public Authority. *Five* Things are incident to every Arbitrement or Award, (*viz.*) *Matter* of *Controverſy*, *Submiſſion*, *Parties* to the Submiſſion, *Arbitrators*, an *Arbitrement* or a Giving of the Award.

1. *Matter of Controverſy*, either of Fact, or of a Right in Things and Actions perſonal and uncertain; but ſo as no [e] Freehold, though the Submiſſion is by Deed, nor leaſe of Years of Land, may be *adjudged* from one to another. Thus Debts due on Record, or upon Bill, or on certain Contract, Matters concerning Matrimony, or criminal Offences, cannot be made Matters of Arbitrement. But in ſuch Caſes, if Men enter into Bond with Condition (as is uſual) to ſtand to the Arbitrement or Award, the Bond may be forfeited for Non-performance of the Condition, or of the Award. [And *Qu.* [f] whether, if there is no Bond, an Action will not lie upon the mutual Promiſes, according to the later Determinations: or the Party may be compelled in a Court of Equity to perform his Part, tho' it relates to Freehold, if he has acepted any Part of the Satisfaction awarded to him for it [h]].

2. *Submiſſion* of the Controverſy to Arbitrators is neceſſary, by giving them Power to pronounce a Sentence betwixt the Parties. [i] This Submiſſion may be either *General*, as of all Demands whatſoever; or *Special*, of ſome certain Matters in Controverſy. It may be alſo by *Word* or *Writing*, *abſolute* or *conditional*. If the Parties give a Bond to each other,

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[f] 4 Rep. 1. 6 Rep. 44. 9 Rep. 78, 79, 80. 3 Black. Com. 15.

[a] 9 Rep. 78, 79. 1 Inſt. 212. b. See p. 279. 280. ante.

[b] 6 Rep. 44. 9 Rep 80.

[c] 1 Ld. Ray. 122. 1 Str. 23, 426, 573.

[d] Weſt's Symb. 2 Part p. 163. § 1. p. 167. § 43. Hardr. 44. 3 Black. Com. 16.

[e] Weſt's Symb. 2 Part p. 164. § 33. 1 Roll. Abr. 242, 244, 246, 265, 266. 9 Rep. 78, 79. 1 Cro. 223, 422. Noy's Max. 108.

[f] 1 Danv. Abr. 513.

[g] 1 Ld. Ray. 114, 234, 248. 2 Wms 450.

[h] 3 Wms 187.

[i] Weſt's Symb. 2 Part. p. 163 § 2, 3, 4. p. 165. § 34, p. 166. § 38. 8 Rep. 38.

it muſt be Word for Word alike on both Sides, only changing the Names, *&c.* The Submiſſion may be, with *Covenants* to perform the Award, if the Parties pleaſe.

3. There muſt be *Parties* to the Submiſſion, and [a] two at the leaſt, one of one Side and one of another Side, of *Capacity* to compromiſe or to make mutual Promiſes, to ſubmit to the Award.

4. [b] *Arbitrators* are requiſite, who are private extraordinary Judges, choſen by the Parties, to give Judgment between them, to end the Debate. Neither natural nor legal Diſabilities do hinder any one from being an Arbitrator. If they are incompetent Judges, the Fault is in thoſe that chooſe them. They are called *Arbitrators*, becauſe they have an *arbitrary* Power, if their Judgment be according to the Submiſſion. If they obſerve the Submiſſion, and keep within their Juriſdiction, their Sentence is definative; from which there lies no Appeal. [But ſee *infra.*] They cannot [c] *aſſign* their Power, for they have but a bare Authority.

5. [d] *Arbitrement* is the Sentence or the Decree, pronounced by the Arbitrators, and publiſhed, when they have heard all Parties. But now as all Submiſſions are uſually by Bond conditionally, *So as the Award be made in Writing, and ready to be delivered to the Parties, or to ſuch of them as ſhall require the ſame*, the Parties having ſo bound themſelves, are obliged to take Notice of the Award at their Peril; [e] unleſs the Words of Submiſſion are, *So that the Award be delivered to each Party by ſuch a Day*. For then it muſt be delivered to each Party accordingly.

In making an Arbitrement or Award, [f] *five* Things muſt be obſerved. 1. That it be according to the very *Submiſſion*, in reſpect of the Perſons and the Things ſubmitted. For to award a Thing to be done *by* a Stranger, and ſometimes *to* a Stranger, who is not Party to the Submiſſion, or to make an Award upon another Thing, that is not ſubmitted, is void. But where the Award is of ſeveral Things, Part within the Submiſſion, and Part out of it, it is voidable, for that which is out of the Submiſſion, and good for the Reſidue. [If they are Matters or Clauſes diſtinct and independent of each other.] 2. It ought to be *equal*, and not on one Side only; for it muſt appoint either Party, to give or do ſomething beneficial or advantageous. 3. The Performance of the Award muſt be *poſſible* and *lawful*. 4. There muſt be a *Means* by Law, [g] to attain unto the Thing awarded. This is chiefly meant, where Submiſſion is without Bond. 5. It ought to be *certain* and *final*, and make an End of all Controverſies ſubmitted; or if it is good only in Reference to Part of the Things ſubmitted, it muſt be final as to that Part, or elſe it will be void.

Theſe Things being obſerved, an Award ſhall not be unravelled or ſet aſide in a Court of [h] Equity, [or ſet aſide in a Court of Law [i], where the Submiſſion is made a Rule of Court] unleſs there was Corruption [or groſs Miſbehaviour [k]] in the Arbitrators, [or a plain Miſtake of the Arbitrators, either as to the Law, or a Matter of Fact, appearing upon the Face of the Award [l]. *Qu.*] [See 9 & 10. *W.* 3. *ch.* 15. *infra.*] If all Things are done *Bonâ Fide*, the Arbitrement ſhall be expounded according to the [m] Intent of the Arbitrators, if agreeable to Law, and not literally.

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[a] Weſt's Symb. 2 Part, p. 163. § 7, 8, 9, 10, &c. 1 Danv. Abr. 549.

[b] Weſt's Symb. 2 Part p. 164. § 21.

[c] Weſt's Symb p. 167. § 41. 4 Rep. 78. 1 Roll. Abr. 251.

[d] Weſt's Symb. 2 Part p 163. § 1. p. 167. § 43. 2 Ld. Ray. 989.

[e] 5 Rep. 103.

[f] Weſt's Symb 2 Part p. 167. § 44. 5 Rep. 78. 10 Rep. 131. 132. 1 Roll. Abr. 242, 243, 244, 245, 247, 248, 249, 252, 253. 1 Inſt. 206. a. & b. Noy's Max. 110. 1 Ld. Ray. 123.

[g] 2 Ld. Ray. 1040, 964.

[h] 1 Chan. Rep. 279. 2 Chan. Rep. 140.

[i] 2 Ld. Ray. 857.

[k] 3 Wms. 361. 2 Vern. 251, 514.

[l] 2 Vern. 705.

[m] 10 Rep. 57. Yelv. 98. 2 Ld. Ray. 1076, 1142.

An [a] *Umpirage* is where there is but one Arbitrator, and is uſually, when the Parties ſubmit themſelves to the Arbitrement or Award of certain Perſons, and if they cannot agree, or are not ready to deliver their Award in Writing before ſuch a Time, then to the Judgment of another as *Umpire*. This is often the Effect of the Bond of Submiſſion.

[a] 1 Roll. Abr. 261, 262.

Note, That [b] Submiſſion to an Award by Bond may be countermanded by Deed. Such Authorities in their own Nature are revocable; as a Letter of Attorney, *&c.* though made irrevocable by expreſs Words. But then the Bond is forfeited. If it had been without Obligation, *&c.* * one might revoke and forfeit nothing. [*Sed Qu.* As it is now held that an Action will lie on the mutual Promiſes; and the Caſes of a Submiſſion to Arbitration, and a Letter of Attorney ſeem to be very different].

[b] 8 Rep. 82.

[c] Where an Accord with Satisfaction may be pleaded, an Award may be pleaded.

[c] 6 Rep. 44.

By 9 *&* 10 W. 3. ch. 15. *The Parties may agree, that their Submiſſion to the Award, or Umpirage of any Perſon or Perſons. ſhall be made a* Rule *of any of His Majeſty's Courts of* Record; *and may inſert ſuch their Agreement in the Condition of their Bond, or other Submiſſion. And a Rule of Court ſhall thereupon be made, that the Parties ſhall be concluded by ſuch Arbitrement or Umpirage. And in Caſe of Diſobedience thereto, the Party neglecting or refuſing, ſhall be ſubject to all the Penalties of contemning a a Rule of Court, as if he was a Suitor or Defendant in ſuch Court, and the Court on Motion ſhall iſſue Proceſs accordingly, which Proceſs ſhall not be ſtopped or delayed by any Order or Proceſs of any other Court, unleſs it ſhall be made appear to ſuch Court on Oath, that the Arbitrators or Umpire miſbehaved, or that ſuch Award was corruptly and unduly procured. In which Caſe it ſhall be ſet aſide by any Court of* Law *or* Equity, *ſo as Complaint be made thereof in the Court where the Rule was made before the laſt Day of tht next Term after the Award publiſhed to the Parties.*

This Statute extends only to ſuch Submiſſions as relate to Matters for which there is no other Remedy but by Perſonal Action, *or by Suit in* Equity.

Where one of the Parties to an Award made on a Submiſſion in Court, purſuant to this Act, dies before the Money paid, no *Sci. Fa.* can iſſue againſt his Heir or Executor, to enforce Payment: For the Award, though eſtabliſhed by the Court, is not in the Nature of a Judgment or Decree to be proſecuted; but in the Nature of a Contempt, which dies with the Perſon.

Pr. in Chan. 223. 2 Vern. 444.

If there be an Award to pay a Sum of Money, a Tender and Refuſal has been formerly held no Performance, without actual Payment: But it has been adjudged otherwiſe ſince.

2 Ld Ray. 964.

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* *Ex nuda ſubmiſſione non oritur actio.* 8 Rep. 82.

CHAP. IV.

Of the Proceedings *in* Suits *or* Civil *Cauſes in our Courts. (viz) Of* Actions *(wherein of the ſeveral* Sorts *of Actions, as Actions of the* Caſe, Detinue, Covenant, Debt, Treſpaſs *Vi et Armis*, Ejectment, *Quare Impedit*, Waſte, Replevin) Writs, *and of the ſeveral* Sorts *of Writs, and of the* Arreſt, Outlawry, Appearance *and* Bail. *Of the* Declaration, Pleas, Iſſues, Trial, *(wherein of* Jury, Challenges, Evidences, Verdict, *&c.)* Judgment, Execution, *and Laſtly*, *Of* Writs *in the Nature of* Appeals.

TO ſhew the Practice in *Civil* Cauſes, I ſhall only take a *general* View of the *Proceedings* in the Court of *Common Pleas*; becauſe the *Common Pleas* Court is of the largeſt Extent for Civil Actions. For though every Court at *Weſtminſter* has ſometimes a particular Courſe of Proceeding, which is the Law of that Court, and of which the Judges ought to take Notice, tho' not of the Courſe of the inferior Courts; yet by giving an Account of the *Common Pleas* Court, you may have a *general* Account of the Proceedings of the Court of *King's Bench* and *Exchequer*, (though I ſhall take Notice by the Way of any conſiderable Differences amongſt them) as alſo of the inferior Courts of Common Law, unleſs they are directed by particular Cuſtoms.

Where the Remedy is to be *by* Suit in Court, the *general* Parts of the Suit may be theſe, (*viz.*) The *Action*, *Writ*, and *Arreſt*, *Outlawry*, *Appearance* and *Bail*, the *Declaration*, *Pleading*, *Iſſue*, *Trial*, *Judgment*, *Execution*, and a *Writ* in the Nature of an *Appeal*.

Of Actions.
3 Black. Com. 116, 117, 118.
a 1 Inſt. 285. a.
2 Inſt. 40.
8 Rep. 151.
b 1 Inſt. 100. a.
c Stamf. Præer. 42, 73.
Finch 255, 256.
2 Inſt. 187.
1 Inſt. 289. a.
d Lit. 689.
1 Inſt. 361. b.
e 1 Inſt. 284. b. 285. a.
2 Inſt. 40.
a Terms of the Law, v. Actions real, Actions perſonal, Actions mix'd.
6 Rep. 3.
1 Inſt 184. b.
2 Inſt. 40.

1. An [a] *Action* is a Right of proſecuting in a Court of Juſtice, for that which is one's Due; or a legal Demand of one's Right.

An Action lies [b] *Quia Timet* in ſome Caſes before Moleſtation.

A [c] *Petition* muſt be made to the *King* in *Chancery*, in the Place of an Action; whereupon Proceſs ſhall go againſt a Grantee, to maintain his Title. But whilſt perſonal Things, ſeized for the King, remain in the Officer's Hands, the Party that hath Right, may traverſe the Record, that intitles the King, and have his Goods again, or one may diſturb the Officer from taking the Profits, or ſue him for the Goods.

The Action continues till the Judgment is given.

Actions are either [d] *falſe* or *faint*. *Falſe*, where the Words of the Writ are falſe. *Faint*, where the Words of the Writ are true, yet there is no Cauſe or Title to recover by that Action.

[e] Actions are either *Criminal* or *Civil*. *Criminal*, as *Appeals* of Death, Felony, or Mayhem. *Civil* are either *real*, *perſonal*, or *mixed*.

[a] *Real* are thoſe, whereby the Demandant claims Title to have a Freehold in any Lands or Tenements, Rents or Commons in Fee-ſimple, Fee-tail, or for Life. Every Action real is either *Poſſeſſory*, *i. e.* of his

own Poſſeſſion or Seiſin, or *Aunceſtrel, i. e.* of the Seiſin or Poſſeſſion of his Anceſtor.

But real Actions are much out of Uſe. For in moſt Caſes at this Day they are ſupplied by other Actions, which yield an eaſier and quicker Method to try Titles; as Actions on the Caſe, Treſpaſs, Replevin, Ejectment, *&c.*

Perſonal Actions are thoſe which the Plaintiff may have againſt the Defendant by Reaſon of any Debt or Contract for Goods and Chattels, * or for Damage done to his Goods or to his Perſon.

Mix'd Actions are thoſe which one may have, to recover the *Thing* demanded; and alſo Damages for the Wrong.

[b] He that brings an Action *real*, is called the *Demandant*; and he againſt whom it is brought, is called the *Tenant*. In Actions *perſonal* and *mix'd*, they are called *Plaintiff* and *Defendant*.

[b] 1 Inſt 127.b.

There are ſeveral *Sorts* of perſonal and mix'd Actions. Therefore I ſhall ſhew, how they are *divided*; and then, who are *incapable* to *bring* ſuch Actions, and *againſt* whom ſuch Actions may be brought; *where* ſuch Actions muſt be *laid*; and within what *Time* they muſt be brought.

1. How *perſonal* and *mix'd* Actions are *divided.*

Perſonal or *mix'd* Actions, that are of common Uſe and Practice, are *divided* into Actions of *Treſpaſs* upon the *Caſe*, *Detinue*, *Covenant*, *Debt*, *Treſpaſs* Vi & Armis, *Ejectment*, Quare Impedit, *Waſte*, *Replevin.*

Before I deſcribe theſe particular Actions let me premiſe, that an Action of *Account* lies againſt thoſe that ought to render an Account, and refuſe to give an Account. Auditors are appointed by the Court, to ſettle the Accounts in ſuch Actions. But Actions of *Account* are almoſt laid aſide. [c] However none can be charged in Account by the *Common Law* but as Guardian in Soccage, Bailiff, or Receiver.

[c] 11 Rep. 89. 1 Inſt. 172.a. 2 Inſt. 379, 380. 3 Black.Com. 162, 163.

A *Bailiff* is a Servant who has the Adminiſtration of Lands, or Goods and Chattels, for the Owner's Benefit, and he is chargeable in Account, for the Profits he has raiſed, or reaſonably might have raiſed, his Expences deducted. A *Receiver* is he that receives Money to another's Uſe, to render an Account without Allowance of Expences. For this Cauſe a Bailiff ſhall not be charged as Receiver, for then he would loſe his Expences and Charges. In an Account againſt a Receiver, the Plaintiff muſt declare by whoſe Hands the Defendant received the Money; which he ſhall not do in caſe of a Bailiff. But in Favour of *Merchants*, and for Advancement of Trade, if they jointly occupy their Stocks, one of them naming himſelf Merchant, ſhall have Account againſt the other, naming him Merchant, and ſhall charge him as Receiver; who ſhall have Allowance of his Expences, and ſhall Account for the Profits he received, or might reaſonably receive. This is by the *Law* of *Merchants.* [See 21 *Ja.* 1. *ch.* 16. Of *Guardians*, *B.* 1. *ch.* 6. *ante*, and 1 *Danv. Abr.* Tit. *Account.*]

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* *Actio perſonalis moritur cum perſona.* 4 Inſt. 315.
Pœnâ ex delicto defuncti hæres teneri non debet. 2 Inſt. 198, 442.
In reſtitutionem, non in pœnam hæres ſuccedit. 2 Inſt. 198.
In hæredes non ſolent tranſire actiones, quæ pœnales ex maleficio ſunt. 2 Inſt. 442.

By 4 Ann. ch. 16. *Actions of* Account *may be brought againſt the Executors or Adminiſtrators of every Guardian, Bailiff, or Receiver, or by one Joint-Tenant, or Tenant in Common, his Executors or Adminiſtrators, againſt the other, as a Bailiff, for receiving more than his Share, or againſt his Executors or Adminiſtrators. And the Auditors ſhall examine the Parties upon Oath*, &c.

[a] Terms of the Law, v. Action upon the Caſe. 3 Black. Com. 51, 122.

I. [a] An *Action* of Treſpaſs on the *Caſe* is a general and perſonal Action, brought againſt one for Wrong done without Force. And it is called an Action of the *Caſe*, becauſe the whole Caſe is contained in the [Writ and] Declaration.

It lies for *Words* and for *Deeds*.

[b] Finch, ch 2. p. 185. 4 Rep 15, 16, 17, 18, 19, 20. 1 Danv. Abr. 80, &c. 2 Wilſon, 403. 1 Ld. Ray. 610. 2 Ld. Ray. 1185.

[c] 1 Ld. Ray. 236.

1. For [b] *Words* ſpoken to or concerning another, whereby one is defamed and *damnified*. All ſcandalous Words are actionable, which may affect one's *Life*, *Limb*, or *Member*, *Liberty*, *Office*, or Place of *Truſt*, *Trade*, *Preferment*; or Words which charge one with a foul and infectious *Diſeaſe*, whereby he ought to keep from the Society of Men, or diſparage one's *Title* to his Eſtate, or where the Words tend to one's Diſinheriſon, as by calling one Baſtard, that is an Heir to Land, or where they tend to one's *particular* Damage, and one is actually damaged thereby. All are actionable, whether ſpoken by way of Affirmation, Hearſay, adjectively, directly, obliquely, interrogatively, if the Words imply an Affirmation, in earneſt, or ſeemingly in jeſt, in *Engliſh*, or any other Language, if the Words are underſtood, *&c.* [c] Words ſpoken *adjectively*, if they imply an Act done, as *J. S.* is a corrupt Judge, are actionable; not if they ſignify an Inclination only, as *J. S.* is a thieviſh Man.

[d] 1 Ld. Ray. 710.

[e] Str. 471, 545, 555.]

[f] See ante. p. 405, 406.

[g] 2 Str. 1138.

But *Note*, That where the Slander doth concern one's Life, Liberty, Member, (as Loſs of Ears, *&c.*) or corporal Puniſhment, Office, Truſt, Trade, or impute a foul Diſeaſe[d], that might cauſe a Separation from the Society of Mankind, the Plaintiff need not aver any particular Damage, as he muſt in other Caſes. Thoſe Scandals which concern Matters merely Spiritual, and without any Temporal *Damage* enſuing, as to call one Adulterer, Fornicator, Heretick, Schiſmatick, Dilapidator, *&c.* are determinable in the Eccleſiaſtical Court. Yet by the Cuſtom of *London*, an Action of the Caſe lies for calling a Woman Whore, [or for Words tantamount[e]] becauſe by Cuſtom ſhe might be carted, if the Words were true. But the Action is maintainable in the Courts of *London* only. Words of *Paſſion* are not actionable; as you have forſworn [f] yourſelf, you are a Villain, Rogue, Varlet, Knave, *&c.* But if one calls an Attorney[g], *&c.* Knave, the Words are actionable; if ſpoken with Relation to his Profeſſion, whereby he gets his Living. To charge one with an *Intention* to kill, *&c.* is not actionable; as the Purpoſe and Intent without Act is not puniſhable.

[For the Action *De Scandalis Magnatum*, See *p.* 44. *ante.* For Defamation by *Deed*, See *p.* 425. *ante*, and for Authorities in all the Caſes abovementioned, 1 *Danv. Abr. p.* 80 to *p.* 172.]

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[b] *Verba accipienda ſunt in mitiore ſenſu.* 4 Rep. 13, 17, 20, 25.
Benignior ſententia in verbis generalibus, ſeu dubiis, eſt præferenda. 4 Rep. 15.
Senſus verborum ex cauſa dicendi accipiendus eſt. 4 Rep. 13, 14.
Sermo relatus ad perſonam intelligi debet de conditione perſonæ. 4 Rep 16.

*It is to be further obſerved, That the Declaration muſt ſet forth in certainty, the Perſon who is ſcandalized; for if the Perſon is uncertain, no Action lieth; and an *Innuendo* cannot make that certain which was uncertain before. So it muſt ſet forth the *very Words* that were ſpoke; for if the Witneſs varies but a little from them, the Cauſe is loſt. Therefore it is beſt to charge the Defendant with ſpeaking the Words ſeveral Ways at ſeveral Times, that you may with more certainty hit upon the very Words, or the Subſtance thereof. For it is not here to be allowed, as it is in the Eccleſiaſtical Court, to lay the Words, and ſay, [a] *or the like*, or to *the like Effect*. [b] An *Innuendo* cannot alter the Words, or add to them, to make them actionable. The Scandal muſt be apparent by the Words themſelves.

*4 Rep. 17, 20.

[a] 2 Roll. Abr. 298.

[b] 4 Rep. 17, 20.

2. For *Deeds*, as for an *Aſſumpſit*, *Nuſance*, *Deceit*, *Trover*, and *Converſion*, and upon *Statutes*.

1. Upon an *Aſſumpſit*, [c] which is a voluntary Promiſe, made by Word, or ſuppoſed to be made by Word, whereby one, upon valuable *Conſideration* aſſumeth, or undertaketh, to *perform* or pay ſomething to another. Therefore,

[c] Terms of Law, v. Aſſumpſit.

An *Aſſumpſit* is either *expreſs* by direct Agreement by Word, or Note in Writing without Seal (for that is all one in Law) or *implied* by the Law.

Expreſs, as for not making a good Eſtate of Land ſold according to Promiſe, not paying Money upon a Bargain and Sale according to Promiſe; for not delivering Goods upon Promiſe upon Notice or Demand. This expreſs *Aſſumpſit* may relate to one's real or perſonal Eſtate, or to one's Perſon. Where an *Indebitatus Aſſumpſit* is brought for Goods ſold and delivered, there you muſt prove a Price agreed on, otherwiſe the Action will not lie.

3 Black. Com. 157.

Implied; thus an Action on the Caſe will lie on an implied *Aſſumpſit* for a *Quantum meruit* for one's Labour, as where I employ any Perſon, to work for me, carry Goods, *&c.* Where a *Quantum meruit* is laid, you need not prove any Price agreed on; but only that the Work was done, and what you deſerve for the ſame. So that in an Action for Work done, it is the beſt Way to lay a *Quantum meruit* with an *Indebitatus Aſſumpſit*. For if you fail in the Proof of an expreſs Price agreed, you will recover the Value. So an Action on the Caſe will lie on an implied *Aſſumpſit* for a *Quantum Valebant*, where an Inn-keeper, *&c.* furniſhes another with Meat, Drink, *&c.* or where a Tradeſman delivers Goods at no certain Price: And in an Action for Goods ſold, it is the beſt Way to lay a *Quantum Valebant* with an *Indebitatus Aſſumpſit*, for the Reaſon above. Alſo an Action on the Caſe on an implied *Aſſumpſit* will lie, for receiving Money *to my Uſe*, as Bailiff or Receiver, or both as Bailiff and Receiver, which ſupplies the Place of an Action of Account; [or where he has received Money of me by Miſtake, or wrongfully [a]] upon an *Inſimul Computaſſet* for Money due upon Account ſtated, ſuppoſing that the Parties have come to an Account; upon a Bill of *Exchange* by the Cuſtom of Merchants; and if a Merchant to whom it is directed ſubſcribes the Bill, it is an *Aſſumpſit* in Law. [*Qu.* If you muſt not declare upon the Cuſtom and not generally [b].] [See 9 & 10 *W.* 3. *ch.* 17. Concerning Inland Bills of Exchange. 3 & 4 *An. ch.* 9. For giving like Remedy upon promiſſory *Notes*, as upon Bills of Exchange; and for the better Payment of Inland Bills of Exchange.] In all theſe Caſes it is implied by the Law, that one agreed to pay, though he made no expreſs Promiſe to do it. And as ſuch Actions on the Caſe upon

3 Black Com. 161.

[a] 2 Str. 916. Moſes v. Macfarlan, K. B Eaſt. T. 33 G. 2.

[b] 2 Ld. Ray. 1035, 1542. See p. 272. ante.

an implied *Aſſumpſit* may be brought againſt the *Parties* themſelves, ſo they will lie for or againſt *Executors* or *Adminiſtrators* upon the Contracts of their Teſtators or Inteſtates; and theſe implied Promiſes may alſo relate to one's real or perſonal Eſtate, or to one's Perſon.

The Statute of 29 *Car.* 2. *ch.* 3. Concerning *Agreements* to *perform*, or *pay*, muſt always be remembred. I have before mention'd ſome Parts of it; but it is neceſſary to remind you again as to ſome Particulars.

By that Statute [An Act for Prevention of Frauds and Perjuries] *No Action ſhall be brought to charge an* Executor *or* Adminiſtrator *on a ſpecial Promiſe, to anſwer* Damages *out of his own Eſtate, or to charge the* Defendant *upon any Promiſe, to anſwer for the* Debt, Default, *or* Miſcarriage *of* another; *or to charge any one upon an Agreement in Conſideration of* Marriage; *or on any* Contract *or* Sale *of* Lands, Tenements, *or* Hereditaments, *or any* Intereſt concerning the ſame; *or upon any* Agreement, *that is not to be* performed within a Year *after the making thereof*; *unleſs the Agreement upon which ſuch Action ſhall be brought, or ſome* Memorandum *or Note thereof, ſhall be in* Writing, *ſigned by the Party to be charged therewith, or ſome other Perſon authorized by him.*

No Contract for the Sale of any Goods for the Price of 10 l. *or upwards ſhall be good, except the Buyer ſhall* accept Part *of the Goods ſo ſold, and actually* receive *the ſame, or give ſomething in* Earneſt, *to bind the Bargain, or in Part of Payment, or except ſome* Memorandum *or* Note *in Writing of the ſaid Bargain be made, and ſigned by the Parties to be charged by ſuch Contract, or their Agents thereunto lawfully authorized.*

[c] A Promiſe to pay, *if another does not*, being made at the ſame Time that the Bargain was made, is not a collateral Promiſe for the *Debt* of *another*; but the Promiſe of both Parties makes one original and entire Contract upon the Sale, *&c.* and both are chargeable, [but this hath been determined to be otherwiſe; [d] for it is only a conditional Promiſe (if the other does not pay) which ſhews that the other is the *original* and proper Debtor; but if a Man ſays, Deliver Goods to *A.* and I will pay you, or the like[e], this is a good Promiſe, and not within the Statute, for *A.* is not liable, which is the Ground of the Diſtinction.] *Quære,* [f] If a Promiſe by another to pay upon *Forbearance* of Suit 'till ſuch a Time, is not a ſufficient Conſideration to create a new Contract, and to bring it out of the Statute. [It hath been held that it is not.[g]]

A Promiſe to pay 50 *l.* and Coſts of Suit to be taxed, made by a third Perſon, in caſe the Plaintiff would withdraw his Record, is not within the Statute of Frauds. 1 *Wilſon*, 305.

[a] It is ſaid, that the Clauſe concerning *Agreements on Conſideration of Marriage* extends to a *Promiſe* to marry, as well as to Promiſes for Payment of Money upon Marriage. [But it hath been often held [b] and is now agreed, that it doth not extend to a Promiſe to marry.]

Any Intereſt concerning the ſame [c] includes an Agreement to aſſign a Term in Being, as well as one created *de novo*.

[d] By the Clauſe *Except ſome Memorandum or Note in Writing be made*, &c. a Promiſe by Letter is ſufficient.

Note, That in Declarations upon many *Aſſumpſits*, it is neceſſary to ſhew a *Notice*, or a *Requeſt*, or *Demand*.

2. This Action of the Caſe lies for a *Nuſance*, [e] which is when any Thing is done or omitted by a Man upon his own Ground, or elſewhere, to the Annoyance and unlawful Hurt of another. It lies only for a Special

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[c] 3 Lev. 363, 364. Skin. 347.

[d] 1 Salk. 27. 6 Mod. 248. S. C. 1 Ld. Ray. 224. 2 Ld. Ray. 1085.

[e] 2 Ld. Ray. 838, 842, 982.

[f] 9 Rep. 93, 94.

[g] 2 Ld. Ray. 1087. 2 Str. 873. 2 Wilſon, 94, 308.

[a] 3 Lev, 65.

[b] 1 Ld. Ray. 387. 1 Str. 34.

[c] 2 Ventr. 361, 362.

[d] 2 Ventr. 361.

[e] Terms of the Law, v. Nuſance. See p. 459. ante.

cial Annoyance to ſome particular Perſon, not for a common Nuſance. [f] Thus an Action of the Caſe may be for a Nuſance, for diverting, ſtopping, or corrupting the Plaintiff's Water, for diverting Water from the Plaintiff's Mill; for turning a Watercourſe upon the Plaintiff's Houſe, Meadow, *&c.* for incloſing and eating up the Common; for ſtopping up a Way leading from the Plaintiff's Houſe to his Land; for ſuffering the next Houſe to decay, to the Damage of my Houſe; for building upon a new Foundation, and ſtopping up ancient Lights, or hindering one to enjoy the wholeſome Air; for ſetting up or making a Hogſtie, Houſe of Office, Lime-pit, Brew-houſe, Dye-houſe, Tan-houſe, Chimney, Chandler's or Butcher's Shop, *&c.* uſing it ſo near my Houſe, that the Smell thereof doth annoy me, or hurt my Graſs or Trees; by laying Carrion near my Houſe, *&c.* But if one ſets up a Brew-houſe, or keeps a Chandler's or Butcher's Shop near me, and lays ſtinking Heaps at his Door; though this be offenſive to me, I cannot have this Action, [g] unleſs the Annoyance is very great and very offenſive to me, becauſe it is a publick Nuſance.

[f] F.N.B. 176. 4 Rep. 86, 87. 5 Rep. 73, 101. 9 Rep. 54, 58. 1 Inſt. 56. b. 2 Inſt. 405, 406. 1 Roll. Abr. 88, 89. 1 Danv. Abr. 174.

[g] 5 Rep. 73, 101, 108.

If a Schoolmaſter keeps a School ſo near the Study of a Lawyer by Profeſſion, as to diſturb him, an Action will not lie.

9 Rep. 54. 1 Cro. 664.

Tho' one hath a Right to Air and Light in his Dwelling; yet for hindering one's *Proſpect*, no Action lieth. For a Proſpect is only for Delight, not of Neceſſity.

9 Rep. 58.

[h] If two have Lands adjoining, and one of them builds a Houſe on his own Land, and makes Windows and Lights looking into the other's Land, the other may lay or erect any Thing upon his own Land, and ſtop them.

[h] 1 Cro. 318. 9 Rep. 55.

[i] Tho' one cannot have an Action of the Caſe for a common Nuſance, becauſe it may be preſented in the Turn or Leet; yet where the Inhabitants of a Town had by Cuſtom a Watering Place for their Cattle, which was ſtopped by another, any Inhabitant may have an Action of the Caſe againſt him, for otherwiſe they would be without Remedy; becauſe ſuch a Nuſance is not common to all the King's People, and preſentable in the Turn or Leet, or to be redreſſed by Preſentment or Indictment in the Quarter-Seſſions.

[i] 5 Rep. 73. 9 Rep. 113. 1 Inſt. 56. a.

[k] Upon *Special* Damage by a foundrous Way, an Action lies againſt a Corporation or private Perſon, that is bound to repair it; but if a Townſhip not Corporate is bound to repair it, the Party, as to his ſpecial Damage, ſeems to be without Remedy.

[k] Vaugh 340.

[a] If one digs a Ditch in the Highway, into which my Servant falls and breaks his Thigh, by which I loſe his Service for a long Time, I ſhall have an Action of the Caſe againſt him for this Loſs of Service. So for digging a Pit, by Reaſon whereof *J. S.* (for whoſe Life I held Lands) was drowned.

[a] 1 Roll. Abr. 88. 1 Danv. Abr. 173.

3. For [b] *Deceit* of one to another to his Damage. There muſt be both Deceit and Damage.

Deceit is either *Judicial* or *Extrajudicial*. *Judicial*; where ſomething about Suits at Law is done, not done, or done amiſs, *&c.* as when an Officer of the Court uſes Deceit in his Office. Thus the Sheriff, *&c.* is liable to an Action of the Caſe for Deceit, if he does not execute the King's Proceſs, or makes a falſe Return of it. Thus a Counſellor or Attorney is liable, that betrays my Cauſe, or if he does not attend at the Trial, by which my Cauſe miſcarries, *&c.* Thus one is anſwerable, that perſonates me in Court to my Damage. *Extrajudicial*; where one

[b] F. N. B. 95, 96, 97. 4 Rep. 18. 11 Rep. 87. Finch, B. 3. ch. 2. p. 188. 1 Roll. Abr. 90, &c. 1 Ld. Ray. 593 3 Black. Com. 165, 166.

an implied *Aſſumpſit* may be brought againſt the *Parties* themſelves, ſo they will lie for or againſt *Executors* or *Adminiſtrators* upon the Contracts of their Teſtators or Inteſtates; and theſe implied Promiſes may alſo relate to one's real or perſonal Eſtate, or to one's Perſon.

The Statute of 29 *Car.* 2. *ch.* 3. Concerning *Agreements* to *perform*, or *pay*, muſt always be remembred. I have before mention'd ſome Parts of it; but it is neceſſary to remind you again as to ſome Particulars.

By that Statute [An Act for Prevention of Frauds and Perjuries] *No Action ſhall be brought to charge an* Executor *or* Adminiſtrator *on a ſpecial Promiſe, to anſwer* Damages *out of his own Eſtate, or to charge the* Defendant *upon any Promiſe, to anſwer for the* Debt, Default, *or* Miſcarriage *of* another; *or to charge any one upon an Agreement in Conſideration of* Marriage; *or on any* Contract *or* Sale *of* Lands, Tenements, *or* Hereditaments, *or any* Intereſt concerning the ſame; *or upon any* Agreement, *that is not to be* performed within a Year *after the making thereof*; *unleſs the Agreement upon which ſuch Action ſhall be brought, or ſome* Memorandum *or Note thereof, ſhall be in* Writing, *ſigned by the Party to be charged therewith, or ſome other Perſon authorized by him.*

No Contract for the Sale of any Goods for the Price of 10 l. *or upwards ſhall be good, except the Buyer ſhall* accept Part *of the Goods ſo ſold, and actually* receive *the ſame, or give ſomething in* Earneſt, *to bind the Bargain, or in Part of Payment, or except ſome* Memorandum *or* Note *in Writing of the ſaid Bargain be made, and ſigned by the Parties to be charged by ſuch Contract, or their Agents thereunto lawfully authorized.*

[c] A Promiſe to pay, *if another does not*, being made at the ſame Time that the Bargain was made, is not a collateral Promiſe for the *Debt* of *another*; but the Promiſe of both Parties makes one original and entire Contract upon the Sale, &c. and both are chargeable, [but this hath been determined to be otherwiſe; [d] for it is only a conditional Promiſe (if the other does not pay) which ſhews that the other is the *original* and proper Debtor; but if a Man ſays, Deliver Goods to *A.* and I will pay you, or the like[e], this is a good Promiſe, and not within the Statute, for *A.* is not liable, which is the Ground of the Diſtinction.] *Quære*, [f] If a Promiſe by another to pay upon *Forbearance* of Suit 'till ſuch a Time, is not a ſufficient Conſideration to create a new Contract, and to bring it out of the Statute. [It hath been held that it is not.[g]]

A Promiſe to pay 50 *l.* and Coſts of Suit to be taxed, made by a third Perſon, in caſe the Plaintiff would withdraw his Record, is not within the Statute of Frauds. 1 *Wilſon*, 305.

[a] It is ſaid, that the Clauſe concerning *Agreements on Conſideration of Marriage* extends to a *Promiſe* to marry, as well as to Promiſes for Payment of Money upon Marriage. [But it hath been often held [b] and is now agreed, that it doth not extend to a Promiſe to marry.]

Any Intereſt concerning the ſame [c] includes an Agreement to aſſign a Term in Being, as well as one created *de novo*.

[d] By the Clauſe *Except ſome Memorandum or Note in Writing be made*, &c. a Promiſe by Letter is ſufficient.

Note, That in Declarations upon many *Aſſumpſits*, it is neceſſary to ſhew a *Notice*, or a *Requeſt*, or *Demand*.

2. This Action of the Caſe lies for a *Nuſance*, [e] which is when any Thing is done or omitted by a Man upon his own Ground, or elſewhere, to the Annoyance and unlawful Hurt of another. It lies only for a Spe-

cial

[c] 3 Lev. 363, 364. Skin. 347.

[d] 1 Salk. 27. 6 Mod. 248. S. C. 1 Ld. Ray. 224. 2 Ld. Ray. 1085.

[e] 2 Ld. Ray. 838, 842, 982.

[f] 9 Rep. 93, 94.

[g] 2 Ld. Ray. 1087. 2 Str. 873. 2 Wilſon, 94, 308.

[a] 3 Lev, 65.

[b] 1 Ld. Ray. 387. 1 Str. 34.

[c] 2 Ventr. 361, 362.

[d] 2 Ventr. 361.

[e] Terms of the Law, v. Nuſance. See p. 459. ante.

cial Annoyance to ſome particular Perſon, not for a common Nuſance.

[f] Thus an Action of the Caſe may be for a Nuſance, for diverting, ſtopping, or corrupting the Plaintiff's Water, for diverting Water from the Plaintiff's Mill; for turning a Watercourſe upon the Plaintiff's Houſe, Meadow, *&c.* for incloſing and eating up the Common; for ſtopping up a Way leading from the Plaintiff's Houſe to his Land; for ſuffering the next Houſe to decay, to the Damage of my Houſe; for building upon a new Foundation, and ſtopping up ancient Lights, or hindering one to enjoy the wholeſome Air; for ſetting up or making a Hogſtie, Houſe of Office, Lime-pit, Brew-houſe, Dye-houſe, Tan-houſe, Chimney, Chandler's or Butcher's Shop, *&c.* uſing it ſo near my Houſe, that the Smell thereof doth annoy me, or hurt my Graſs or Trees; by laying Carrion near my Houſe, *&c.* But if one ſets up a Brew-houſe, or keeps a Chandler's or Butcher's Shop near me, and lays ſtinking Heaps at his Door; though this be offenſive to me, I cannot have this Action, [g] unleſs the Annoyance is very great and very offenſive to me, becauſe it is a publick Nuſance.

If a Schoolmaſter keeps a School ſo near the Study of a Lawyer by Profeſſion, as to diſturb him, an Action will not lie.

Tho' one hath a Right to Air and Light in his Dwelling; yet for hindering one's *Proſpect*, no Action lieth. For a Proſpect is only for Delight, not of Neceſſity.

[h] If two have Lands adjoining, and one of them builds a Houſe on his own Land, and makes Windows and Lights looking into the other's Land, the other may lay or erect any Thing upon his own Land, and ſtop them.

[i] Tho' one cannot have an Action of the Caſe for a common Nuſance, becauſe it may be preſented in the Turn or Leet; yet where the Inhabitants of a Town had by Cuſtom a Watering Place for their Cattle, which was ſtopped by another, any Inhabitant may have an Action of the Caſe againſt him, for otherwiſe they would be without Remedy; becauſe ſuch a Nuſance is not common to all the King's People, and preſentable in the Turn or Leet, or to be redreſſed by Preſentment or Indictment in the Quarter-Seſſions.

[k] Upon *Special* Damage by a foundrous Way, an Action lies againſt a Corporation or private Perſon, that is bound to repair it; but if a Townſhip not Corporate is bound to repair it, the Party, as to his ſpecial Damage, ſeems to be without Remedy.

[a] If one digs a Ditch in the Highway, into which my Servant falls and breaks his Thigh, by which I loſe his Service for a long Time, I ſhall have an Action of the Caſe againſt him for this Loſs of Service. So for digging a Pit, by Reaſon whereof *J. S.* (for whoſe Life I held Lands) was drowned.

3. For [b] *Deceit* of one to another to his Damage. There muſt be both Deceit and Damage.

Deceit is either *Judicial* or *Extrajudicial*. *Judicial*; where ſomething about Suits at Law is done, not done, or done amiſs, *&c.* as when an Officer of the Court uſes Deceit in his Office. Thus the Sheriff, *&c.* is liable to an Action of the Caſe for Deceit, if he does not execute the King's Proceſs, or makes a falſe Return of it. Thus a Counſellor or Attorney is liable, that betrays my Cauſe, or if he does not attend at the Trial, by which my Cauſe miſcarries, *&c.* Thus one is anſwerable, that perſonates me in Court to my Damage. *Extrajudicial*; where one

[f] F. N. B. 176. 4 Rep. 86, 87. 5 Rep. 73, 101. 9 Rep. 54, 58. 1 Inſt. 56. b. 2 Inſt. 405, 406. 1 Roll. Abr. 88, 89. 1 Danv. Abr. 174.

[g] 5 Rep. 73, 101, 108. 9 Rep. 54. 1 Cro. 664.

9 Rep. 58.

[h] 1 Cro. 318. 9 Rep. 55.

[i] 5 Rep. 73. 9 Rep. 113. 1 Inſt. 56. a.

[k] Vaugh 340.

[a] 1 Roll. Abr. 88. 1 Danv. Abr. 173.

[b] F. N. B. 95, 96, 97. 4 Rep. 18. 11 Rep. 87. Finch, B. 3. ch. 2. p. 188. 1 Roll. Abr. 90, &c. 1 Ld. Ray. 593. 3 Black. Com. 165, 166.

counterfeits Letters in my Name, and receives my Money; or cheats me with falſe Cards and Dice; or ſells to me by falſe Weights and Meaſures; or knowingly ſells to me unwholeſome Victuals, Wine, or Drugs, to my Hurt and Damage; or ſells me Goods that are none of his own, affirming them to be his own; or where a Tailor cuts my Clothes ſo ſcanty, that they will not be for my Uſe, or where a Smith pricks my Horſe, or a Surgeon unſkilfully ſets one of my Bones that were broken. It lies alſo againſt all Shopkeepers for any Frauds or Deceits to the Damage of another; againſt all Perſons upon expreſs Warranties, or Warranties in *Law.* [c] But obſerve in the Caſe of a *Warranty* upon Sale (which is the moſt uſual Deceit) that the Warranty muſt be *Parcel* of the Contract; for if it is *after* the Contract at another Place (tho' an After-Warranty by Deed may amount to a Covenant) it is a void Warranty, and no Action of Deceit lieth upon it. Alſo a Warranty can reach but to Things in *Being* at the Time, not to Things to come; for a Warranty, that the Horſe which you buy of me, ſhall carry you thirty Miles a Day, is a void Warranty. One may not warrant, that a Man ſhall live a Year, that a Ship ſhall return from ſuch a Place, that a Horſe ſhall continue ſound for a Year; neither will a Warranty be good, of Things which I may plainly diſcern to be otherwiſe; as that the Horſe is not lame or blind, when he is apparently lame or blind; that Clothes of a Murry Colour are Blue, unleſs the Buyer is blind. But where a Horſe is warranted to be ſound Wind and Limb, and he is broken-winded, or hath other ſecret Diſeaſe, or where Cloths are warranted to be of ſuch a Length, and are not; there an Action of the Caſe for Deceit lieth: For theſe Things cannot be certainly known by Sight of unſkilful Perſons.

[c] Finch, 189.
2 Cro. 4, 386, 630.
1 Roll. Abr. 97.
2 Ld. Ray. 1120.
1 Str. 414.

[d] Every one will affirm, that his Wares are good, that the Horſe which he ſells, is ſound, yet if he does not *warrant* them to be ſo, tho' it was falſe, no Action lies.

[d] 2 Cro. 4.

4. An Action of Treſpaſs upon the Caſe may be for *Trover* and *Converſion,* [e] which lies againſt any Perſon that hath gotten into his Poſſeſſion any of the Plaintiff's Goods, and doth refuſe to deliver them upon Demand. It is a ſpecial Action of the Caſe, brought to recover Damages to the Value of the Goods. For you recover not the Thing detained, as you poſſibly may in an Action of *Detinue.* *Trover* is a *French* Word, and ſignifies *to find*; ſo that in this Action the Plaintiff ſurmiſeth, that he *loſt* ſuch and ſuch Goods, and that the Defendant hath *found* them, and *converted* them to his own Uſe at ſuch a Place. The loſing is but a mere Suggeſtion, and not material. For if the Plaintiff delivered the Goods to the Defendant; or if the Defendant takes the Goods in his Preſence, &c. this Action lies againſt him, if there is a *Converſion.* [a] For that is the Point of the Action, and muſt be particularly alledged. If a Man finds Goods he may take Poſſeſſion of them, and no Action lies [that is, not till Demand by the Owner, and Refuſal to deliver them]; but he ought not to abuſe them, or uſe them; for therein lies the Offence. It may be brought againſt the firſt Finder, or againſt any other, that hath the Goods by Sale or otherwiſe. But it muſt be obſerved, That the Plaintiff in this Action muſt prove, 1. A *Right* or *Property* in the Goods, or at leaſt a lawful Poſſeſſion or [b] ſpecial Property for ſome Time, as in the Caſe of a Carrier. 2. A *Poſſeſſion* in the *Defendant.* 3. A *Demand* and *Refuſal* to deliver them [or bring other Evidence of a Converſion]. [c] This Refuſal or Denial is allowed to be good Evidence to a Jury, that he converted the ſame, till it appears to the contrary.

[e] Terms of the Law, v. Trover.
3 Black. Com. 151.
4 Black. Com. 356.

[a] 1 Danv. Abr. 21, 22, 23.

[b] 1 Ld. Ray. 276.
[c] 10 Rep. 56, 57, 91.
1 Danv. Abr. 20, 21.

It may be brought by any one in his own Right, or by an Executor or Adminiſtrator, for Goods which came to the Defendant's Poſſeſſion after the Death of the Teſtator or Inteſtate.

[d] This Action lies for Money out of a Bag [*Qu.* for it ſeems to be the better Opinion that it will not, but that an Action for Money had and received, will lie againſt the Finder or Taker, as well as againſt the Receiver of another's Money] as well as in the Bag, becauſe the Thing itſelf is not to be recovered, but Damages to the Value aforeſaid; for Money depoſited in a third Perſon's Hand upon a Wager [*Qu. ut ſupra*]; for any *live* Goods, as Horſes, Oxen, Sheep, Hens, Deer, and Hawks reclaimed, a Maſtiff, Hound, Grayhound, Spaniel, Tumbler, as well as for Things *inanimate*; as Beds, Jewels, Rings, Plate, Carts, Timber, and Trees cut down, a Ship and its Tackle, a Bank Note, a Bond and other Writings. [e] It will not lie for Creatures *Feræ Naturæ*, nor any Part of a *Freehold*, as for Lead upon a Houſe, Doors, or Windows fixed; but if they are removed and converted, it will lie.

The Plea on the Defendant's Part is uſually the general Iſſue, Not guilty, and the ſpecial Matter may be given in Evidence, to prove the Plaintiff has no Cauſe of Action, or which intitles the Defendant to the Thing in Controverſy. It is ſaid, [f] that there is no Plea in Trover but a *Releaſe*, or Not *guilty*. If the Defendant pleads a Special Plea, he muſt either confeſs and avoid the Title of the Plaintiff, or elſe traverſe or deny it.

5. Actions of the Caſe may be upon *Statutes*. Theſe are either [g] *Private* or *Popular*. 1. *Private*, when an Action is given by a Statute to the *King* and to the *Party grieved* only; as for a Robbery upon 13 *Ed.* 1. *Stat.* 2. *ch.* 1. and 27 *El.* For *fraudulent Conveyances* on 13 *El. ch.* 5. 27 *El. ch.* 4. For *Perjury* on the 5 *El. ch.* 9. where the King only joins for Honour and Conformity, the Party grieved having all the Damages. [But this is not ſo in all the Statutes above cited, for by the three laſt mentioned Statutes, one Moiety is to the King, and one Moiety to the Party grieved.] Or to the *Party grieved* only upon a penal Statute, as upon the Statute of *Glouceſter*, or 5 & 6 *Ed.* 1. *ch.* 5. For *Waſte*. And here if the Action is given to the Party grieved, the King cannot diſcharge the ſame, nor proceed in it after the Death of the Party. 2. *Popular*, where an Action is given upon a Statute to the King, or to *any one* that will ſue for the King and himſelf, by Action or Information, according as the Statute directs; as upon 31 *Ed.* 3. *St.* 1. *ch.* 12. where a Juror takes Money, to give his Verdict; the 3 *H.* 8. *ch.* 11. For practiſing Phyſick without Licence. In which Statutes the King is to have one Moiety of the Forfeiture, and any Informer (without limiting it to the Party grieved) the other Moiety. When any one hath begun to ſue in this Action, no other can purſue it. [a] If the King commences his Suit before the Informer, the King ſhall have the whole Forfeiture, and he may, before the Informer begins his Suit, releaſe the Penalty to the Offender, and bar all others for ever; unleſs it be provided to the contrary by the Act. But if, after a popular Action is brought by the Informer, the King's Attorney will enter an *Ulterius non vult Proſequi*, the Informer may proſecute for his Part. For by bringing his Action, he hath made the popular Action his private Action, which the King, or any other, cannot releaſe, as to his Intereſt; and the Condemnation or the Acquittal of the Party at his Suit is a Bar againſt the King and all others. If the Informer,

[d] Danv. Abr. 20, 21.

[e] 1 Ld. Ray. 726. 1 Salk. 126. Millar v. Race K. B. Hil. T. 31 G. 2.

[f] 2 Salk. 654.

[g] Terms of the Law, v. Action upon the Statute.

[a] Crompt Jur. 21, 38. 11 Rep. 65, 66. 3 Inſt. 154, 194, 195, 238. 2 Ld. Ray. 1039.

Qui tam pro Domino Rege quam pro ſeipſo, dieth depending the Action or Information, the King's Attorney may proſecute the Suit for the King. For the Information by the Party ſhall ſerve for the King after his Death.

See Burn's Juſt. Edit. 1770. Introd. xxiv.

RULES *concerning* Penal Statutes.

[b] 2 Inſt. 118, 131, 163. 12 Rep. 99. 2 Cro. 134.

WHEN [b] any Thing is generally prohibited by a Statute, tho' the Statute doth not give an Action, yet the Party grieved may have an Action, and the Offender for his Contempt of the Law, may be fined and impriſoned at the King's Suit.

[c] 2 Inſt. 55, 74, 118.

Every Statute made againſt an Injury [c] gives a Remedy by Action, expreſſly or impliedly.

[d] 1 Inſt. 159 a. 2 Inſt. 650. 4 Inſt. 84. [e] 11 Rep. 60.

[d] Where a Statute giveth a Forfeiture (without ſaying to whom) againſt a Wrong-doer, as upon 2 *Ed.* 6. *ch.* 13. For not ſetting out Predial Tithes, he that is grieved ſhall have the Action and Forfeiture, not the King. [e] But where no particular Perſon is grieved, and the Forfeiture is given generally, the King ſhall have it.

[f] 7 Rep 37.

[f] The Proſecution and Execution of any penal Statute cannot be transferred to any Subject; nor can the Forfeiture be transferred to any other before it is recovered, or veſted in the King, by due Courſe of Law.

[g] 1 Inſt. 98.b. 4 Rep. 12. 3 Cro. 135.

He that [g] reciteth a Statute in pleading is not bound to recite the very Words, ſo long as he keeps to the Subſtance. And yet the ſafeſt Way is to recite the very Words.

[h] 2 Inſt. 468, 479. 3 Inſt. 46. H. P. C. 8.

[h] Where Degrees of Puniſhment are inflicted by a Statute for the firſt, ſecond, and third Offence, there muſt be ſeveral Convictions and Judgments.

[a] Plow. 86.

[a] Penal Statutes ſhall not be extended by Equity: The Words may be conſtrued beneficially, according to the Intent of the Legiſlators; but Things out of the Words ſhall not be taken by Equity.

By 4 H. 7. ch. 20. *Recovery (otherwiſe than by Verdict) in an Action popular by* Colluſion *ſhall be no Bar in an Action ſued for the ſame Thing* bona Fide.

By 29 El. ch. 5. ſ. 21. *If any ſhall be ſued on a penal Law in the* King's Bench, Common Pleas, *or* Exchequer, *he may appear by Attorney without Bail, if ſuch Perſon is bailable by Law.*

3 Inſt. 186, 191.

[See 18 *El. ch.* 5. and 31. *El. ch.* 5. [b] 21 *Ja.* 1. *ch.* 4. *where* popular Actions are to be laid; and 21 *Ja.* 1. *ch.* 3. Alſo ſee in what *Time* Actions muſt be brought *infra*; and Of *Informations, ch.* 5. *poſt.*]

The Statutes of *Jeofails*, or the Statutes that do remedy Overſights in pleading, extend not to penal Proſecutions.

1 Roll. Abr. & 1 Danv. Ab. Tit. Actions on the Caſe.

There are General Actions of the *Caſe*, in many other Inſtances, as for Reſcue of a Priſoner taken upon mean Proceſs or Execution; Reſcue upon a Diſtreſs; Entering Liberties or Franchiſes, and Arreſting upon the Warrant of the Sheriff of the County, or for other Diſturbances of the Liberty; for Negligence in keeping Fire, whereby my Neighbour's Houſe is burned; for keeping a Dog knowingly accuſtomed to bite Paſſengers, or to kill Sheep, where one is hurt, or his Sheep killed; for a Conſpiracy to indict one falſely and maliciouſly; againſt a Carrier for loſing one's Goods; againſt an Inn-keeper for the Goods of his Gueſt, ſtolen in his Houſe. Action of the Caſe may be for *not* doing, *miſdoing*, or for *doing* that which ſhould not be done; or in other Words for *Nonfeazance*, *Misfeazance* and *Malefeazance*. It is impoſſible to reduce all of them under particular Heads; for they are almoſt infinite, daily increaſing and continually receiving new Forms.

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[h] *Quod non apparet, non eſt.* 2 Inſt. 479.
De non apparentibus, et non exiſtentibus, eadem eſt ratio. 4 Rep. 47.

Note, That *Quod Permittat*, Aſſizes for Commons, Ways, &c. Aſſizes of Nuſances, and *Secta ad Molendinum*, are now turned into Actions of Treſpaſs, and of the Caſe.

2. An *Action* of [c] *Detinue* (from *Detineo* to detain) lieth, where one comes by the Goods of another. either by *delivery* or *finding*. It muſt be laid ſo certain, as that the Thing detained may be known and recovered. For in this Action the Plaintiff ſhall recover the Thing detained. But if one cannot recover the Thing itſelf, he ſhall recover Damages for the Thing, and alſo for the Detainer. It lies not for Money out of a Bag, or Corn out of a Sack [d], for here the Money or Corn cannot be known from other Money or Corn. In that Caſe the Party muſt have an Action of the Caſe, &c.

One may have an Action of Detinue for Charters, which concern the Inheritance of his Land, if he knows the *Certainty*, of them. For *Detinue* ought to be always of a Thing in *certain*, of Goods *valuable*, wherein one hath *Property* or a *Right*; and it muſt be once in the Poſſeſſion of the Defendant. This Poſſeſſion muſt not be altered by Act of *Law*, as Seizure, &c. nor muſt the *Defendant* have a Right or Property in them by Diſtreſs, &c. *Detinet* is a neceſſary Word in the Writ.

The *Bailment* (From *Bailler*, to deliver) or *Delivery* of Goods or Writings, may be *ſimple*, as to keep for my Uſe; or *conditional* as to be re-delivered, when Money is paid, &c. He that delivers the Goods is termed the *Bailor*, he to whom they are delivered the *Bailee*. Upon Bailment or Delivery theſe Things are to be obſerved. [a] If Goods are delivered to a Man to be *ſafely kept*, or to be kept (which is all one in Law) and after theſe Goods be ſtolen from him; this ſhall not excuſe him, becauſe he undertook to keep them ſafely; but he ſhall be excuſed in this Caſe, if he undertook to keep them as he would his own. If Goods are delivered to one as a *Pledge*, and they are ſtolen from him, this Action lieth not againſt him, becauſe he hath a Property in them; and therefore ought to keep them no otherwiſe than his own. [[b] But as in common Caſes the Bailee has no Right to uſe them, it ſhould ſeem that if they are ſtolen from him during ſuch Uſe, he is anſwerable for them; for he hath only a *ſpecial* Property in them.] But if he that pledged them tendered the Money before the ſtealing, and the other refuſeth to deliver them, he ſhall be charged. If *A.* leaveth a Cheſt locked with *B.* to be kept, and taketh the Key with him, and does not tell *B.* what is in the Cheſt, and the Cheſt together with the Goods are ſtolen, *B.* ſhall not be charged therewith; becauſe *A.* did not truſt *B.* with them. And that which hath been ſaid before of ſtealing, is to be underſtood of all other like inevitable Accidents. Therefore it is neceſſary for one that receives Goods to be kept, to promiſe only to keep them as his own, or to keep them at the peril of the owner. [[c] But theſe Diſtinctions between taking the Goods upon a *general* Bailment, or ſpecially to *keep as his own*, have

[c] F.N.B 138. 1 Inſt. 286. b. 2 Danv. Abr. 510, 511. 3 Black. Com. 151.

[d] Dy. 22.

[a] 1 Inſt. 89. a & b. 398. b. 4 Rep. 83, 84. 5 Rep. 13. 1 Roll. Abr. 338. 1 Vent. 238.

[b] 2 Ld. Ray. 917.

[c] Dr. & Stud. dial. 2. ch. 38. 2 Ld. Ray. 909. 2 Salk. 522. S. C. 2 Str. 1099. 1 Ld. Ray. 655.

been long ſince exploded. And whether it be the Caſe of a *general* Bailment, or a Taking to keep as his own, if the Party is to have no Reward for keeping, it hath been determined that the Bailee ſhall not be anſwerable for them when ſtolen, or for any other Loſs or Damage, than what happens by *groſs* Negligence ; and *Qu.* if the Bailee is *any further* anſwerable, when he takes the Goods under a Promiſe to keep them *ſafely.*] The Caſe of a Carrier, Ferryman, common Inn-keeper, is different ; for they have their Hire, and thereby implicitly undertake the ſafe Delivery of the Goods intruſted with them ; and therefore they ſhall anſwer the Value of them, if they are ſtolen from them. A common Carrier, Hoyman, or Maſter of a Ship, who have their Hire or Reward, are chargeable for the Goods intruſted to them againſt all Events, but Acts of God and Enemies of the King, though the Force be never ſo great ; as if an irreſiſtable Multitude of People ſhall rob him. For elſe theſe Carriers might undo them who deal with them, by clandeſtinely combining with Thieves. If a Man delivers a Box to a Carrier, in which there is a great Sum of Money, and the Carrier aſks the Owner what was in it, he tells him that it was filled with Silks, *&c.* upon which the Carrier takes it, and was robbed ; adjudged liable to pay for the whole. A ſpecial Acceptance would have excuſed him. But though a Factor hath Wages and Salary, yet if he is robbed, he ſhall be allowed to diſcount for it ; for his Duty is to merchandize as a Servant, in the beſt Manner that he can, and he is bound only to reaſonable Care in the Execution of his Truſt. [See *B.* 3. *ch.* 1. Of *Grand Larceny.*]

[d] 10 Rep. 57.

[d] Actions of *Detinue* are not ſo frequently brought as formerly. Actions on the Caſe in *Trover* and *Converſion* are come into their Place, where the Converſion changes the Detinue to an Action of the Caſe. So that the tedious Proceedings as to Garniſhment, and Interpleader are now out of Uſe. Beſides in Detinue the Defendant may [a] *wage* his Law, but he cannot in *Trover.*

[a] 1 Inſt. 286. b. 295. a. See Tit. Trial poſt.

[b] Terms of the Law, v. Covenant. 3 Black. Com. 156. F. N. B. 145. 2 Danv. Ab. 235, &c. 2 Inſt. 215. a. & b. 5 Rep. 17, &c. 1 Saund. 238, &c. See p. 222, 223. ante.

[b] 3. An *Action* of *Covenant* ariſes, where an Agreement is made by Deed, or Writing ſealed, between two Perſons at the leaſt, each to perform certain Covenants on his Part. In this Caſe, he that is aggrieved, may have this Action.

An Action of Covenant is maintainable only upon a *Deed,* indented or poll ; except it is otherwiſe by Cuſtom, as in *London.* If there is only a Hand to the Writing without Seal, Covenant lieth not, but Caſe upon Agreement. [See 32 *H.* 8. *c.* 34.]

[c] 1 Cro. 3.

In this Action the Plaintiff recovers Damages for the Breach of the Covenant, beſides Coſts ; and if the Defendant breaks the Covenant again, [c] a new Action lieth. And though there is a Bond to perform Covenants, Damages only may be recovered : Purſuant to 8 & 9 W. 3. ch. 11. ſ. 8. *whereby in all Actions in Courts of* Record *upon any* Bond *or Penal Sum for Non-performance of Covenants, the Plaintiff may aſſign as many Breaches as he ſhall think fit, and the Jury at the Trial ſhall aſſeſs* Damages *for ſuch Breaches ſo aſſigned, as the Plaintiff ſhall prove broken.*

If Judgment is given for the Plaintiff upon Demurrer, Confeſſion, or Nihil dicit, *the Plaintiff upon the Roll may ſuggeſt as many Breeches as he ſhall think fit, upon which ſhall iſſue a Writ to the Sheriff to ſummon a Jury to appear before the Juſtices of Aſſize or* Niſi prius, *to inquire of the Truth of every one of theſe Breeches, and to aſſeſs* Damages *accordingly, and the Juſtices* *of Aſſize, &c. ſhall make a Return thereof to the Court from whence the ſame iſſued.*

In caſe the Defendant after ſuch Judgment entered, ſhall pay into Court ſuch Damages *aſſeſſed and Coſts of Suit, a Stay of Execution ſhall be entered on Record: Or if, by Reaſon of Execution executed, the Plaintiff ſhall be paid ſuch Damages with Coſts, the Body, Lands, and Goods of the Defendant ſhall be diſcharged, and the Satisfaction entered upon Record, yet ſhall ſuch Judgment ſtand and be as a farther Security, to anſwer the Plaintiff his Executors, or Adminiſtrators ſuch Damages, as ſhall be ſuſtained, for further Breach of any Covenant in the ſame Deed or Writing contained.* [And the Plaintiff may thereon have a *Scire facias* againſt the Defendant.]

At Common Law the Jury may find the Penalty, but Relief may be had in Equity.

4. An *Action* of [d] *Debt* lies, where one oweth another a Sum of Money by Bond, Bill, Bargain upon a certain Contract, or upon a Leaſe for Life [See 8 *Ann. ch.* 14.] or Years reſerving Rent, Judgment, Statute Merchant, Recognizance, *&c.* So that ſometimes it is grounded upon a Writing, and ſometimes it lies without Writing.

[d] 1 Roll Abr. 591, 593, 597, 598, 599, 600, 2 Danv. Ab. 484, &c. 3 Black. Com. 154.

If Money is due upon any *Specialty*, an Action of Debt muſt be brought, and no other Action. Upon a Note without Seal, an Action of Debt may be brought, but the Defendant may *wage* [e] his Law. [f] But if it is by Action on the Caſe, on the Defendant's Promiſe to pay the ſame, which the Law implies, the Defendant cannot wage his Law. If I agree with a Tailor for a *certain* Price, to make me a Garment, the Tailor may have a general Action of Debt; but if the Price is not agreed on, there lies an Action of the Caſe only, or at moſt but a ſpecial Action of Debt upon a ſpecial Contract, which the Law may imply upon a *Quantum Meruit*. An Action of Debt too is ſometimes grounded upon an *Act* of *Parliament*; as upon 2 *Ed.* 6. *ch.* 13. for not ſetting out of Tithes; 27 *El. ch.* 13. againſt a Hundred for a Robbery; upon 9 *Ann. ch.* 10. for Money due for Letters to the Poſt Office, *&c.* It alſo lies upon [a] *Arbitrement*, *Eſcape*, *Amerciament* in a Court-Baron, and upon a *By-Law*.

[e] See of Trial poſt.

[f] 4 Rep. 93, 94. 8 Rep. 147. 9 Rep. 89, 90.

[a] 1 Roll. Abr. 591. 599, 602, 5 Rep. 92, 93. 8 Rep. 41.

If Money is due to one in his own Right, the Action muſt be brought in the [b] *Debet* and *Detinet*; but if it is brought by or againſt Executors, there it muſt be in the *Detinet* only. [See 32 *H.* 8. *ch.* 37.] [c] An Heir, as ſuch, cannot have this Action. It is at the [d] Election of the Obligee, to bring an Action of Debt againſt an Heir, bound by the Deed of his Anceſtor, if he hath Aſſets by Deſcent or the Executor if he hath Aſſets. If the Executor hath not Aſſets, then againſt the Heir only. [See 3 *W.* & *M. ch.* 14.]

[b] 5 Rep. 31. 1 Roll. Abr. 602, 603, 604. 2 Danv. Abr. 501, 504.

[c] F.N.B. 120. Finch 296.

[d] 5 Rep. 60. 2 Inſt. 441. 442.

[See *Payment of Rent*, *B.* 2. *ch.* 2. Of *Obligations*, *B.* 2. *ch.* 3. *ante.* Where an Action of Debt lies where one is bound to pay a Sum of Money at ſeveral Days.]

Note, This Action lies not againſt Executors upon a Simple Contract made by the Teſtator. [See 32 *H.* 8. *ch.* 37.]

By 4 Ann. ch. 16. *Where an Action of Debt ſhall be brought on a* ſingle Bill, *or Action of Debt, or* Scire facias *on a* Judgment *whereon the Money hath been paid, the Defendant, may plead ſuch Payment in Bar of ſuch Action. In an Action of Debt upon* Bond, *the Defendant may plead Payment in Bar, if at any Time before Action brought, he hath paid the Principal and*

9 Rep. 87.

Intereſt due by the Condition, or Defeazance, though ſuch Payment was not ſtrictly made at the Day and Place according to the Condition or Defeazance: and pending an Action on ſuch Bond with a Penalty, the Defendant may bring in Principal, Intereſt, and Coſts expended in Law or Equity upon ſuch Bond, and the Court ſhall diſcharge the Defendant from the ſame.

5. *Actions* of [e] *Treſpaſs*, (*Tranſgreſſio*) are upon a Wrong, which is ſuppoſed to be done *Vi et Armis*, with Force and Arms, either againſt the *Perſon* of a Man, or againſt his *Property*. *Arms* ſignify any Thing that a Man ſtriketh or hurteth withal.

1. Treſpaſs againſt the *Perſon*, may be committed. 1. By *menacing* or threatening bodily Hurt to him, whereby he dares not follow his Buſineſs. But threatening alone without Loſs, maketh not the Treſpaſs. 2. By *Aſſault*, where one doth attempt to beat another, but doth not; as by holding up his Cane at him within his Reach, or by drawing his ſword upon him; ſtriking at one, *&c.* whereunto belongeth lying in wait, beſetting one's Houſe, and not ſuffering one's Servant to go in and out, *&c.* 3. By *Battery*, when one doth wilfully and unlawfully beat another. If one is carrying away my Goods, I may beat him to prevent him from carrying them away. This is no unlawful Beating. So one may beat another in Defence of his Perſon or Poſſeſſion [f] 4. By *Mayhem*, when one doth by Violence take from another the Uſe of a Member proper for his Defence in Fight, by depriving him of his Finger, Foretooth, *&c.* not of a Grinding Tooth, Ear, Noſe, *&c.* Theſe are but Deformities, for which Treſpaſs of Aſſault and Battery lies. For Mayhem, one may have this Action [g], or an Appeal of Mayhem, at his Election. 5. By *Impriſonment*, where one is any way reſtrained [h] (whether in a Gaol, Stocks, Houſe, or by holding one in his Arms in the High-ſtreet) to go about his Buſineſs, as at other Times, by an Impriſonment without Cauſe or Authority; or when one doth arreſt another at a forbidden Time, or in a forbidden Place. But if the Impriſonment is upon a falſe or feigned Suit, as by ſuing Execution upon a Statute Merchant, when the Money is paid, *&c.* no Action lieth; [that is, not this Kind of Action; but an Action on the Caſe will lie againſt the Party who ſues, and cauſes another to be arreſted when there is no Debt due;] becauſe it is an Impriſonment by Courſe of Law, and in a legal Way.

2. Treſpaſs againſt the *Property* of a Man may be, 1. Againſt his *Wife*, *Children*, *Servants*. 2. Againſt his *Houſe* and *Goods*,. 3. Againſt his *Lands*, by carrying away one's Evidences and Writings concerning them, by cutting his Trees, breaking his Hedges, cutting or ſpoiling his Graſs, digging in his Ground, *&c.* with Pretence of Title, or without ſuch Pretence. For ſuch Treſpaſs done upon the Soil and Poſſeſſion of the King, the Uſe is to have an Information of Intruſion for the King in the Court of *Exchequer*.

[*By* 21 Ja. 1. ch. 16. § 5. *To an Action of Treſpaſs the Defendant may plead a Diſclaimer of any Right to the Land, and that the Treſpaſs was involuntary, and alſo Tender of ſufficient Amends before the Action brought.*]

2 Danv. Abr. 633. *Note*, That when the Beaſts of another commit a Treſpaſs upon my Land, or do there feed, tread, or ſpoil my Corn, Graſs, Wood, *&c.* without my Licence, I may diſtrain and impound them by Night or

[e] F. N. B. 86, 87, 88, &c. Finch 198, 199, 201, 202, 203, 204. 2 Roll. Abr. 545, &c. 3 Black. Com. 120.

[f] See 417, 418. ante.

[g] See 355, 356. ante.

[h] See 17. ante.

Day for this Treſpaſs. And this is called *Diſtraining* of Beaſts *Damage-feaſant*, i. e. *doing Damage*.

3 Black. Com. 6.

But Note alſo, [a] That when Entry, Authority, and Licence is given by *Law*, and one doth abuſe it, he ſhall be a Treſpaſſer *ab initio*; for the Law will judge by the ſubſequent act, to what Intent he doth enter. As the Law giveth one Authority to enter into a common Inn, to a Lord to diſtrain, to the Owner of the Ground to diſtrain for Damage-feaſant, *&c.* yet if in any of theſe Caſes the Party doth commit a Treſpaſs, the Law will judge, that he entered for that Purpoſe. [But ſee 11 *G.* 2. *ch.* 19. in *p.* 190. *ante*, as to Irregularity in Diſtreſs for Rent.] But where an Entry, Authority, or Licence is given to one *by the Party*, and he abuſeth it, there he ſhall be puniſhed for the Abuſe, but ſhall not be a Treſpaſſer *ab initio*. For when the Party giveth Licence, he cannot for any ſubſequent Cauſe puniſh *that*, which is done by his own Licence.

[a] 8 Rep. 146. 2 Str. 634. 2 Ld. Ray. 1399. S. C. 3 Black. Com. 15.

In all Treſpaſſes *Vi et Armis* the Plaintiff ſhall recover Damages according to the Wrong done. But in Battery and Mayhem, the Court may [b] increaſe the Damages upon View of the Record and the Perſon. The Defendant alſo in Strictneſs of Law is to pay a Fine to the King; becauſe the Wrong is ſuppoſed to be done *Vi et Armis, et contra Pacem, &c.* [But the *Capias* for this Fine is taken away by 5 *W.* & *M. ch.* 12. and inſtead thereof the Plaintiff, on ſigning Judgment, is to pay ſix Shillings and Eight-pence, which is to be added to his Coſts; and therefore the Words *Vi et Armis* have been ſince held to be unneceſſary. [c]]

[b] 1 Roll. Abr. 572. 1 Wilſon 5.

[c] 2 Ld. Ray. 985.

See of *Judgment*, *poſt*, For the *Statutes* concerning *Coſts* in Treſpaſs, *&c.*

6. An [a] *Ejectment*, *(Ejectio Firmæ)* is an Action where one makes a Leaſe to another of Houſes (or of one Room in a Houſe,) Lands, Coal-mines, Boileries of Salt, *&c.* For Term of Years, and a third Perſon enters and ouſts the Leſſee, whereupn he recovers his Term and Damages. This is the common Action for Trial of Titles to Lands and Tenements. It comes in the Place of many real Actions, as Writs of Right, *Formedons*, *&c.* which were very tedious, difficult and chargeable. And this Method by Ejectment is alſo made more eaſy than formerly. For now there is no Occaſion for a *Leaſe* to be made, ſealed, and delivered upon the Premiſſes to the Leſſee, who has a Mind to try the Title, and to leave the Leſſee in Poſſeſſion, to be *ouſted* and ejected by the Tenant in Poſſeſſion, *&c.* The uſual Courſe now is, to draw a Declaration, and therein to feign a caſual Ejector, or Defendant, in the Declaration (for no Arreſt is to be made in this Action) and then deliver the Declaration to the Tenant in Poſſeſſion, or his Wife, not to the Son or Daughter, or to a Servant, with a Notice in Writing at the Bottom, or on the Back thereof, in the Name of the caſual Ejector, directed to the true Tenant, for him to appear and defend his Title; or that he the feigned, or nominal Defendant, will ſuffer Judgment by Default, whereby he the true Tenant will be turned out of Poſſeſſion. To this Declaration the true Tenant may appear by his Attorney, and conſent to a Rule to be made Defendant in the Place of the caſual Ejector, or feign-

[a] F.N.B. 220. 3 Leon. 210. 2 Cro. 150. 2 Danv. Abr. 665. 3 Black. Com. 199. 2 Burrow, 667, 668, 757, 1116, 1148, 1161, 1162, 1181. 1182. 1 Burro. 143. to 147 329, 364, 366, 615, 622, 624. 629, 630, 631, 111, 119, 126.

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[a] *In æquali jure melior eſt conditio poſſidentis, et rei quam actoris.* 4 Rep. 90. 2 Inſt. 391. 4 Inſt. 180.

ed Defendant, and to confeſs a *Leaſe*, *Entry*, and *Ouſter*, and at the Trial to ſtand upon the Title only.

If he, the Tenant in Poſſeſſion, doth not appear in due Time after the Declaration left with him, and enter into the above-mentioned Rule, then upon an *Affidavit*, or Oath made, That the Declaration was left at his Houſe with his Wife, or ſerved upon him, with Notice to appear, as aforeſaid; the Court upon Motion will order Judgment to be entered againſt the caſual Ejector or feigned Defendant in the Declaration. Or if the true Tenant doth appear, and yet doth not conſent to ſuch Rule, the Court will order that Judgment ſhall be entered againſt the caſual Ejector, (*viz.*) the feigned Defendant in the Declaration, and thereby the true Tenant will be ouſted.

By 11 Geo. 2. ch. 19. § 12. which recites, *That great Inconveniencies frequently happen to Landlords by their Tenants ſecreting Declarations in Ejectment, or refuſing to appear, or to ſuffer their Landlords to take the Defence*; it is enacted, *that every Tenant to whom ſuch Declaration is delivered, ſhall forthwith give Notice thereof to his Landlord, or his Bailiff, or Receiver, upon Penalty of forfeiting the Value of three Years improved or Rack Rent, to the Perſon of whom he holds.*

And the Court where the Ejectment is brought may ſuffer the Landlord to make himſelf Defendant, by joining with the Tenant to whom the Declaration was delivered, in caſe he appears; but if he refuſes or neglects to appear, Judgment ſhall be ſigned againſt the caſual Ejector for want of ſuch Appearance; but if the Landlord of any Part of the Lands or Tenements for which the Ejectment was brought, ſhall deſire to appear by himſelf, and conſent to enter into the like Rule, that the Tenant in Poſſeſſion, if he had appeared, ought to have done, the Court may permit ſuch Landlord ſo to do; and order a Stay of Execution upon ſuch Judgment againſt the caſual Ejector, until further Order.

[a] 4 Rep. 26.

The Leſſee of a Copyholder for a [a] *Year* may maintain an *Ejectione Firmæ*, for his Term is warranted by general Cuſtom of the Realm.

[b] See p. 190. ante.

If there is no Tenant in Poſſeſſion, the old Way of ſealing a Leaſe upon the Premiſſes muſt be obſerved; and he that firſt enters upon the Land without the Conſent of the Leſſee, may be made the Ejector. [b] But there is a ſhorter Method in ſuch Caſe for Non-payment of Rent, preſcribed by 11 *Geo.* 2. *ch.* 19.

See of Evidence, poſt.

Upon *Trial* the Plaintiff muſt ſet forth his Title under the laſt Perſon ſeiſed in Fee of the Premiſſes, and prove the Execution of the Deeds.

[c] 2 Str. 1056.

In this Action the *Poſſeſſion* only of the Houſe or Land demiſed is recovered, and alſo Damages and Coſts. [See 8 & 9 *W.* 3. *ch.* 11. For Coſts in Ejectment where one of the Defendants is acquitted.] [c] But if the Term does lapſe, while the Action is depending, yet the Action ſhall proceed for Damages and Coſts.

Where there is a Recovery in Ejectment by Verdict, the Leſſor of the Plaintiff, or the Plaintiff, may bring an Action for the mean Profits and recover the ſame, from the Time of the Defendant's Entry laid in the Declaration.

Altho' there is a Verdict and a Judgment againſt the Plaintiff, yet the Plaintiff may bring another Action of Treſpaſs and Ejectment for the Land, *&c.* A Judgment in this Action is never final; for it is but to recover the *Poſſeſſion* of the Land; and is not like an Aſſize or Writ of Right, *&c.* wherein the *Title* to the Land is tried.

All Titles cannot be tried by Ejectment. For where the Entry is taken away by Diſſeiſins, Deſcents, Fines, and Recoveries, Non-claims, or by the Statute of Limitations, no Ejectment lies. It lies not for [d] Tithes generally, without expreſſing the Nature or Quality of them. [But ſee 32 *H.* 8. *ch.* 7.] It lies for a Rectory or Chapel, and the Tithes thereunto belonging. For from ſuch a Thing one might be ejected, and one may be reſtored to the Poſſeſſion of it. It lies not of a Rent, Common, [[e] but it does for Common of Paſture, for if it ſhall be taken to be Common appendant, or appurtenant, for which Kind of Common Ejectment will lie,] a Right of Fiſhing in ſuch a River, *&c.*

[d] 3 Cro. 301, 492. 11 Rep. 25. 2 Ld. Ray. 789.
[e] 1 Str. 54.

By 4 Ann. ch. 16. *The Courts at* Weſtminſter *may order a* View *of the Place before Trial in Ejectment*, *Treſpaſs*, &c. [See 4 *Geo.* 2 *ch.* 28. For Delivery of Ejectments upon Clauſes of Re-entry for Non-payment of Rent.]

7. An Action by [f] *Quare Impedit* is a Poſſeſſory Action, to recover an Advowſon; and lies where one hath an Advowſon, and the Parſon dieth, another preſents a Clerk, and diſturbeth him who hath Right to preſent. It ſuppoſes both a Poſſeſſion and a Right. [g] The Plaintiff or Demandant in his Writ muſt alledge a Preſentation in himſelf, or his Anceſtors, or in thoſe under whom he claims, unleſs in caſe of a Lapſe to a Biſhop, *&c.* [a] It lies alſo for a Donative, Archdeaconry, Prebend, Maſterſhip of an Hoſpital. [See 13 *Ed.* 1. *ch.* 5.] One that hath the Grant of the [b] *next Avoidance* ſhall have a *Quare Impedit.*

[f] Terms of the Law, v. Quare impedit. 3 Black. Com. 246. 2 Roll. Abr. 376, 378.
[g] F. N. B. 33. 5 Rep. 97. 1 Ld. Ray. 192. 2 Str. 1006.
[a] 1 Inſt. 344. a. 1 Cro. 141, 207. 2 Roll. Abr. 376, 380.
[b] 5 Rep. 97. 2 Roll. Abr. 373, 377.

[c] If one brings a *Quare Impedit* againſt the Patron and Incumbent within ſix Months, and recovers after the ſix Months, he ſhall remove the Incumbent, if named in the Writ.

[c] 6 Rep. 51, 52. 2 Roll. Abr. 390, 392.

[d] An Aſſize of *Darrein Preſentment* lies, where I or my Anceſtors have preſented before. But here too one may have a *Quare Impedit.* For where *Darrien Preſentment* lies, a *Quare Impedit* alſo lies; but not *e contra.**

[d] Terms of the Law, v. Quare Impedit.

[See 13 *Ed.* 1. *ch.* 5. and 7 *Ann. ch.* 18. and ſee of an *Advowſon*, *p.* 150. *ante.*]

8. An *Action of* [e] *Waſte* (*Vaſtum*) may be brought by the Heir, or him in Remainder, or Reverſion, againſt Tenant for Life, Years, in Dower, or by Curteſy, or Guardian, who makes Waſte or Spoil in the Houſes, Woods, Gardens, Orchards, or Lands, which he holds, to the Prejudice of the Heir, or of him in the Remainder, or Reverſion.

[e] F. N. B. 31. Terms of the Law, v. Waſte. 1 Inſt. 53. a. 54. b. 2 Inſt. 299, 300, 301, 302, 303. F. N. B. 55, &c. 3 Black. Com. 227.

Let us ſee *who may bring* this Action, and *againſt whom* it may be brought.

1. This Action muſt be *brought by him* that hath the [f] immediate Eſtate of Inheritance, in Fee-ſimple, or Fee-tail. But ſometimes another may join with him.

[f] 1 Inſt. 53 b. 285. a.

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* The Aſſize of *Darrein Preſentment* lies only where a Man has an Advowſon by Deſcent from his Anceſtors; but the Writ of *Quare Impedit* is equally remedial, whether one claims by Deſcent or Purchaſe. 2 *Inſt.* 355, 356.

[g] 1 Inſt. 53.b. 356. a. 2 Roll. Abr. 825.

Note, That the Reverſion muſt [g] *continue* in the ſame State that it was at the Time of the Waſte done, and not granted over. For though the Reverſioner taketh the Eſtate back again, the Action is gone, becauſe the Eſtate did not continue. But in ſome ſpecial Caſes an Action of Waſte ſhall lie, tho' the Leſſor had nothing in the Reverſion, at the Time of the Waſte done. For if a Biſhop makes a Leaſe for Life, or Years, and dies, and the Leſſee, the See being void, doth waſte, the Succeſſor ſhall have an Action of Waſte. This is allow'd upon a particular Reaſon. A *Purchaſer* ſhall have an Action of Waſte, though the Statute, hereafter to be mentioned, ſpeaks of thoſe that are *Inheritors.*

[h] 1 Inſt. 341.a.
[i] 1 Inſt. 53.b. 356. a.

A Tenant for Life cannot have this Action. [h] But a Parſon, *&c.* may have an Action of Waſte, and the Writ ſhall ſay *Ad Exhæredationem Eccleſiæ*; for it is the Dowery of the Church. [i] If a Tenant doth Waſte, and he in Reverſion dieth, the Heir ſhall not have an Action of Waſte, for Waſte done in the Life of his Anceſtor. For he cannot ſay, that the Waſte was done to *his Diſinheriſon.* Neither ſhall a Biſhop, Maſter of an Hoſpital, Parſon, *&c.* have an Action for Waſte done in the Time of his Predeceſſor.

[k] 5 Rep. 76, 77. 1 Inſt. 54. a. 2 Inſt. 301.

[k] If a Leaſe is made to *A.* for Life, the Remainder to *B.* for Life, Remainder to *C.* in Fee; no Action of Waſte lieth againſt the firſt Leſſee, during the Eſtate in the mean Remainder. For then his Eſtate would be deſtroyed. Otherwiſe, if *B.* had a mean Remainder for Years only; for that would have been no Impediment, the Recovery not deſtroying the Term for Years.

[l] 1 Inſt. 285.a, 2 Inſt. 304.
[a] 1 Inſt. 53. a. 283. a. 2 Inſt. 306. 5 Rep. 119. 2 Cro. 658.

[l] If Leſſee for Years committeth Waſte, and the Years do expire, yet the Leſſor ſhall have an Action of Waſte for the treble Damages, tho' he cannot recover the Place waſted. But if the Leſſor accepteth of a Surrender of the Leaſe, after the Waſte done, he ſhall not have his Action of Waſte. (*Qu.*) If a Tenant [a] repairs, before Action brought, he in Reverſion cannot have an Action of Waſte. But he cannot plead that he did no Waſte; therefore he muſt plead the ſpecial Matter.

By 20 Ed. 1. St. 2. *An Action of Waſte is maintainable by the Heir, for Waſte done in the Time of his Anceſtors, as well as for Waſte done in his own Time.*

[b] 2 Roll. Abr. 825. May. Edw. 2, 231, 273, &c.

[b] *Quære,* If this is not an *Ordinance* only; for it is queſtioned whether it is a *Statute.* And if it is a Statute, it is thought to have been repealed.

2. Now let us ſee, *againſt whom* the Action of Waſte is maintainable.

[c] Reg. 72. 1 Inſt. 54. a. 2 Inſt. 145: 299, 301, 335.

There are [c] *five* Writs of Waſte; *two* at the *Common Law,* as for Waſte done by Tenant in Dower, or by Guardian: *three* by *Statute,* as againſt Tenant for Life, Tenant for Years, and Tenant by the Curteſy. But it is ſaid too, that Tenant by the Curteſy was puniſhable for Waſte by the Common Law; for that the Law created his Eſtate, as well as that of Tenant in Dower, and therefore the Law gave like Remedy againſt him. The Common Law gave no Remedy againſt Tenant for Life or Years; for he comes in by a Leaſe of the Owner of the Land, *&c.* who might have provided by Covenant, that his Leſſee ſhould not do or ſuffer Waſte.

By Stat. of Glouceſter, *or* 6 Ed. 1. ch. 5. *An Action of Waſte is maintainable* againſt *Tenant by the Curteſy, in Dower for Life, or Years.*

By Conſtruction of the Statute it is maintainable *againſt* Tenant for [d] half a Year: But it lieth not * againſt Tenant at Will, Tenant by Statute-Merchant, Staple, or *Elegit*; for they are not Tenants for Years. But an Action of Treſpaſs lieth againſt them for voluntary Waſte; or Covenant, if they are reſtrained by Covenant. It ſhall not lie againſt Tenant [in Tail] after Poſſibility of Iſſue extinct; becauſe the Inheritance was once in him.

It lieth againſt * Mortgagee in Fee conditional and Deviſee.

[d] Lit. 67. 1 Inſt. 54. b.
* 5 Rep. 13. 1 Inſt. 54. a. 57. a. 2 Inſt. 145, 299,303,305. 6 Rep. 37,41. 2 Roll. Abr. 826.
* Noy's Max. 32.

By Weſt. 2. *or* 13 Ed. 1. ch. 22. *An Action of Waſte is maintainable by one Tenant in Common* againſt *another Tenant in Common of Wood, Turf, Land, Fiſhing, or other ſuch Thing.*

[e] This Act extends to Joint-tenants, but not to Coparceners, becauſe they were compellable to make Partition by the Common Law.

[e] 1 Inſt. 200 b. 2 Inſt. 403.

By 11 H. 6. ch. 5. *An Action of Waſte is maintainable by the Reverſioner* againſt *Tenants for Life or Years, that* alien *their Eſtates to a Stranger, and afterwards (ſtill receiving the Profits) commit Waſte.*

He in the [f] Remainder, as well as the Reverſioner, may bring this Action; and every Aſſignee of the firſt Leſſee, mediate or immediate, is within this Act.

[f] 5 Rep. 77. 2 Inſt. 302.

[g] If Tenant by *Curteſy* or *Dower* grants over his or her whole Eſtate, and the Grantee doth commit Waſte, yet the Heir ſhall have an Action of Waſte againſt them, and recover the Lands againſt the Grantee. In all other Caſes regularly the Action ſhall be brought *againſt* him that did the Waſte, whether the Tenant or his Aſſignee. If Tenant for Life or Years doth Waſte, and after aſſigneth over his Eſtate, yet ſhall the Action of Waſte be brought againſt him; and againſt him ſhall the treble Damages be recovered, and the Place waſted.

[g] 1 Inſt. 54. a. 2 Inſt. 301, 302.

[a] Tenant by the Curteſy, in Dower, for Life, Years, nay an *Infant*, or *Huſband* and *Wife*, Leſſees for Life or Years, muſt anſwer for the Waſte done by themſelves or a Stranger, being left to take their Remedy againſt the Stranger, if he did Waſte. A *Guardian* ſhall not be anſwerable for Waſte done by a Stranger. But when there is no Remedy, as when Waſte is committed by the King's Enemies, the Tenants, or Leſſees, are not puniſhable; except there is a Covenant in the Leaſe, that they ſhall not permit or ſuffer Waſte. (*Qu.*) If Tenant for Years commits Waſte, no Action lies againſt his [b] Executors or Adminiſtrators, for Waſte done before their Time. For Actions grounded on Wrongs die with the Perſon.

[a] 1 Inſt. 54. a. 2 Inſt 145, 146,303,305.

[b] 1 Inſt. 53. b. 2 Inſt. 302.

If Tenant in [c] *Dower* takes Huſband, who commits Waſte, and dies, the Wife ſhall not be puniſhed for this Waſte. [d] But if the Huſband hath a Leaſe for Years in Right of his Wife, and commits Waſte, and then the Wife dies, an Action of Waſte lies againſt him; becauſe the Law gives the Term to him. A Wife that hath the Eſtate by Survivorſhip, ſhall be puniſhed for Waſte done by the Huſband in his Life-time, if ſhe *agrees* to the Eſtate.

[c] 2 Roll. Abr. 827.

[d] 1 Inſt. 54. a. 2 Inſt. 303.

If one [e] *Joint-tenant* doth Waſte, both ſhall be attainted of the Waſte. It is the Waſte of both as to the Place waſted, but the treble Damages ſhall be recovered againſt him only that did the Waſte.

[e] 2 Inſt. 302.

If one recovers in an Action of Waſte, againſt Tenant for *Life* or *Years*, [f] he ſhall have the Corn growing upon the Land.

[f] Noy's Max. 101.

If a Leaſe is made to one [g] *without Impeachment of Waſte*, (from *Empeſchement*, a Hindrance, or *Sine Petitione* [*impetitione*] *Vaſti i. e.* without Reſtraint of committing any Waſte, or without Demand or Challenge of Recompence for doing Waſte) then the Tenant may cut down Trees, and convert them to his own Uſe, tho' the [h] Property was in the Leſſor; or he may let the Houſes be out of Repair, and not be liable to any Action But if the Words are, *To hold without any Impeachment of any Writ or Action of Waſte*, the Leſſor may ſeize his Trees, if the Leſſee cuts them down; or bring Trover for them; becauſe the Diſcharge extends only to the Action of Waſte. The Clauſe *without Impeachment of Waſte* is very common in Leaſes; whereby the Tenant hath a Property in the Houſes, Trees, *&c.* if he executes his Power during the Privity of Eſtate. But on the other Hand, it is as common to provide againſt Waſte, by Condition, Covenant, or Exception, if Waſte is not allowed.

As to the *Forfeiture* and *Judgment* in Waſte, (*viz.*) the Thing waſted, and the treble Damages. See the Statute of *Glouceſter*, explained 2 *Inſt.* 303, *&c.* and 8 *&* 9 *W.* 3. *ch.* 11. *ſ.* 3. for Recovery of Coſts; and Of *Waſte*, *p.* 295, 296. *ante.*

9. A [i] *Replevin* is a Remedy grounded or granted upon a Diſtreſs, that the Thing diſtrained may remain with the firſt Poſſeſſor, upon Security given by him to try the Right with the Diſtrainer, as hath been obſerved [k]. As thus——One doth diſtrain another's Cattle or Goods for Rent, Fine, Service, or Suit, or for Damage-feaſant, the Owner (upon giving Security to the Sheriff, that he will purſue his Action againſt him that diſtrained, and *return* the Cattle or Goods again, if the Taking ſhall be adjudged lawful) may have a Writ of Replevin, or *Replegiari facias*; whereby the Sheriff is commanded to return the Cattle or Goods to the Owner or firſt Profeſſor, till the Right of the Diſtreſs is determined. For the End of this Diſtreſs is, that the Party diſtrained may be forced to ſatisfy the Debt or Duty to the Party diſtraining, or elſe to anſwer him at Law. Now the Party diſtrained is to be Plaintiff in the Replevin, and the Party diſtraining is to be the Defendant, or Avowant. For his Juſtification of the Diſtreſs is called an *Avowry*. If he took it in his own Right, he muſt ſhew it, and avow the Taking. If in the Right of another, he muſt then make Conuſance (or Acknowledgment) of the Taking, as Bailiff or Servant to him in whoſe Right he took it. [See 21 *H.* 8. *ch.* 19. [a] and 32 *H.* 8. *ch.* 2.]

Note, [b] Coparceners muſt join in an Avowry. But it is directly otherwiſe in the Caſe of Tenants in Common [c].

There muſt be two Sorts of Pledges, (*viz.*) *Plegii de Proſequendo*, and *Plegii de returno Habendo.* [See *Weſt.* 2. or 13 *Ed.* 1. *ch.* 2. *infra.*] Caſes Temp. Lord *Hardwicke*, 352.

If the Cattle or Goods are not delivered upon the firſt Replevin, the Party diſtrained may have an [d] *Alias*, and a *Pluries* Replevin.

[e] The Sheriff may act in ſuch Caſes by Virtue of the *Writ* of Replevin, or *Ex Officio* by *Precept* or Command by Word of Mouth to his Bailiff upon *Complaint*. Replevin by *Writ* is by *Common Law*; upon *Plaint* or Complaint, by *Statute*. For.

By Stat. Marlb. *or* 52 H. 3. ch. 21. *If Beaſts are taken and wrongfully with-holden, the Sheriff upon* Complaint *may deliver them if they were taken*

[g] 11 Rep. 82, 83. 1 Inſt. 220. a. 2 Inſt. 146. 2 Cro 216.

[h] 4 Rep. 63. 5 Rep. 11, 76. 11 Rep. 48, 50, 81.

[i] Inſt. 145. b. 161. a. 3 Black. Com. 145, 13, 170.

[k] See p. 185. ante.

[a] 1 Inſt. 268. b.

[b] 1 Ld. Ray. 64.

[c] 1 Ld. Ray. 422.

[d] F. N. B. 68.

[e] 2 Inſt. 139. F. N. B. 69.

taken out of Liberties. But if within Liberties, *and the Bailiffs thereof will not deliver them, the Sheriff ſhall cauſe them to be delivered.*

This is the moſt uſual Method to obtain a Replevin, *(viz.)* by *Plaint.*

[f] The Sheriff may take a Plaint by the ſaid Statute, and make a Replevin preſently, and afterwards enter it in the County-Court. For it would be inconvenient that the Owner ſhould tarry for his Cattle till the next County-Court.

By 1 & 2 Ph. & M. ch. 12. *The Sheriff of every Shire ſhall at his firſt County-Court, or within two Months after he receives his Patent, depute and proclaim in the Shire-Town within his Bailiwick,* four Deputies, *at leaſt, to make Replevins,* &c.

[g] If the Diſtrainer, after the Diſtreſs taken, doth carry it out of the County, or to a Place unknown, or keep it in a Caſtle, *&c.* ſo that the Sheriff cannot replevy it, or deliver it to the firſt Poſſeſſor, the Party may have a Writ of *Withernam* (from *Wyther* in Saxon *other*, and *Naam*, a Taking or Diſtreſs) directed to the Sheriff, to take ſo many of the Diſtrainer's own Cattle or Goods, by way of Repriſal, inſtead of the other that are ſo eloined. And if the Cattle or Goods are put into a Strong Hold[h], the Sheriff may take the *Poſſe Comitatus* to break into it, that he may make the Replevin. [See *Weſt.* 1. or 3 *Ed.* 1. *ch.* 17.]

By Weſt. 2. *or* 13 Ed. 1. ch. 2. *The Sheriff or Bailiffs ſhall take* Pledges *of the Plaintiff, to* proſecute *his Suit, and to return the Cattle, if a Return is awarded. And if Pledges are otherwiſe taken, he ſhall anſwer for the Price of the Beaſts to be recovered by Writ. And if the Bailiff is not able to reſtore them, his Superior ſhall do it.*

It is a general Rule that the Plaintiff (*i. e.* he that is diſtrained) muſt have a general or ſpecial [i] *Property* of the Goods in him at the Time of the Taking. But if the Defendant (the Diſtrainer) claims the Property, the Sheriff cannot proceed, till that Matter is decided before him by Writ. For Property ought to be tried by Writ. And therefore in that Caſe, where the Trial is by *Plaint*, the Plaintiff may have a Writ *De Proprietate Probandâ* directed to the Sheriff, to try the Property. And if it is found for the Plaintiff, then the Sheriff is to make a Replevin or Deliverance. But if for the Defendant, he can proceed no further: Yet the Plaintiff may afterwards replevy by *Writ*; and if the Sheriff returns the Claim of Property, it ſhall be put in Iſſue, and ſhall be tried in the Common Pleas.

One cannot claim Property in a Replevin by his Bailiff or Servant, where Replevin is by Plaint in the County-Court; [a] but one may claim Property in a Court of Record by a Bailiff or Servant.

If any Thing touching *Freehold* comes in Queſtion, the Sheriff likewiſe can proceed no further. Neither ſhall a Replevin be granted, when it appears to the Sheriff, that the King is Party, or that the Taking was in his Right.

If a Landlord by his Deed grants a Rent with Clauſe of Diſtreſs, and that he ſhall keep the Goods diſtrained [b] againſt Pledges, until the Rent is paid to him, yet the Sheriff may replevy the Goods diſtrained; for it is againſt the Nature of ſuch a Diſtreſs, to be irrepleviſable.

If after a Replevin brought, the *Plaintiff* (or he that is diſtrained) doth make Default, being nonſuit before Declaration, or is nonſuit after Declaration, or if Judgment is given againſt him, then the Defendant, (or he that diſtrained) may have a Writ *De Retorno Habendo* of

[f] 1 Inſt. 145. b. 2 Inſt. 139.

[g] 2 Inſt. 140. F.N.B. 68, 69.

[h] 2 Inſt. 193, &c.

[i] 1 Inſt 145. b. Finch 316, 317.

[a] 1 Lev. 90.

[b] 1 Inſt. 145. b. 282. b. 2 Inſt. 140.

of the Goods, and by this he ſhall have the Diſtreſs delivered to him again.

c F. N. B. 72. [c] If the Plaint is removed into the Common Pleas, *&c.* and the Plaintiff in Replevin is nonſuit before or after Avowry made, the Defendant may again diſtrain his Cattle, for the ſame Cauſe he diſtrained the firſt; yet the Plaintiff, or the diſtrained, may ſue out a Writ of ſecond Deliverance upon the ſame Record, which is to revive the firſt Suit.

The Plaintiff in Replevin was nonſuited for want of a Declaration, and a Writ of *retorno habendo* was awarded, afterwards the Plaintiff ſued out a Writ of *Second Deliverance*; and then the Avowant executed a Writ of Inquiry of Damages; which was held good, 2 *Wilſon*, 116. If Plaintiff in Replevin be nonſuited for want of a Plea in Bar, the Avowant may ſue the Sureties upon the Replevin Bond, and need not execute a Writ of Inquiry for his Damages, 2 *Wilſon*, 41.

If after this ſecond Deliverance and Trial thereupon, or that the Plaintiff be again nonſuit upon a Declaration, then there muſt be awarded a *Returnum irreplegiabile* to the Defendant, and then he may make his *Avowry*, *i. e.* a Plea in Juſtification of his Diſtreſs, to ground a Writ to inquire of Damages; or he may hold the Beaſts, *&c.* as a Diſtreſs till he is ſatisfied. [See *Weſt.* 2. *ch.* 2.]

d F. N. B. 69. [d] If the *Defendant* maketh Default, the Plaintiff ſhall have Judgment, to recover all in Damages.

e F. N. B. 69, 70. [e] This Action of Replevin may be removed out of the County-Court by *Pone* out of the Chancery, if it was ſued by *Writ*; and by *Recordare*, if the Replevin was upon *Plaint*, returnable into the King's Bench, or the Common Pleas, where the Cauſe may be tried.

1 Inſt. 268 b. 8 Rep. 65. 9 Rep. 36. *By* 21 H. 8. ch. 19. *Upon a Replevin ſued, an Avowry may be made by the Lord, or Conuſance and Juſtification by his Bailiff or Servant, of a Diſtreſs taken upon the Land holden of the ſame Lord, without naming any Perſon certain to be Tenant thereof. The like Law is alſo upon every Writ ſued of ſecond Deliverance.* [See 32 *H.* 8. *ch.* 37.]

In any ſuch Avowry, &c. *in any* Replegiare, *or ſecond Deliverance for Rents, Cuſtoms, Services, or Damage-feaſant, if the Avowry, Cognizance, or Juſtification be found for the Defendant, or the Plaintiff be nonſuit, or otherwiſe barr'd, the Defendant ſhall recover ſuch Damages and Coſts, as the Plaintiff ſhou'd have had, if he had recovered.*

By 17 Car. 2. ch. 7. *When a Plaintiff ſhall be nonſuit before Iſſue in any Suit of Replevin, removed or depending in any of the Courts at* Weſtminſter, *the Defendant making Suggeſtion in the Nature of an Avowry for* Rent, (*or if Judgment be given on Demurrer for the Avowant, by* § 3.) *the Court upon his Prayer ſhall award a Writ to the Sheriff, to inquire of the Sum in Arrear, and the Value of the Diſtreſs, of the Execution of which Writ of Inquiry, the Plaintiff or his Attorney ſhall have fifteen Days Notice. Upon Return of which Inquiſition the Defendant ſhall have Judgment to recover the Arrears, if the Diſtreſs amounts to that Value, or elſe the Value of the Diſtreſs with full Coſts, and ſhall have Execution thereupon; and in caſe the Plaintiff is nonſuit after Avowry made and Iſſue joined, or if the Verdict be given againſt him, the Jury ſhall, at the Prayer of the Defendant, inquire concerning the Arrears, and the Value of the Diſtreſs, and thereupon the Avowant ſhall have Judgment for ſuch Arrears, or ſo much thereof as the Diſtreſs amounts to, with full Coſts, and ſhall have Execution for the ſame.*

Where the Diſtreſs ſhall not be found to the Value of the Arrears, the Party may diſtrain for the Reſidue. [And by 19 *Car.* 2. *ch.* 5. The above Act is extended to *Wales*, aud the Counties-Palatine.]

By 4 An. ch. 16. *The Plaintiff in a Replevin in any Court of* Record, *with Leave of the Court, may plead as many ſeveral Matters thereto, as he ſhall think neceſſary for his Defence.*

Provided, That if any ſuch Matter ſhall upon Demurrer joined, be judged inſufficient, Coſts ſhall be given at the Diſcretion of the Court: Or if a Verdict ſhall be found upon any Iſſue for the Plaintiff or Demandant, Coſts ſhall alſo be given; unleſs the Judge ſhall certify, that the Plaintiff in Replevin had a probable Cauſe to plead ſuch Matter.

By 11 G. 2. ch. 19. § 22. & 23. *All Defendants in Replevin may avow or make Conuſance generally, that the Plaintiff in Replevin, or other Tenant of the Lands whereon the Diſtreſs was made, enjoyed the ſame under a Grant or Demiſe at ſuch a certain Rent, during the Time wherein the Rent diſtrained for incurred, which Rent was then and ſtill remains due; or that the Place where the Diſtreſs was taken was Parcel of ſuch certain Tenements held of ſuch Honour, Lordſhip, or Manor, for which Tenements, the Rent, Relief, Heriot, or other Service, diſtrained for, was at the Time of ſuch Diſtreſs, and ſtill remains due; without further ſetting forth the Grant, Tenure, Demiſe, or Title of ſuch Leſſor, or Owner of ſuch Manor. And if the Plaintiff be nonſuit, diſcontinue, or have Judgment againſt him, the Defendant ſhall have double Coſts.*

And all Sheriffs and other Officers having Authority to grant Replevins, ſhall in every Replevin of a Diſtreſs for Rent, take in their own Names, from the Plaintiff and two reſponſible Perſons, as ſureties, a Bond in double the Value of the Goods diſtrained (ſuch Value to be aſcertained by Oath of one or more credible Witneſſes not intereſted in the Goods or Diſtreſs, which Oath ſuch Officer may adminiſter) conditioned for proſecuting the Suit with Effect, and without delay, and for duly returning the Goods and Chattels diſtrained, in caſe a Return ſhall be awarded before any Deliverance be made of the Diſtreſs. And ſuch Officer ſhall at the Requeſt and Coſts of the Avowant, &c. *aſſign ſuch Bond to the Avowant,* &c. *by indorſing the ſame, and atteſting it under his Hand and Seal in the Preſence of two or more credible Witneſſes; which may be done without Stamp, provided the Aſſignment be duly ſtamped before any Action brought thereon. And if the Bond ſo aſſigned be forfeited, the Avowant,* &c. *may ſue and recover thereon in his own Name; and the Court may by Rule give Relief to the Parties upon ſuch Bond, and ſuch Rule ſhall have the Effect of a Defeaſance to ſuch Bond.*

So that the Learning of Avowries is in a great Meaſure abridged by 21 H. 8. and the Intricacies of Proceſs in Replevin, *Returno Habendo, Withernam, &c.* much remedied in Caſe of Diſtreſſes for *Rents* by 17 *Car* 2. if the Practiſers would purſue that Statute, And obſerve the Strictneſs in Pleading enlarged by 4 *An.* and 11. *G.* 2. and See 2 *Wilſon*, 208. *&c.*

[See 1 *Danv. Abr.* Tit. *Avowry*, *p.* 644, 645, *&c.* And ſee of *Sheriff*, *B.* 1. *ch.* 7. and of *Diſtreſſes* for *Rent*, *B.* 2. *ch.* 2. Of the *County-Court*, *B.* 4. *ch.* 1. *ante.*]

Thus have I given a general and ſummary Account how Actions are *divided*. Of which Actions, *Caſe*, *Debt*, *Ejectment* and *Replevin*, are the moſt uſual. I proceed to ſhew,

2. Who are *incapable* to *bring* Actions; and *againſt whom* may Actions be brought.

[a] Lit. 196, 197, 198, 199, 200, 201. 1 Inſt. 128. a. & b. 129. &c. 7 Rep 17.

[b] See p. 311. & 324. ante.

[d] See p. 61. ante.

[a] Men attainted of Treaſon or Felony, a Convict Recuſant, [See 3 *Ja.* 1. *ch.* 5. 13 *W.* 3. *ch.* 6. 1. *G.* 1. *St.* 2. *ch.* 13. 5 *G.* 1. *ch.* 27.] Outlawed, or excommunicated Perſons, Convicts of a *Pramunire*, an Alien Enemy, [the Law ſeems otherwiſe now as to perſonal Actions [b]] a Religious (as Monk, Frier, *&c.*) cannot bring an Action, till Pardon, Reverſal, Abſolution, *&c.* Executors or Adminiſtrators [c] outlaw'd may ſue in the Right of the Teſtator or Inteſtate, though not in their own. A Feme Covert or married Woman muſt ſue with her Huſband [d], unleſs ſhe is a Sole Merchant in the City of *London.* [See as to *Infants* and *Idiots, B.* 1. *ch.* 1. *ante.*]

By 8 & 9 W. 3. *ch.* 11. *Executors and Adminiſtrators have Power to continue Actions, if the Plaintiff dies after an interlocutory Judgment, and before a final Judgment. And if the Defendant dies after ſuch interlocutory Judgment, and before final Judgment, the Plaintiff may continue the Action* againſt *the Executors or Adminiſtrators. And if one or more Plaintiffs or Defendants die, the Action ſhall ſurvive to the ſurviving Plaintiff, or againſt the ſurviving Defendant.*

A Poor Perſon is to be admitted to ſue in *forma Pauperis.*

* *By* 11 H. 7. ch. 12. *Every* poor *Perſon* (who can make Oath that he is not worth 5 *l.* over and above his Wife's wearing Apparel, his Debts paid) *having Cauſe of Action, ſhall have original and other Writs and* Subpœna's *gratis. And the Chancellor, or Judge, or Judges of the Court, where the* Suit *depends, ſhall aſſign him Counſel and an Attorney; who are to diſpatch his Buſineſs without Fees.* [One may be admitted, to defend as well as ſue, *in forma Pauperis,* See 9 & 10. *W.* 3. *ch.* 25. 2 *G.* 2. *ch.* 28. See alſo 23 *H.* 8. *ch.* 15. And of *Maintenance, B.* 3. *ch.* 3. *ante.*]

Quære, If one ought to be admitted to ſue *in Forma Pauperis* in an Action of the Caſe for Words?

Actions may be brought *againſt* all Perſons, whether attainted of Treaſon or Felony, a convict Recuſant, outlaw'd or excommunicated, *&c.* A Feme Covert muſt be ſued with her Huſband. [See again of *Infants, Idiots, Huſband* and *Wife,* and of *Executors, prout ſupra,* and of *Writs, infra.*]

‡ *By* 8 & 9 W. 3. ch. 11. *In Actions of Aſſault, Treſpaſs, falſe Impriſonment, or Ejectment againſt ſeveral Perſons,* where *one of the Defendants is acquitted by Verdict, he ſhall recover Coſts, unleſs the Judge certify there was a reaſonable Cauſe for making him a Defendant.*

3. To know where Actions muſt be *laid,* it muſt be conſidered, that Actions are either *local* or *tranſitory.*

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* A *Pauper* not going on to Trial according to his Notice, ſhall pay Coſts before he be permitted to try the Cauſe 1 *Stra.* 420. But he ſhall not be obliged to pay Coſts of a former Nonſuit, without Circumſtances of Vexation. 2 *Stra.* 878. If a *Pauper,* be nonſuited, and afterwards recovers in a ſecond Action, the Coſts in the firſt Action ſhall not be ſet off. 2 *Stra.* 891. A *Pauper* was diſpaupered for not going on to Trial. 2 *Stra.* 983. On Indictments Defendants may be admitted in *forma Pauperis, ibid.* 1041. The Court will refuſe to make a Rule, to tax Coſts on a *Pauper*'s bringing a ſecond Ejectment, where he does not appear to be vexatious. *ibid.* 1121. A Pardon was pleaded in *forma Pauperis, ibid.* 1215.

[a] 1. *Local,* as real and mixt Actions, Waſte, Ejectment, Treſpaſs *Quare Clauſum fregit, &c.* are mixt Actions; and muſt be laid in the ſame County where the Land lieth.

[a] 1 Inſt. 282. a. & b. 2 Inſt. 229, 230, 231. 6 Rep. 47. 3 Black. Com. 294. 1 Cro. 645.

By 31 El. ch 5. *In Actions upon penal Statutes the Offence ſhall be laid to be done in the* County *where it was done. Otherwiſe, if the Defendant traverſes and diſproves that Point, the Plaintiff ſhall be barred.*

This Act ſhall not reſtrain Officers of Record, who, in reſpect of their Offices, have lawfully uſed to exhibit Informations, or ſue upon penal Laws; nor Actions brought for Champerty, buying of Titles, Extortion, Offences againſt 1 El. ch. 11. Concerning the right Landing of Merchandize, and Cuſtom of ſweet Wines, *concealing of Cuſtoms,* &c. *corrupt Uſury, Foreſtalling, Regrating, or Ingroſſing, when the Penalty ſhall amount to twenty Pounds or above. In theſe Caſes the Offence may be laid in any County.*

All Suits for uſing unlawful Games, or for uſing any Art or Myſtery without being brought up in it, ſhall be proſecuted at the Aſſizes or Seſſions of the County, *within which the Offence was committed.* [See alſo 18 *El. ch.* 5.]

By 21 Ja. 1. ch. 4. *Actions popular on penal Statutes, which may be proſecuted before Juſtices of* Aſſize, Niſi Prius, Gaol-Delivery, Oyer *and* Terminer, *or of the* Peace, *ſhall be proſecuted only in the* Counties *where the Offences were committed, except for Recuſancy, Maintenance, Champerty, buying of Titles, concealing of Cuſtoms,* &c. *or tranſporting of Gold, Silver, Munition, Wool, Wool-fells, or Leather.*

Upon Default of proving, that the Offence was committed in the ſame County where the Action is laid, the Defendant ſhall be found Not guilty.

The Informer ſhall make Oath, that the Offence was committed in the ſame County where the Action is laid, and within one Year before the Suit commenced.

[b] By this Statute no Action of Debt, or Information, or other Suit, can be brought in any Court in *Weſtminſter-Hall,* on any penal Statute, for any Offence, which is not therein excepted, if the Offender may be proſecuted in the proper County, where the Offence was committed, [unleſs ſuch Offence ſhall be committed in the ſame County in which ſuch Court ſits.] It not only reſtrains common Informers, but the Attorney General, and all other Perſons, [except the Party grieved.] But there are ſeveral ſubſequent Statutes, which give an Action of Debt, *&c.* for the Recovery of a Penalty, in any of the King's Courts at *Weſtminſter,* and ſo far they do repeal 21 *Ja.* 1. [And this Statute has been held not to extend to Actions upon ſubſequent Statutes [a].]

[b] 3 Inſt. 192, 193. 1 Cro. 645. 1 Ld Ray. 372. 2 Ld. Ray. 872.

[a] Salk. 373. 2 Str. 1081.

Notwithſtanding this Statute. Indictments may be removed by *Certiorari* into the King's Bench, and may be tried there, or in the Country by *Niſi Prius.*

[*By* 21 Ja. 1. ch. 12. *Actions on the Caſe, Treſpaſs, Battery, or falſe Impriſonment brought againſt Juſtices of the Peace, Mayors, and other Officers of Corporations, Headboroughs, Conſtables, Tythingmen, Churchwardens, and Overſeers, and their Deputies or Aſſiſtants, for any Thing done in their Office, ſhall be laid in the County where the Fact was committed.*]

4 Inſt. 174, &c.

By 3 W. & M. ch. 12. 1 Ann. *St.* 1. ch. 18. *All Matters concerning Highways, Bridges,* &c. *ſhall be determined in the* County *where they lie; and no Preſentment, Indictment, or Order, ſhall be removed by* Certiorari *out of the County.*

[Beſides which, there are ſeveral other penal Statutes which expreſsly direct the Actions brought on them to be laid in the proper County, as 5 *G.* 1. *ch.* 26. againſt keeping large Quantities of Gunpowder in improper Places, and 12 *Geo.* 2. *ch.* 28. againſt Gaming, *&c.*]

2. * *Tranſitory* Actions, or all perſonal Actions, where no Poſſeſſion is awarded, (as Actions for Debt, Detinue, Aſſault and Battery, falſe Impriſonment, Deceit, Trover and Converſion, Account, *&c.*] may be brought in *any County*, and laid in any Place; and the Defendant cannot traverſe it, or be allowed to ſay, that it was done in another Place; except in the Caſe of an Officer, as a Conſtable, *&c.* who has a ſpecial [local] Cauſe of Juſtification by Reaſon of his Office, by 21 *Ja.* 1 *ch.* 12. as above, or for taking Beaſts or Goods *Damage-feaſant*; or when an Action is brought againſt any one, for doing any Thing by Virtue of an Act of Parliament; or where Action is brought by a Leſſor againſt a Leſſee for Rent, *&c.* But if tranſitory Actions are laid in a different County, from that in which the Cauſe of Action did ariſe, [b] the Court upon *Affidavit* doth commonly alter the *Venue, i. e.* order it to be laid in the proper County, unleſs the Plaintiff will undertake to give ſome [material] Evidence, ariſing in that County, where he hath laid his Action; however, in Writs of Debt, Account, *&c.* you ſhall not declare, that the Contract was made in any other County than is contained in the original Writ. [See 6 *Ri.* 2. *ch.* 2. though the Act is not put in Uſe.] But obſerve, that when the Place is material, as when it is made Parcel of the Iſſue, then the Jury cannot find the Point in Iſſue in any other Place. In Actions tranſitory the [c] *Day* and Time is not traverſable, if the Act be done before the bringing of the Writ. As if a Treſpaſs was done on the 4th of *May*, and the Plaintiff alledgeth it to be done on the 5th of *May*, or the 1ſt of *May* when no Treſpaſs was done, yet if the Treſpaſs was done before the Action brought, it is ſufficient. So it is in Indictments.

3 Black. Com. 294.

[b] 2 Salk. 668. &c.

6 Rep. 46, 47.

[c] Lit. 485. 1 Inſt. 283. a. 2 Inſt. 318. 3 Inſt, 230.

An Attorney has a Privilege to lay his Action in [a] *Middleſex*, becauſe of his Attendance at the Courts at *Weſtminſter*, and ſo has a Barriſter at Law. 1 *Wilſon*, 159. [See of *Privilege* in the *Catalogue* of *Writs*, *poſt.*]

[a] 2 Inſt. 229. 2 Vent. 47.

Where the *Contract* and the *Performance* is [b] beyond Sea, this wants Trial in our Law; except in the Caſe of a Bond. [But this hath been ſince held not to be Law; for that Matters tranſitory and perſonal, tho' tranſacted abroad, may be tried here.] [See of the *Court* of *Chivalry*, (or *Court Martial*) and of the Court of *Admiralty*, *B.* 4. *ch.* 1. and of the *Courts* in *Cities*, *&c.* *ch.* 2. *ante.*]

[b] 6 Rep. 46. Hob. 11, 12. [c] 1 Salk. 290. 2 Ld. Ray. 1532. 1 Str. 614. 646.

4. Actions muſt be brought in *due Time*, or they will be barr'd, by *Statutes* of Limitation. *Limitation* is a certain Time preſcribed by Statute, within which an Action muſt be brought.

[d] Time of Limitation is two-fold, (*viz.*) in *Writs* by ſeveral *Statutes*, and to make *Title* to an *Inheritance* by *Common Law*. [See for Title to an Inheritance by *Preſcription*, *B.* 2. *ch.* 3. *ante.*]

[d] 1 Inſt. 115. a.

As to *Writs* or *Actions*.

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* *Debitum et contractus ſunt nullius loci.* 2 Inſt. 231.

By Weſt. 1. *or* 3 Ed. 1. ch. 39. *The Limitation of a Writ of* Right *was from the Time of* Ri. 1. (*i. e.* from the firſt Day of his Reign. For *from the Time* being indefinite, doth include the whole Time of his Reign.) [e] But this Time is altered. For,

By 32 H. 8. ch. 2. *The former Limitation of Time in a Writ of* Right *is reduced to ſixty Years next before the* Teſte *of the Writ. And ſo other Actions are limited to fifty, forty, or thirty Years*; as by that Act [and 21 *Ja.* 1. *ch.* 16.] at large appeareth.

[f] This Act doth not extend to *Services* which by common Poſſibility may not happen or become due within ſixty Years; as to cover the Hall of the Lord, *&c.* nor to a Rent created by Deed, nor to a Rent reſerved upon any particular Eſtate, nor any Writ of Right of Advowſon, *Quare Impedit*, Aſſize of *Darein Preſentment*, or *Jure Patronatus*, [See 1 *Mar. Seſſ.* 2. *ch.* 5.] but they are left as they were before the Statute; within which Time the Demandant or Plaintiff in a real Action muſt prove himſelf or ſome of his Anceſtors to be ſeiſed. For the Law doth favour a [g] long Poſſeſſion as an Argument of Right, tho' no Deed can be ſhewn, rather than an ancient Deed without Poſſeſſion.

Note, That tho' one hath been out of Poſſeſſion for ſixty Years, yet if his Entry is not taken away, he may enter and bring his Action of his own Poſſeſſion. For the firſt Clauſe in the Act of 32 *H.* 8. doth not bar any Right; but ſays, that no Perſon ſhall ſue or maintain any Writ of Right, or make any Preſcription, Title or Claim for any Lands, *&c.* of the Poſſeſſion of his Anceſtor or Predeceſſor, but only of the Seiſin of his Anceſtors within ſixty Years; which does not take away any Action of his own Poſſeſſion, *&c.*

By 31 El. ch. 5. *Actions, Suits, Bills, Indictments, or Informations upon penal Statutes, where the King hath only the Forfeiture, ſhall be commenced within* two *Years. Where the King hath only a Part, and the Informer the reſt, they ſhall be commenced within* one *Year, or after that one Year by the King only, within the* two *Years after that Year ended.* [See 18 *El. ch.* 5. § 1.]

But this is to be underſtood, where a ſhorter Time is not limited by any other Statute.

[See 21 *Ja.* 1. *ch.* 2. By which concealed Lands ſhall not be recovered by the Crown, unleſs it is proved that the Crown hath been anſwered for the Profits, or that the ſame have been duly charged of Record, within ſixty Years before.]

By 21 Ja. 1. ch. 16. (the Statute of moſt Uſe) *All Writs of* Formedon in Deſcender, Remainder, *or* Reverter, *ſhall be ſued within twenty Years after Title accruing. Otherwiſe ſuch Title ſhall for ever be barr'd. And all Perſons having any Right or Title of* Entry *into any Lands, Tenements, or Hereditaments, muſt enter within twenty Years after Title accrued. The Titles of any Infant, Feme Covert,* Non Compos Mentis, *one impriſon'd, or beyond Sea, are ſaved; ſo as they commence their Suit within* ten *Years after ſuch Impediments removed.* See the 4 *Ann. ch.* 16. *infra.*]

Note, [a] That Copyhold Lands are within theſe Statutes of Limitation of Entry within twenty Years.

Now for the Time of Limitation in *Perſonal* Actions according to the ſame Statute.

Alſo all Actions upon the Caſe (other than for Slander) Actions of Account, (other than what concern Merchandize between Merchant and Mer-

[e] 1 Inſt. 114 b. 115. a. 2 Inſt 94, &c. 238. 1 Inſt. 115. a. 4 Rep. 10, &c.

[f] 4 Rep. 10, 11. 1 Inſt. 115. a.

[g] 2 Inſt. 118.

[a] Kitch. 170.

[b] 1 Ventr. 89, 90. 2 Saund. 124, 125. 1 Lev. 287.

chaut) [[b] This Exception ſeems to be now underſtood not to relate to an Account ſtated, but only to an Account *current*] *Actions of Treſpaſs* Quare Clauſum fregit, *Debt upon Lending or Contract without Specialty, or Arrearages of Rent, of Detinue, Trover, Replevin, ſhall be commenced within* ſix *Years after the Cauſe of Action, and not after.*

Note, That the Debt muſt be upon *Lending* or *Contract*, and without *Specialty*; or elſe for Arrearages of Rent without Specialty.

[c] 1 Ld. Ray. 421, 741. 2 Wms. 375.

A Debt *confeſſed* within ſix Years doth not avoid the Statute. It muſt be an *expreſs Promiſe* to give a new Cauſe of Action. [[c] *Qu.* If it is not now generally underſtood, that an Acknowledgment of the Debt is ſufficient to avoid the Statute.] Delivery of the laſt Goods by Tradeſmen continues the Action, for what was before due.

All Actions of Treſpaſs, of Aſſault, Menace, Battery, Wounding, Impriſonment, ſhall be commenced within four *Years after ſuch Cauſe of Suit, and not after.*

All Actions of the Caſe for Words, *ſhall be commenced within* two *Years after the Words ſpoken, and not after; and in this Action the Plaintiff ſhall recover no more Coſts than Damages, if the Jury aſſeſs the Damages under* 40 s.

The Right of Infants, Feme Coverts, Non Compos Mentis, *Perſons impriſon'd, or beyond Sea, is ſaved; ſo that they commence their Suits within the Time above limited, after their Impediments are remov'd.*

Provided, That if in any ſuch Actions Judgment is given for the Plaintiff, and the ſame is reverſed by Error; or if a Verdict paſs for him, and upon Motion in Arreſt of Judgment it is given againſt him; or if the Defendant is outlaw'd in the Suit, and does after reverſe the Outlawry; in theſe Caſes the Plaintiff, his Heirs, Executors or Adminiſtrators, may commence a new Action within a Year after ſuch Reverſal, and not after.

[a] 2 Ventr. 192, 193, 259.

[b] 1 Ld. Ray. 432. 2 Ld. Ray. 880.

[c] 2 Ld. Ray. 1441.

[d] 2 Ld. Ray. 883.

[e] 2 Wms. 145, 374.

Note, [a] That it is ſaid to be the Courſe of the *Common Pleas*, to declare in any Action (eſpecially upon an *Aſſumpſit* or the like) upon a *Quare Clauſum fregit*, as they do upon a *Latitat* in the *King's Bench*, [But *Qu.* If a [b] *Quare Clauſum fregit*, tho' returned, is a ſufficient Commencement of a Suit to avoid the Statute of Limitations.] If one ſues out an *Original*, or takes out a *Latitat* [c] in a perſonal Action within the Time limited by Statute, and hath a *Non eſt Inventus* returned by the Sheriff, and enters his Writ upon the Roll, and files it, though he doth not declare againſt the Party within the Time limited by the Statute, the Action ſhall be ſaid to be brought in due Time. But a Writ ſued out, and not returned [d], will not avoid the Statute of Limitations. Truſts are not within the Statute of Limitations [e].

[f] 11 Rep. 74.

[f] The King is not within theſe general Acts of Limitation, nor Eccleſiaſtical Perſons for their Lands belonging to their Churches; for then by Colluſion they might evade the Statutes made to prohibit their Alienations.

[g] 1 Saund. 38. 2 Saund. 66.

[g] An Action of Debt grounded on the 2 *Ed.* 6. For not ſetting out of Tithes, or any Action growing by Virtue of a *Statute*, (being a *Specialty*) is not within 21 *Ja.* 1. *ch.* 16. The like of *Arbitrement*, under the Hand and Seal of the Arbitrator, being a *Specialty*.

See 10 & 11 *W.* 3. *ch.* 14. Concerning Limitation of *Writs* of *Error* under *Fines*, *Recoveries*, *Judgments*, &c. and 4 *Ann. ch.* 16. Concerning *Claims* and *Entries* to avoid a *Fine*, or what ſhall be a ſufficient Entry, or Claim within the Statute of Limitations of 21 *Ja.* 1. *ch.* 16. and concerning Suits in the Admiralty for *Seamens Wages* to be proſecuted within *ſix* Years. See alſo 12 & 13 *W.* 3. *ch.* 3. Whereby the Plaintiff ſtaid by *Privilege* of *Parliament* ſhall not be barr'd by any Statute of Limitation.

By 4 Ann. ch. 16. *If any Perſon* againſt *whom there ſhall be Cauſe of Action for Seamens Wages, or of Treſpaſs, Detinue, Trover, Replevin, Account, Caſe, Debt grounded on Contract or lending without Specialty, or for Rent, or Aſſault, Menace, Battery, Wounding and Impriſonment ſhall, at the Time of ſuch Cauſe of Suit accrued, be beyond Sea, then the Perſon intitled to ſuch Suit may* bring an Action after the Return *of ſuch Perſon, ſo as he brings the ſame within ſuch Times after the Return, as are reſpectively limited by* 21 Ja. 1. ch. 16.

The former Statute of 21 *Ja.* 1. ſaved the *Plaintiff*'s Right where he was beyond Sea, but not where the *Defendant* was beyond Sea.

It is to be wiſhed, that in [h] *Criminal* Caſes at the Suit of the King, there was a Limitation of Time for Proſecution; eſpecially in caſe of Life and Death. [See 7 & 8 *W.* 3. *ch.* 3. By which the Indictment in High Treaſon or Miſpriſion of Treaſon, committed in *England*, or *Wales*, in ſome Caſes, is to be found within *three* Years after the Offence committed. And 1 *Geo.* 1. *ch.* 5. Concerning Rioters, whereby Proſecution is to be within twelve Months.] In Offences under Treaſon and Felony there are many Statutes that limit the Time of Proſecution to one or two Years, ſix Months, &c. A ſhort Limitation of Time is always neceſſary, where an Offence is committed by bare *Words*. [See 6 *Ann. ch.* 7. whereby Information upon Words ſpoken againſt the Proteſtant Succeſſion contrary to that Act, muſt be given upon Oath within *three Days*, and Proſecution be within *three Months* after Information, and Conviction muſt be by the Oath of *two* Witneſſes.]

[h] 4 Inſt. 185.

He that will take Advantage of the Statute of Limitations muſt plead [a] it; or he cannot have the Benefit of it, although it appears upon the Declaration that the Cauſe of Action accrued ſo many Years ago.

[a] 2 Ld. Ray. 838.

II. [b] A *Writ* (*Breve, à Brevitate*) in general is the King's Precept in Writing under Seal, *commanding* ſomething to be done, or giving *Commiſſion* to have it done.

Of Writs.

[b] Terms of the Law, v. Brief.

Writs are larger than Actions. Some are grounded upon *Rights* of *Action*. Some are in the Nature of *Commiſſions*, as Writs of Error, *Oyer* and *Terminer*, Writs to elect Knights and Burgeſſes of the Parliament, for Surety of the good Behaviour or Peace, &c.

Some Writs are *Mandatory* and *Extrajudicial*, as *Ne exeat Regno ſine Licentiâ*, Writs for calling one to be a Peer, to chooſe a Biſhop, to call one to be a Serjeant, Chief Juſtice, &c. Some Writs are *Patent*, and ſome *Cloſe*. *Patent* (or open) ready to be ſhew'd, that the Sheriff, &c. might take Notice thereof. *Cloſe*, as Writs directed into Ancient Demeſne, &c.

1 Inſt 73. b. 289 a.
2 Inſt. 39, 40, 41.
7 Rep. 20.
3 Black. Com. 273.

Some Writs are directed to the Sheriffs or Coroners; and in ſpecial Caſes to the Party, as writs of Prohibition, *Ne exeat Regno*; or to others, as to Judges Temporal or Eccleſiaſtical, &c.

But now of Writs grounded upon *Action*.

After the Action is fix'd on for a Wrong done, or a Right detain'd, ſuch a Writ muſt be taken out, as is ſuitable to the Action. For the Writ is different from the Action, though they are often confounded; for an Action is the Right of Suit. And the Writ is grounded thereupon, and is the Means to bring the Plaintiff to his Right. Such a Writ is the King's Precept in Writing under Seal iſſuing out of his Courts, whereby any Thing is commanded to be done touching a Suit or Action commenced. But yet more particularly; a Writ is a Proceſs iſſuing out of the *Chancery*, or other Court, commanding the Sheriff of the County, *&c.* to ſummon or attach a Perſon, to anſwer the ſuit of another. The Writ muſt be directed to the Sheriff, [c] though it be for a Thing done in a Franchiſe. And he muſt ſend it to the Bailiff of the Franchiſe, [d] who ſhall ſerve it as a Servant to the Sheriff, and the Sheriff ſhall *return* it.

[c] See p. 70, 71, &c. ante.
[d] See p. 201. ante.

Of Writs that are grounded on Civil Actions, ſome are *Original* and ſome *Judicial*. *Original* (of great [e] Authority for the Proof of the Law in particular Caſes) which iſſue out of the Court of *Chancery* in the King's Name, and are ſent to make a Defendant appear. [f] Some are in the *Præcipe quod reddat*, as Debt, Detinue, *&c.* Some *Quod Permittat*, as for one to uſe his Common, *&c.* Some *Quod Faciat* as in an Action of Account, Covenant. A *Præcipe* is a command to the Sheriff, to require the Defendant to do ſomething that the Plaintiff ſueth for, or to appear to the Suit. A *Si fecerit te ſecurum*, or *Pone*, is an original Writ, and the Ground of the *Capias* which iſſues out of the Common Pleas or King's Bench thereon, when the Proceedings are not by Bill. [a] Here the Plaintiff in the Writ is ſuppoſed to give Security by Pledges; but this is diſuſed. Writs original alſo may be in Appeals that concern Life. [See 1 *H.* 5. *ch.* 5. [b] Of *Additions* in original Writs of Actions perſonal, Appeals, *&c.*] *Judicial*, which iſſue out of the Court where the Original is return'd, after the Suit is begun, or where the Cauſe depends, and do bear the Name of the Chief Juſtice of the Court, whence they iſſue.

[e] 1 Inſt. 93. b. 8 Rep. 48, 49. 1 Str. 146, &c.
[f] Finch 257. 2 Inſt. 40.
[a] 1 Inſt. 127. a.
[b] 2 Inſt. 665.

Writs alſo according to the Nature of the Action are either [c] *Real*, *Perſonal*, or *Mixt*. Real, which touch the *Poſſeſſion*, and are call'd Writs of *Entry*; or the *Property*, which are Writs of *Right*, *&c.* But theſe Real Writs, and the ſeveral Proceſſes thereon, as the *Grand Cape*, *Petit Cape*, *Saver*, *Default*, *Reſceit*, *View*, *Aid-Prayer*, *Voucher*, *&c.* are out of Uſe. For in moſt Caſes at this Day (as I have ſaid before) where the Entry is lawful, Men chooſe to recover their Poſſeſſions by *Ejectment*. In common Recoveries only, the Form of ſuch real Actions is preſerved. And ſometimes, tho' ſeldom, there is a Writ of *Dower*, or *Formedon*. But in the Grand Seſſions in *Wales* they proceed by ſuch Writs. The Remedy alſo by Writs of *Aſſize*, as *Novel Diſſeiſin*, *&c.* and the ſeveral Forms and Proceedings relating to them are antiquated by the common Uſe of Ejectments inſtead thereof. So that an Aſſize is rarely brought, unleſs for the Recovery of the Poſſeſſion of *Offices*. Other Aſſizes, as for Commons, Ways, Nuſances, *&c.* are turned (as hath been ſaid) into Actions of Treſpaſs, and Actions on the Caſe. *Perſonal*; which are Writs taken out for Debt or Damages, *&c.* where the Plaintiff is to be reſtored to ſomething in the Perſonalty. *Mixt*; which are Writs that iſſue out for the Recovery of the Thing demanded and Damages.

[c] 1 Inſt. 73. b. 2 Inſt. 40.

Note, [d] That the King's Writs are *Ex Debito Juſtitiæ*, and cannot be denied to the Subject; tho' ſome are *Ex Gratia*, as Writs of Protection, *De Excommunicato Capiendo*, *&c.* And it ought to be remembered, that it is regularly true, that no Man ſhall be puniſhed for ſuing of Writs in the King's Courts, be it of Right or Wrong.

[d] 1 Inſt. 161. a. 2 Inſt. 40, 369, 623.

Writs *Original* and *Judicial*, moſt neceſſary to be known, are theſe that are ſet down in *alphabetical* Order. But *Fitzherbert's Natura Brevium* muſt be read again and again, and upon all Occaſions conſulted.

A.

[e] *Accedas ad Curiam*, lies to remove Plaints in any other Court-Baron beſides the County-Court, and is directed to the Sheriff to make a Record of the ſaid Suit in Preſence of the Suitors of the ſaid Court, and to certify it into the King's Court.

[e] F. N. B 19, 70. Terms of the Law, v. Accedas ad Curiam.

[f] *Account*, lieth againſt Guardian in Socage, a Bailiff, or Receiver, or againſt one as Bailiff and Receiver. [See 4 *Ann. ch.* 16.]

[f] F. N. B. 116

[g] *Ad Admittendum Clericum*, is directed to the Biſhop, to admit a Clerk, after he has recovered his Preſentation.

[g] F. N. B 38.

Ad Inquirendum, is a Judicial Writ, commanding an Inquiry to be made by a Jury, into any Thing touching a Cauſe depending in Court, for the Satisfaction of the Court, and Execution of Juſtice, [See *Inquiry, infra*.] [a] There need not to be twelve upon the Jury. [But *Qu*. If the Practice is not to have twelve upon ſuch Writs.]

[a] Finch 484.

[b] *Ad Quod Damnum*, is a Writ of Inquiry, of what Damage it will be to the King or any other Perſons, to grant a Liberty, Fair, or Market, or to turn a Highway, *&c.* [See 8 & 9 *W.* 3. *ch.* 16.] or to grant Lands, or Licence to alien in Mortmain, *&c.*

[b] F. N. B. 221.

[c] *Annuity*, is a Writ which lieth for the Grantee, where one granteth to another a yearly Rent for Life, or for Years, or in Fee, out of his Lands, or out of his Coffers, or to receive from his *Perſon* (and his Heirs if named) yearly at a certain Day, when it is behind at the Day of Payment.

[c] F. N. B. 152. Finch 161. See p. 192. ante.

Aſſize of [d] *Darrein Preſentment* (i. e. *Ultimæ Præſentationis*) lies where one or his Anceſtors have preſented a Clerk to the laſt Avoidance of a Church, and a Stranger, upon the Death, Reſignation, *&c.* of the Clerk, preſents a Clerk to the ſame Church, in Diſturbance of him that hath Right. [See *Quare Impedit infra*, and for the Meaning of an *Aſſize*, *Lit.* 234.]

[d] F. N. B. 31, 37. 2 Inſt. 356, &c.

Aſſize of [e] *Juris Utrum*, lieth for a Parſon againſt a Layman, or for a Layman againſt a Parſon, or for one Parſon againſt another, for Lands or Tenements, whether they be Lay-Fee or Free-Alms, or Free-Alms of this Church or another. [See *Weſt.* 2. *ch.* 24. 14 *Ed.* 3. *St.* 1. *ch.* 17.

[e] F. N. B. 48, 49, 195. 1 Inſt. 159.a. 2 Inſt. 407.

[f] *Aſſize* of *Mortdanceſter* (*Aſſiſa Mortis Anteceſſoris*) lieth where one's immediate Anceſtor dies ſeiſed of Lands, and a Stranger abates, *&c.*

[f] F N. B. 195, &c. 1 Inſt. 159.a. Finch 290.

Aſſize of [g] *Novel Diſſeiſin*, is a Real Writ for a Freeholder againſt his Diſſeiſor, whether of Land, Rent, *&c.*

[g] F. N B. 177. 8 Rep 45, &c.

[h] *Attachment*, is to take one by his Body, *&c.* to bring him to anſwer, *&c.* Alſo it iſſues for Contempt of the Court, or upon *Affidavit* for not obeying a Rule or Order, *&c.* and the Perſon ſo attached may be examined upon Oath on Interrogatories. And if he is acquitted [or has cleared his Contempt] he ſhall be diſcharged upon Motion to the Court. But if he appears to be Guilty, he ſhall be fined for his Contempt. In *inferior* Courts there may go an Attachment againſt one's Goods, to make him appear in a perſonal Action. There is alſo a *Foreign* Attachment, which is an Attachment of the Goods of Foreigners within a Liberty, or City, at the Suit of any within the Liberty, to whom a Foreigner oweth Money, *&c.*

[h] Terms of the Law, v. Attachment.

Further, There is a Writ of Attachment of *Privilege* at the Suit of a Clerk or Attorney of the Court, which is in the Nature of a *Capias*, to bring a Defendant into Court. It will hold the Defendant to bail, [in the ſame Caſes where a *Capias* will.]

[i] F. N. B. 105, &c. Finch 484, 485.

[i] *Attaint*, lieth againſt a Jury of twelve Men aſter Judgment, who have given a falſe Verdict in any Court of Record, that the Judgment may be reverſed. [See *Weſt.* 1. *ch.* 37. 34 *Ed.* 3. *ch.* 7. 9 *Ri.* 2. *ch.* 3. 32 *H.* 8. *ch.* 3.] The Plaintiff in the Attaint can give no more Evidence than was given at firſt. But the Defendant in Affirmance of the firſt Verdict may.

[k] F. N. B. 102. Finch 488, 489. 1 Inſt. 290.b. 2 Inſt. 396. 3 Rep. 13, 14.

[k] *Audita Querela*, is for a Perſon who is like to be in Execution, or is actually in Execution, upon a Statute, Recognizance, or Judgment, to ſet aſide the Execution, by ſuggeſting ſome juſt Cauſe ſince the Judgment, to diſcharge himſelf of the Execution; as Arbitrement, Releaſe, &c. This Writ ſhall iſſue out of *Chancery* directed to the Juſtices of the *King's Bench* or *Common Pleas*, willing them to grant Summons to the Creditor, to appear before them to anſwer the Complaint at a certain Day.

[a] 3 Inſt. 235.

[a] It lies not againſt the King.

B.

[b] Reg. 307.b.

[b] *Beneficio Primo Eccleſiaſtico Habendo*, is a Writ directed from the King, to beſtow the Benefice that ſhall firſt fall in the King's Gift, above or under ſuch a Value, upon a particular Perſon.

C.

Capias ad Reſpondendum, is the next Writ to the Original in an Action of Debt, &c. and is a Proceſs to impriſon the Defendant. [See 19 *H.* 7. *ch.* 9. 23 *H* 8. *ch.* 14.]

[c] 1 Inſt. 289.a. 2 Inſt. 394, 395. 3 Rep. 11, 12. Finch 476. 1 Roll. Abr. 897, &c.

[c] *Capias ad Satisfaciendum*, is a Judicial Writ for Execution after Judgment, to take the Body of a Man, and to impriſon him, till Satisfaction is made. It lay not at Common Law. But it is given in many Caſes by *Statutes*. [See 1 *Ja.* 1. *ch.* 13. 21 *Ja.* 1. *ch.* 24.]

[d] Finch 476.

[d] *Capias Utlagatum*, is an Execution for arreſting a Perſon outlaw'd, when he refuſes to appear upon the *Exigent*. [See *Exigent*.]

There is alſo a ſpecial *Capias Utlagatum* againſt his Body, Lands, and Goods.

[e] Finch 476.

[e] *Capias pro Fine*, is when a Fine is impoſed for an Offence, and is payable to the King. [See 5 & 6 *W.* & *M.* *ch.* 12.]

Capias in Withernam. [See *Withernam, infra*.]

[f] F. N. B. 242. Finch 443. Terms of the Law, v. Certiorari. 1 Salk. 144, &c.

[g] See Hawk. P. C. B. 2. p. 285, &c.

[h] 1 Ld. Ray. 216, 469, 580. 2 Ld. Ray. 836. 2 Burro. Table, tit. Certiorari.

[f] *Certiorari*, is a Writ directed to an inferior Court of Record, to remove, and certify the Record of a Cauſe [into the Court of Chancery, King's Bench, or Common Pleas, or to remove Indictments, or Orders, or Convictions by Juſtices of Peace into the Court of King's Bench.[g]] No Record ſhall be removed into the *Common Pleas*, or Indictment taken in the Country to the King's Bench immediately by a *Certiorari* [*Qu.*]; but firſt it muſt be certified into *Chancery* by a Surmiſe, and from thence ſent by *Mittimus* into the Common Pleas or King's Bench, as the Caſe is. [This hath been otherwiſe determined, [h] and that a Record of an inferior Court may be removed into the King's Bench or Common Pleas immediately by *Certiorari*, as well as by *Certiorari* and *Mittimus*.] [See 1 & 2 *Ph.* & *M.* *ch.* 13. 21 *Ja.* 1. *ch.* 8 & 23. 12 *Car.* 2. *ch.* 23. 22 *Car.* 2. *ch.* 12. 3 *W.* & *M.* *ch.* 10 & 12. 4 & 5 *W.* & *M.* *ch.* 23. 5 & 6 *W.* & *M.* *ch.* 11. 7 & 8 *W.* 3. *ch.* 6. 8 & 9 *W.* 3.

ch. 33. 1 *Ann. St.* 1. *ch.* 18. 5 *Ann. ch.* 14. 5 *Geo.* 1. *ch.* 15. 5 *Geo.* 2. *ch.* 19.]

[i] *Cautione Admittenda*, is a Writ that lieth to a Biſhop (when one taken by Force of the Writ *de Excommunicato Capiendo*, offereth ſufficient Pledges or Caution to obey and ſubmit to the Eccleſiaſtical Laws for the future) to admit the Caution and to deliver him. It may be directed to the Ordinary himſelf, to command him to be delivered, which the Ordinary may do by Word. [See *Excommunicato Capiendo* and *Deliberando, infra.*]

[a] *Clerico Capto per Statutum Mercatorum, &c.* is for the Delivery of a Clerk out of Priſon, who is impriſon'd upon a Statute-Merchant, *&c.* [See 13 *Ed.* 1. *St.* 3.]

[b] *Clerici non Eligantur in Officium, &c.* For a Clerk not to be choſen an Officer for his Lands; as Bailiff, Beadle, or in any ſuch like Office. And this Writ reciteth, that by the Common Law they ought not to be choſen.

[c] *Conge d' Elire* (Leave to elect) is the King's Licence to a Dean and Chapter in the Time of Vacation, to proceed to an Election of a Biſhop. [See 25 *H.* 8. *ch.* 20]

[d] *Conſpiracy*, is where two Perſons at leaſt maliciouſly conſpire to indict any Perſon falſely of Felony, Treſpaſs, *&c.* [*Quære* of Treſpaſs?] and the Perſon is acquitted. Here the Perſon, indicted, after Acquittal ſhall have a Writ of Conſpiracy.

[e] *Conſultation*, is to return a Cauſe, removed by Prohibition, to the Eccleſiaſtical Court, when the Judges find, that that Court hath Juriſdiction, or that the Suggeſtion is falſe, or not proved. It is in the Nature of a *Procedendo*. [See 24 *Ed.* 1. 50 *Ed.* 3. *ch.* 4. and of a *Procedendo* and *Prohibition, infra.*]

[f] *Coronatore Eligendo*, is directed to the Sheriff out of *Chancery*, to call together the Freeholders of the County, to chooſe a new Coroner, and to certify the ſame into *Chancery*. There is alſo a Writ *De Coronatore Exonerando* to diſcharge him.

[g] *Corpus cum Cauſâ*, iſſues out of the Chancery, where a Man lies in Execution upon a *Judgment* for Debt, to remove the Body and the Record into the King's Bench, *&c.* there to lie until the Judgment is ſatisfied. [*Qu.* If this Writ is any thing more than a *Habeas Corpus cum Cauſâ*, to remove a Cauſe from an inferior Court: For this Deſcription of the Writ ſeems to be a Miſtake, occaſioned by blending the Writ itſelf and the Conſequences of it, when returned, according to 2 *H.* 5. *ch.* 2. which Act, reciting that Debtors in Execution often procured Writs of *Certiorari* and *Corpus cum Cauſâ* out of the Chancery to bring up their Bodies, with the Cauſe of their Impriſonment, who were then let to Bail, enacts, that if it be returned upon any ſuch Writ, that the Priſoner is condemned by Judgment, he ſhall be remanded, and not let to Bail.] [See 2 *H.* 5. *ch.* 2. 21 *Ja.* 1. *ch.* 23.]

[A Writ of the ſame Name alſo lies to [h] remove any Action from inferior Courts of Record into any of the Courts of Law at *Weſtminſter*. See *Habeas Corpus, infra.*]

[i] *Covenant*, lies upon a Covenant by Deed. [See *Actions* of *Covenant*, *ſupra.*]

D.

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[i] F. N. B. 63. 2 Inſt. 189, 623.

[a] 2 Inſt. 4.

[b] F. N. B. 175. 2 Inſt. 3, 4. 623.

[c] F. N. B. 170.

[d] F. N. B. 114. Finch 446. See p. 414. ante.

[e] F. N. B. 50.

[f] F. N. B. 163.

[g] F. N. B. 251.

[h] Terms of the Law, v. Corpus cum Caſua.

[i] F. N. B. 145.

D.

Darrein Preſentment. [See *Aſſize* of *&c.*

[k] F. N. B. 119.

[k] *Debt.* [See *Action* of *Debt*, *ſupra.*]

[l] F. N. B 95.

[l] *Deceit.* [See Action of the *Caſe*, *ſupra.*]

[m] F. N. B. 171.

[m] *Decies Tantum*, lieth againſt a Juror, who takes Money of either Party, to give his Verdict. And it lies againſt all the Jurors, though they ſeverally take Money, as ſome more ſome leſs. It is call'd *Decies Tantum*, becauſe the Recovery is for *ten* Times ſo much, as was taken. [See 38 *Ed.* 3. *St.* 1. *ch.* 12.]

[a] F. N. B. 146, 147, 170.

[a] *Dedimus Poteſtatem*, is a Writ to commiſſion private Perſons, to do ſome Act in the Place of a *Judge*, as to take a Perſon's Anſwer to a Bill in *Chancery*, to examine Witneſſes, *&c.* to take a Fine, take a Recovery, *&c.* [See 15 *Ed.* 2.]

[b] F. N. B. 138.

[b] *Detinue.* [See *Action of Detinue*, *ſupra.*]

Diſtringas, is directed to the Sheriff, *&c.* commanding him to diſtrain one for a Debt to the King; or for his Appearance at a Day, (or at the Suit of a private Perſon, where the Defendant is privileged, or is a Corporation aggregate, in order to compel an Appearance] *Diſtringas Juratores*, is a Writ directed to the Sheriff, commanding him to diſtrain upon the Jury, and to return *Iſſues*, (Profits of their Lands and Tenements) to appear; which cannot be ſaved upon Non-Appearance, but on reaſonable Cauſe proved by Oath. [See 4 & 5 *W.* & *M.* *ch.* 24.]

Dower. [See *Right* of *Dower*, *infra.*]

Duces Tecum, iſſues out of Chancery, commanding one to appear at a Day in that Court, and to bring with him ſome Writing, *&c.* that is wanted, to be there inſpected.

There is alſo a *Duces tecum licet languidus*, directed to the Sheriff, upon a Return that he cannot bring his Priſoner without Danger of Death.

E.

[c] F.N.B. 220.

[c] *Ejectione Firmæ.* [See *Action* by *Ejectment*, *ſupra.*]

[d] F N. B. 267. C. 1 Inſt. 289. b. 290. a. 2 Inſt. 394, 395, 396. 3 Rep. 11, 12, 15.

[d] *Elegit*, is a Writ judicial, given by Statute, directed to the Sheriff where one hath gotten Judgment for Debt or Damages, or upon a Recognizance, in any Court, commanding him to deliver to the Perſon recovering all the Goods (Beaſts of the Plough excepted) of the Debtor, and half the Lands, *&c.* if the Goods are not ſufficient; upon which the Creditor ſhall hold the Moiety of the Land belonging to him, until his whole Debt or Damages are ſatisfied. This muſt be done by an Inqueſt or Jury of twelve Men, ſummoned by the Sheriff, upon ſuch Land as the Defendant had at the Time of the Judgment. But this Writ ought to be ſued within a Year and a Day after the Judgment. [See *Weſt.* 2. *ch.* 18. 32 *H.* 8. *ch.* 5.]

[e] F. N. B. 20, 22, 24. Finch 479, 480.

[e] *Error* is to redreſs a falſe Judgment, given in any Court of *Record*, where the Court hath Power to hold Plea of any Sum in Debt or Treſpaſs above 40 *s.*

[f] F. N. B. 226.

[f] *Eſſendi Quietum de Telonio*, is to Officers, not to grieve thoſe that ought to be quit of the Payment of Toll in Fairs and Markets according to their Privilege, either by Charter or Preſcription.

[g] *Excommunicato Capiendo*, is directed to the Sheriff upon Certificate of the Biſhop, *&c.* under his Seal into the Chancery, to apprehend a Perſon denounced excommunicated forty Days, for Contumacy or Contempt of the Eccleſiaſtical Laws; and to commit him to Priſon without Bail, until he ſubmits. This Writ muſt be returnable in the King's Bench [h]. The Certificate is good tho' it comes from a Biſhop elect before Conſecration. For the Confirmation gives him Juriſdiction. [See 5 *El. ch.* 23.]

[i] *Excommunicato Deliberando*, is directed to the Sheriff, to deliver an excommunicate Perſon upon his Submiſſion to the Church, upon Certificate of the Biſhop into the Chancery, that the Church is ſatisfied, and that he hath abſolved him.

If the Biſhop will not accept of his Caution, or Pledges to ſubmit upon the King's Writ *De Cautione Admittendâ*, or will not command the Sheriff to deliver him, or if the Excommunication is for a Matter, that is not of Eccleſiaſtical Cognizance, this Writ ſhall be directed to the Sheriff, to deliver him. And if an Excommunicate Party offers to perform a Sentence, and the Biſhop refuſes to accept it, and to abſolve him, the Party ſhall have a Writ to the Biſhop, requiring him to abſolve him. [See *Cautione admittenda ſupra.*]

[a] *Excommunicato Recipiendo*, is to remand a Perſon excommunicated to Priſon, who hath been illegally delivered from thence, before he has ſubmitted to the Church.

[b] *Executione Judicii*, is directed to a Judge of an inferior Court of Record, or not of Record, to do Execution upon the Judgment, or to return ſome reaſonable Cauſe wherefore he delays the Execution. [See of *Execution infra.*]

Exigent, lieth where the Defendant in an Action perſonal cannot be found. It is directed to the Sheriff, to proclaim and call the Defendant five County-Days one after another, *exacting* and requiring him to appear upon Pain of Outlawry, or to be out of the Protection of the King and his Laws. The Judgment of Outlawry is to be pronounced by the Coroner, on the fifth County-day. [See 31 *El. ch.* 3.]

[c] *Extent* is directed to the Sheriff, to ſeize and value Lands and Goods, to the utmoſt *Extent*, if one that is bound to the King by Specialty, or to others by Statute, Recognizance, *&c.* hath forfeited it; ſo that by the yearly Rent the Creditor may be paid his Debt. Upon this the Creditor may ſue a Writ to the Sheriff out of the Chancery, to deliver him the Lands and Goods to the Value of the Debt; which is called a *Liberate.* [For Extents by *Elegit*, Statute-Merchant or Staple, *&c.* See *Weſt.* 2. *ch.* 18. *Stat. de Acton-Burnel de Mercatoribus*, or 11 *Ed.* 1. 23 *H.* 8. *ch.* 6. and 32 *H.* 8. *ch.* 5.]

F.

[d] *Falſe Impriſonment*, is brought for impriſoning one without Cauſe, or for unlawfully detaining him without legal Proceſs.

[e] *Falſe Judgment*, is to correct a Judgment, given in a Court *not* of Record.

[f] *Fieri Facias*, is directed to the Sheriff, where one hath recovered in an Action Debt or Damages in the King's Court, to command him to levy the Debt or Damages of the Goods and Chattels of the Perſon againſt whom the Recovery was had. It may be brought at any Time

[g] F. N. B. 62, 63. 8 Rep. 69.

[h] 3 Wms. 55.

[i] F. N. B. 63, &c. 2 Inſt. 623.

[a] Reg. Orig. 67. F. N. B. 64.

[b] F. N. B. 20.

[c] F. N. B. 131. 4 Rep. 67.

[d] F. N. B. 86. K.

[e] F. N. B. 17, 18.

[f] F. N. B. 140. B. 1 Inſt. 290. b.

within a Year and a Day after Judgment. [See *Weſt.* 2. *ch.* 18. *Scire facias* and *Execution*, *infra*.]

[g] *Forcible Entry*, lies where one is ſeiſed of a Freehold, and is thereof diſſeiſed, or put out of his Lands or Tenements, with Force; or if he is diſſeiſed peaceably, and afterwards the Deſſeiſor doth keep and detain the ſame with Force. [See 8 *H.* 6. *ch.* 9.]

[h] *Formedon* (*De Forma Donationis*, becauſe the Writ doth comprehend the Form of the Gift) is of three Sorts, (*viz.*) *Formedon* in the *Deſcender*, *Remainder* and *Reverter*, *Formedon* in *Deſcender* is for the Iſſue in Tail, which claim by Deſcent *per Formam Doni*. It is the higheſt Writ that a Tenant in Tail can have. [See *Weſt.* 2. *ch.* 1.] A *Formedon* in *Remainder*, is for him in Remainder, his Heirs and Aſſigns, after the Determination of the Eſtate-tail. *Formedon* in *Reverter* lieth for him in the Reverſion, or his Heirs or Aſſigns, after the Eſtate in Tail is ſpent.

H.

[a] *Habeas Corpus*, lies where one is indicted of a Treſpaſs before Juſtices of the Peace, or in a Court of any Franchiſe, and is impriſoned for the ſame, and hath offered ſufficient Bail, and it is refuſed where bailable; [or it lies [b] where a Perſon is impriſoned in any Gaol or other Place, to bring him up either to the Court of Chancery, or other the King's ſuperior Courts, or before a Judge, in order to his being bailed, diſcharged, or remanded, as the Caſe may be, and in many other Caſes to bring up the Body of any Priſoner into any of thoſe Courts, in order to do or receive what to Juſtice appertains, or to anſwer the Purpoſes of Juſtice, as to give his Teſtimony as a Witneſs (which is called a *Habeas Corpus ad Teſtificandum*) or the like] or where a Debtor is arreſted in an inferior Court and in Priſon, this Writ, which in ſuch Caſe is uſually called a *Habeas Corpus cum cauſa*, may remove his Body and the Cauſe from the inferior Court, to be tried at Common Law in a Superior Court. [See 43 *El. ch.* 5. 21 *Ja.* 1. *ch.* 23. 31 *Car.* 2. *ch.* 2.]

[c] *Habeas Corpora*, is to bring in a Jury, or ſo many of them as refuſe to come upon the *Venire facias*, for the Trial of a Cauſe at Iſſue.

[d] *Habere Facias Seiſinam*, is directed to the Sheriff, to give Seiſin in Land of *Freehold* recovered in the King's Courts.

Habere Facias Poſſeſſionem, is directed to the Sheriff to give Poſſeſſion of a Term for Years, recovered in the King's Courts, as in Ejectment.

[e] *Homine Replegiando*, is to bail one out of Priſon, except in Caſes of Treaſon, Murder, Outlawry, Excommunication, *&c.* [See *Weſt.* 1. *ch.* 15. and the Petition of Right, 3 *Car.* 1. *ch.* 1.]

I.

[f] *Idiota Inquirendo vel Examinando*, is directed to the Sheriff, requiring him to call before him the Party repreſented to be an Idiot, and to examine him, and alſo to inquire by a Jury, whether he is of ſufficient Underſtanding to manage his own Lands, and to certify the ſame into Chancery. But he may be afterwards examined before the Lord Chancellor; and if it doth not appear that he is an Idiot, the Inquiſition of the Sheriff may be ſet aſide.

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[g] F. N. B. 248.

[h] F. N. B. 211, &c. 217. 219, &c. 2 Inſt. 326. 393. b.

[a] F N. B. 250. H. 2 Inſt. 52, 53, 55, 615. Terms of the Law, v. Habeas Corpus.

[b] See p. 18, ante.

[c] Terms of the Law, Ibid.

[d] F. N. B. 167. Terms of the Law, v. Hab-Fac. Seiſ. Finch 410.

[e] F. N. B. 66, 67. 2 Inſt. 185, &c. See of Bail, ch. 5. poſt.

[f] F. N. B. 232, 233.

[Inſtead of this Writ[g] a Commiſſion is now iſſued under the Great Seal, directed to certain Commiſſioners, who direct their Precept to the Sheriff to ſummon a Jury, *&c.*]

[h] *Indicavit*, lieth for the Patron of the Defendant, where one Parſon ſueth another Parſon in the Spiritual Court for Tithes, which amount to a *fourth* Part of the Advowſon of the Tithes. It is a Writ of Prohibition, directed to the Eccleſiaſtical Judge not to proceed. For in this Caſe the Cauſe belongs to the temporal Courts, becauſe the Patron of the Clerk Defendant ſhall loſe the Benefit of his Advowſon, loſing the Profits of the Church, if the Clerk of the Plaintiff ſhall recover.

The *Indicavit* then is always between four Perſons (*viz.*) two Patrons, and two Clerks. One claimeth to hold of the Advowſon of one Patron, the other of the other Patron. This Writ is ſet at a *fourth* Part by *Articuli Cleri*, or 9 *Ed.* 2. *ch.* 2. whereas it might have iſſued for any Value before the Statute. And ſo it is now in the Caſe of the King.

[*Inquiry* is a Writ iſſuing out of the King's Courts of Record, directed to the Sheriff, for ſummoning a Jury, to inquire what Damages the Plaintiff hath ſuſtained, who hath obtained an interlocutory Judgment in any of the ſaid Courts.]

[a] *Injunction*, generally iſſues out of *Chancery*, or the *Exchequer*, to ſtay Proceedings in the temporal Courts, and ſometimes in the Spiritual Courts, upon Suggeſtion, that if the Rigour of the Law takes Place, it is againſt Equity and Conſcience. Sometimes it is granted in *Chancery*, or the *Exchequer*, to quiet a Poſſeſſion.

Juris Utrum, [See of *Aſſize* of *Juris Utrum*, *ſupra.*]

[b] *Juſticies*, is directed to the Sheriff, to do Juſtice in a Cauſe above 40*s.* in the County-Court, of which he hath not Cognizance by his ordinary Power; the Court above having ſuch Confidence in the Sheriff, that no Return is required of this Writ. It is in the Nature of a Commiſſion to the Sheriff.

L.

[c] *Latitat*, is to call one into the *King's Bench*, to anſwer in a perſonal Action. It hath its Name from a Suppoſition, that one cannot be found in the County of *Middleſex*, but that he *hides* himſelf in ſome other County, as appears by the Return of the Sheriff of *Middleſex*. Therefore this writ is directed to the Sheriff of that County, to apprehend him there.

[d] *Levari facias*, is directed to the Sheriff for levying or collecting of a Sum of Money upon the Rents, Corn, and other *preſent* Profit of the Land, and the Goods and Chattels of him that hath forfeited a Recognizance. This Writ is given by the Common Law before the Statute of *Weſt.* 2. *ch.* 18. which gave the *Elegit*. The *Fieri facias* is to levy Execution of the Goods and Chattels only. [See of *Execution*, *infra.*]

[e] *Liberate*, is directed to the Gaoler for the *Delivery* of a Priſoner, that hath put in Bail for his Appearance. It alſo iſſues out of Chancery to the Sheriff, for the *Delivery* of Lands and Goods taken upon Forfeiture of a Recognizance. [See *Extent.*] [f] And it lies likewiſe for the Payment of a Yearly Penſion or Sum of Money, granted under the Great Seal, being directed out of Chancery, to the Lord Treaſurer, Chamberlains, Barons of the Exchequer, or Clerk of the Hamper, *&c.*

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[g] See Harriſon's Practice in Chancery, vol. 2.

[h] F. N. B. 44, 45. Finch 451, 452. 1 Inſt. 243. a. 2 Inſt. 364, 365.

[a] Weſt's Symb. 2 pt. Tit. Proceedings in Chancery, ‡ 25.

[b] F. N. B. 117. C. 119. 152 B. 2 Inſt. 312. Terms of the Law, v. Juſticies.

[c] Terms of the Law, v. Latitat. 2 Ld. Ray. 882. 1 Str. 550.

[d] F. N. B. 265. Finch 471.

[e] Terms of the Law, v. Liberate.

[f] 4 Inſt. 116.

[g] F.N.B. 229.
2 Inſt. 281.

[g] *Libertatibus Allocandis*, is a Writ that lies to a Court, commanding them to allow a Liberty, upon Claim and Plea of the Grant of it.

M.

[a] 2 Inſt. 40.
1 Lev. 23.
2 Lev. 14, 18, 19.
1 Str. 540.

[a] *Mandamus*, iſſues out of the Court of King's Bench to the Head of a *College* [See 1 *Geo.* 1. *St.* 2. *ch.* 13.] or other *Corporation*, requiring them to *admit* or *reſtore* ſome Perſon into their Society, into an Office, *&c.* alſo to a Biſhop or Archdeacon, to ſwear a Churchwarden, an Executor, or Adminiſtrator; to a Rector, Vicar, or Churchwarden, to reſtore a Sexton, *&c.* [And alſo in many other Caſes to compel Judges of inferior Courts, and miniſterial Officers, and other Perſons, to exerciſe their proper legal Juriſdictions, or to admit or reſtore Parties to the Enjoyment of their legal Rights.] [See 9 *An. ch.* 20. To render the Proceedings upon Writs of *Mandamus* more effectual.]

[b] F.N.B. 255.
Terms of the Law, v. Melius Inquirend.
8 Rep. 168, 169.
2 Inſt. 691. 692.
[c] Finch 445.
[d] F.N.B. 22. G.
[e] 2 Inſt. 52, 591, 592.
[f] F. N. B. 14.
4 Inſt. 269.

[b] *Melius Inquirendum*, is a Writ that lieth for a ſecond *Inquiry*, where the firſt finding is defective or partial.

[c] *Mittimus*, is for removing and transferring of Records from one Court to another; and ſometimes by *Certiorari* into *Chancery*, and from thence by a *Mittimus* into another Court. [d] But the Lord Chancellor may deliver ſuch Record with his own Hands, if he pleaſes.

A *Mittimus* is alſo uſed for a [e] Precept to a Gaoler, to receive and keep ſafe an Offender ſent to Priſon.

[f] *Monſtraverunt*, lies for Tenants in ancient Demeſne, who hold by free Charter, not by Copy, *&c.* when they are diſtrained to do unto their Lords other Services and Cuſtoms than they, or their Anceſtors, uſed to do. It is directed to the Lord, or to the Sheriff, to charge the Lord, that he do not diſtrain them for ſuch unuſual Services, *&c.* It lies alſo when the Tenants are diſtrained for the Payment of Toll, *&c.* contrary to their Liberty.

N.

[g] F. N. B. 37.
Finch 458.
6 Rep 61, 62.

[g] *Ne Admittas*, is to be directed to the Biſhop, for the Plaintiff or Defendant, where a *Quare Impedit* or *Aſſize* of *Darrein Preſentment* is depending, when either Party fears, that the Biſhop will admit the other's Clerk. It ought to be brought within ſix Calendar Months after the Avoidance, otherwiſe the Biſhop may preſent by Lapſe.

[h] F. N. B. 85.
3 Inſt. 178, &c.

[h] *Ne Exeat Regnum* (or *Regno*) is to inhibit one from going into foreign Parts without the King's Licence. It may be directed to the Sheriff, to make the Party find Surety, that he will not depart, or elſe to commit him to Priſon; or it may be directed to the Party himſelf, and if he goes he may be fined.

[i] 3 Wms. 312.
[k] 1 Wms, 263.

This Writ ſeems to be now no otherwiſe in Uſe than for the Benefit of private Perſons, to prevent one, on whom they have a Demand [i] *merely equitable*, flying from Juſtice; and for that Purpoſe it iſſues out of *Chancery* upon the Application of a Plaintiff, (who has filed his Bill there for any ſuch Demand) and Affidavit of the Demand, and of the Defendant's Deſign to leave the [k] Kingdom, on which the Defendant muſt either find Surety in the Sum ordered by the Court to be indorſed on the Writ, according to the Nature and Amount of the Demand, or to be committed to Priſon.]

Niſi Prius. [See of the *Court* of *Aſſizes, ch.* 1. *ante.*]

[a] *Non Omittas Propter Aliquam Libertatem,* is directed to the Sheriff (where the Bailiff of a Liberty refuſes or neglects to ſerve a Writ) to enter into the Franchiſe, and execute the King's Proceſs himſelf, or by his Officer. Before this Writ is granted, the Sheriff muſt return, that he hath ſent to the Bailiff, and that he hath not ſerved the Writ. But for Diſpatch the uſual Practice is to ſend a *Non Omittas* with a *Capias* or *Latitat,* [or without].

[a] F. N. B. 68, 74. 2 Inſt. 453. See p. 201. ante.

[b] *Non Ponendis in Aſſiſis & Juratis,* is granted for the Freeing ſome Perſons, from being put upon Juries. It is founded upon *Weſt.* 2. *ch.* 38. *Artic. ſuper Chartas, ch.* 9. But ſee 4 *&* 5 *W. & M. ch.* 24. whereby Oath is directed to be made, that the Suggeſtion is true, before this Writ iſſues, and ſee *Marl.* or 52 *H.* 3. *ch.* 14. as alſo 2 *Inſt.* 130. Where one that hath a Charter of Exemption, may ſue the Sheriff for returning him.

[b] F. N. B. 165. 2 Inſt. 127, 447, 448.

Novel Diſſeiſin, [See *Aſſize* of *Novel Diſſeiſin, ſupra.*]

O.

Oyer and *Terminer.* [See of the *Court* of *Aſſizes, ch.* 1. *ante.*]

P.

[c] *Partitione Facienda* is to ſet out and aſſign to every one a diſtinct Part by Metes and Bounds, where two or more Perſons hold Lands or Tenements, as Joint-tenants, Tenants in Common, or Coparceners, and one or more of them refuſe to join in Partition. See 31 *H.* 8. *ch.* 1. 32 *H H.* 8. *ch.* 32. 8 *&* 9 *W.* 3. *ch.* 31.]

[c] F. N. B. 61. 62. 1 Inſt. 165. b. 166. a. & b. 167. a. 169. a. 170. a. 171. a. &. b.

[d] *Pone,* is a Writ whereby a Cauſe depending in the County Court, or other inferior Court is removed into the *Common Pleas,* and ſometimes into the *King's Bench,* as when a Replevin is depending by Writ out of Chancery, the Plaintiff or Defendant may remove the Plea by *Pone.* The Plaintiff without Cauſe, and the Defendant with Cauſe.

[d] F. N. B. 69. Finch. 444. 2 Inſt. 339.

A Writ willing the Sheriff (on the Plaintiff's putting in Sureties to proſecute, being a Thing merely ſuppoſed) to ſummon the Defendant to appear, and to anſwer the Plaintiff's Suit, is alſo called a *Pone,* from the Words in the Writ, (*viz.*) *Si A. fecerit te ſecurum,* &c. *Pone B. &c.* [See *ſupra.*]

[e] *Ponendum Sigillum Ad Exceptionem,* is to require a Judge to put his Seal to Exceptions, made in Writing by the Plaintiff or Defendant againſt the Evidence, Challenge to a Juror, Verdict, or other Proceedings before the ſaid Judge. [See *Weſt.* 2. or 13 *Ed.* 1. *ch.* 31.]

[e] F. N. B. 21 N. 2 Inſt. 427, 428.

Præmunire. [See *B.* 3. *ch.* 3. *ante.*]

[f] *Privilege,* lies for an Officer of the Courts at *Weſtminſter,* that is ſued in any other Court than where he attends, to remove the Cauſe to his own Court. An Attorney, *&c.* being Executor or Adminiſtrator, ſhall not ſue or be ſued as a privileged Perſon. [See 18 *Ed.* 3. *St.* 5.]

[f] 2 Inſt. 551. Finch 321. Hob. 177.

[g] *Procedendo,* is to ſend down a Cauſe (called from an inferior Court to a ſuperior Court, as the Chancery, King's Bench, *&c.* by Writ of *Privilege, Certiorari, Habeas Corpus, &c.*) directing the Judge of the inferior Court to proceed upon it; it not appearing to the higher Court, that the Suggeſtion is ſufficiently proved. [See 21 *Ja.* 1. *ch.* 23.] This is a *Procedendo in Loquelâ.*

[g] 5 Rep. 63. 2 Inſt. 269. F. N. B. 153, &c.

But there is a *Procedendo ad judicium,* where the Judges of any Court delay the Party, Plaintiff or Defendant, and will not give Judgment for him, when they ought to do it.

[a] F.N.B. 39, 40, &c. 50, 51, &c. 5 Rep. 73. 2 Inſt. 229, 601, &c. Finch. 450, 451. 1 Wms. 43, 476. 2 Salk. 547. &c.
[b] 2 Inſt. 602, 607, 611, 615, 619.
[c] 1 Str. 187. 2 Salk. 548.
[d] 2 Salk. 547.

[a] *Prohibition*, iſſues out of the Chancery, King's Bench, or Common Pleas, to forbid a Judge, *&c.* in the *Spiritual* Court, *Admiralty*, Court of *Chivalry*, *&c.* to proceed in a Cauſe, that belongs to the Common Law Courts, or that belongs not to their Juriſdiction, though the Courts at Law can give no Remedy; or it may forbid a Judge of any Temporal Court, to proceed in a Cauſe depending before him, upon Suggeſtion that the Cognizance of the Cauſe does not belong to him. The King's Courts that may award Prohibitions, being informed by Plaintiff or Defendant, or by any Stranger, that any Court Temporal or Eccleſiaſtical do hold Plea, *where they have no Juriſdiction*, may lawfully prohibit that Court, [b] as well after judgment and Execution, as before. [No Prohibition ſhall go to the Spiritual Courts after Sentence, [c] unleſs for Defect of Juriſdiction, where it is a Matter not of Spiritual Conuſance; for if the Prohibition be for Defect of Trial, it is too late to apply for it after Sentence, [d] unleſs it be in the Caſe of a Refuſal of Proof of Payment by one Witneſs, or the like, where the Sentence is the Grievance.] And if the Judge of the inferior Court or the Party, proceeds notwithſtanding a Prohibition, an Attachment may be had againſt them, or an Action of the Caſe will lie againſt them. But upon a Prohibition to the Spiritual Court, the Party may appear and take a Declaration upon the Suggeſtion, and go to Trial. And if thereupon it be found againſt the Plaintiff in the Prohibition, a Writ of *Conſultation* will be awarded with Coſts. [See 8 & 9 *W.* 3. *ch.* 11.]

2 Inſt. 662. 2 Ld. Ray. 1172.

In a Suggeſtion for a Prohibition to the Eccleſiaſtical Court in a Cauſe of *Tithes* and other Spiritual Profits, the Suggeſtion muſt be proved to the Court by two ſufficient Witneſſes within ſix Months after ſuch Prohibition granted; provided the Suggeſtion does not contain a Negative. [See 2 & 3 *Ed.* 6. *ch.* 13.]

An *Inhibition* is commonly iſſued forth out of a higher Court-Chriſtian to an Inferior Court-Chriſtian, to ſtop Proceedings; and is in the Nature of a Prohibition. [See *Stat. De Circumſpecte Agatis*, 13 *Ed.* 1. *St.* 4. *Artic. Cler.* 9 *Ed.* 2. *ch.* 1. 45 *Ed.* 3. *ch.* 3. 50 *Ed.* 3. *ch.* 4. and 2 *Inſt.* 601 to 618.]

[e] F. N. B. 77. Dyer 173. Finch 450.

[e] *Proprietate Probanda*, is to inquire before the Sheriff of the Property of Goods diſtrained, when the Defendant claimeth Property upon a Replevin ſued.

[f] F. N. B 28, 29. 1 Inſt. 130. a. & b. 131. a. & b.

[f] *Protection cum Clauſula Volumus*, is an Immunity given by the King to a Perſon in his Service, to be free againſt Suits of Law for one Year; and ſo from Year to Year. Thus the King may grant a Protection to his Debtor, that he be not ſued till the King is paid his Debt. [See 25 *Ed.* 5. *St.* 5. *ch.* 19.] There are many Sorts of Protections; but they are rarely uſed, being in many Caſes ouſted by Act of Parliament in perſonal Actions. [*Qu.* if this Writ is now at all in Uſe.] [But ſee 12 & 13 *W.* 3. *ch.* 3. of Privilege of Parliament, *&c.*]

* Terms of the Law, v. Proviſo. 2 Ld. Ray. 1083. 2 Str. 1055.

* *Proviſo*, is where the Plaintiff forbears to bring this Cauſe to Trial, and the Defendant takes a *Venire Facias* directed to the Jury with this Clauſe (*viz. Proviſo Quod, &c.*) provided that if the Plaintiff taketh out any Writ to that Purpoſe, the Sheriff ſhould ſummon but one Jury upon them both. This is called going to Trial by *Proviſo*.

Q.

[a] F. N. B. 32, 33. 1 Inſt. 344. a. & b. 2 Inſt. 356, &c.

[a] *Quare Impedit*, lies when one is diſturbed by another in his Right of Advowſon, to preſent a Clerk to a Church when it is void. It dif-

fereth from a *Darrein Preſentment*, becauſe that lies where one and his Anceſtors formerly preſented; [See Aſſize of *Darrein Preſentment, ſupra.*] whereas a *Quare impedit* lies alſo for a Purchaſer. [See *Weſt.* 2. *ch.* 5. Alſo 7 *An. ch.* 18. And ſee of an *Advowſon, B.* 2. *ch.* 2. *ante.* And of an *Action* of *Quare Impedit, ſupra.*]

[b] *Quare Incumbravit*, lieth after a Recovery in a *Quare Impedit* or Aſſize of *Darrein Preſentment*, againſt a Biſhop, who within ſix Months after the Death of the Incumbent admitteth a Clerk to the Benefice, notwithſtanding the Writ of *Ne admittas* ſerved on him; this Writ may be brought after the ſix Months. If the Biſhop doth incumber the Church before a *Ne admittas*, then the Party ſhall have a *Quare Impedit*; for the Ordinary can have no Notice till the *Ne admittas*. A *Quare Incumbravit* lieth always hanging the Plea.

[b] F. N. B. 48. Term of the Law, v. Quare Incumbravit.

[c] *Quare non admiſit*, is where one hath recovered in a Plea of Advowſon, and the Biſhop will not admit his Clerk upon Pretence of Lapſe, *&c.*

[c] F. N. B. 47.

[d] *Quo Minus*, lies for the King's Farmer or Debtor in the Court of *Exchequer*, becauſe by the detaining of his Debt he is the *leſs able* to pay the King. This Writ goes into *Wales*, as well as the *Subpœna* out of the Office of Pleas.

[d] Terms of the Law, v. Quo Minus.

[e] *Quo Warranto*, lieth againſt any Perſon or Corporation that uſurps any Franchiſe or Liberty againſt the King. [See 18 *Ed.* 1. *St.* 2. 9 *An. ch.* 20.]

[e] 2 Inſt. 279, &c. 495. &c. F.N.B. 229, 230. Finch. 322.

[f] *Note*, That in a *Quo Warranto*, final Judgment is given againſt the King, or for the King. But there is *Salvo Jure* for the King to ſave any other Title than that adjudged on the *Quo Warranto*.

[f] 2 Inſt. 282, 495, 497.

R.

[g] *Recaption*, is to recover Damages, for him whoſe Goods being diſtrained for Rent, Services, *&c.* (but not for Damage-feaſant upon a new Treſpaſs) are diſtrained again for the ſame thing, hanging the Plea in the County-Court, or before the Juſtices.

[g] F. N. B. 71. 72.

[h] *Recordare facias loquelam* (called a *Refalo* by contracting it into the initial Letters) is to command the Sheriff to make a Record of the Proceedings in the County-Court, *&c.* by Writ or without Writ, and to ſend it up to the *King's Bench* or *Common Pleas*. It is in the Nature of a *Certiorari*. The Plaintiff may remove the Plaint in the County without Cauſe; but the Defendant cannot remove it without Cauſe ſhewn in the Writ, as upon a Plea of Freehold, *&c.* But if the Plaint is in another Court, neither the Plaintiff or Defendant can remove it without Cauſe. [See *Accedas ad Curiam, Certiorari,* and *Pone, ſupra.*]

[h] F. N. B. 70. 2 Inſt. 339.

Recordo et Proceſſu mittendis, for a Record and the whole Proceedings in a Cauſe out of an inferior Court into a higher Court at *Weſtminſter*, &c.

Re extent, is a ſecond Extent upon Lands or Tenements, upon Complaint that the former Extent was partially made, *&c.* [See *Extent ſupra.*]

[a] *Replevin.* [See *Action by Replevin, ſupra.*]

[a] F. N. B. 68. 1 Inſt. 145. b.

There is alſo a Writ call'd *Secunda Deliberatione*, which is a *ſecond* Writ of Replevin, granted where Cattle or Goods are diſtrained and afterwards replevied; yet by Reaſon of ſome Default in the Party that took out the Replevin, the Cattle are adjudged to him that diſtrained them; ſo that this Writ lieth for the replevying the ſame *again*, upon giving Security to re-deliver them, if the Diſtreſs is juſtified.

[b] F. N. B. 101, 102. Finch 459.

[b] *Reſcous*, lieth where one doth diſtrain for Rent, Services, Damage-feaſant, and as he is driving the Cattle towards the Pound, another reſcues them, or taketh them from him before they are impounded. [See of *Replevin* and *Reſcous*, *B.* 2. *ch.* 2. *ante.*]

[c] F.N.B. 169. 1 Roll. Abr. 880, 881, 882.

[c] *Reſtitutione Temporalium*, is directed to the Sheriff, to reſtore the Temporalties, or the Barony, to a Biſhop elected and confirm'd.

[d] F. N. B. 74.

[d] *Returno Habendo*, is where Cattle are diſtrained and replevied, and the Perſon that took the Diſtreſs juſtifies the Taking, and proves it to be lawful, upon which the Cattle are to be return'd to him. This Writ alſo lies, when the Plaint is removed by *Recordare* into the King's Bench or Common Pleas, and he whoſe Cattle are diſtrain'd makes Default, and doth not proſecute his Suit. [See *Weſt.* 2. *ch.* 2.]

[e] 1 Inſt. 158. b.

[e] *Right* (or a *Writ* of *Right)* is a Writ of the higheſt Nature in Real Actions, to recover not only the Poſſeſſion as in other Writs, but the Property. It hath the moſt aſſured and final Judgment. The Writs of Right are Right *Patent*, Right *Cloſe*, Right of *Advowſon*, Right of *Dower*, &c.

[f] F. N. B. 1. 2, &c. Finch 312.

Right [f] *Patent*, lies only for him that hath a Fee-ſimple in the Lands or Tenements ſued for (not in a Rent-Charge, Common, *&c.*) againſt Tenant of the Freehold at leaſt.

[g] F.N.B. 11. 4 Inſt. 269.

Right [g] *Cloſe*, where one holds Lands or Tenements by Charter in ancient Demeſne, in-Fee-ſimple, Fee-tail, or for Term of Life, or in Dower, and is diſſeiſed. It is directed to the Bailiff of the King's Manor, or to the Lord of ancient Demeſne, if the Manor is in the Hands of a Subject, commanding him to do Right in his Court.

[h] F. N. B. 30.

Right of [h] *Advowſon*, lies only for him that hath an Eſtate, or Right of Eſtate, in the Advowſon to him and his Heirs in Fee-ſimple, and is diſturbed to preſent upon an Avoidance; having not brought any Action of *Quare Impedit* or *Darrein Preſentment* within ſix Months. [See of an *Advowſon*, *B.* 2. *ch.* 2. *ante.*]

[i] F. N. B. 7, 2, 147. 1 Inſt. 32. b. 33. a. 38. b. 39. a.

[i] *Right* of *Dower*, lies where a Woman hath received only Part of her Dower, and demands the Reſidue againſt the ſame Tenant in the ſame Town, ſhewing the Right to recover ſuch Reſidue. It ſhall be directed to the Heir of the Huſband, or to his Guardian.

Dower *Unde nihil habet*, is where the Wife hath receiv'd no Part of it; as where a Man having Lands or Tenements hath made no Aſſurance of any Part thereof to his Wife, ſo that ſhe is driven to ſue for her Dower againſt the Heir or his Guardian. [See 20 *H.* 3. *ch.* 1. And of an *Eſtate* in *Dower*, *B.* 2. *ch.* 1. *ante.*]

There are other Writs of *Right* in their Nature, as *De Rationabili parte*, and *Ne injuſte vexes*, but now of little or no Uſe.

S.

Scandalum Magnatum, is a Writ to recover Damages for ſcandalizing of a Peer. [See of the *Nobility*, *&c.* *B.* 1. *ch.* 4. *ante.*]

[a] 1 Inſt. 290. b. 291. Finch 477.

[b] 2 Ld. Ray. 1048. 1253.

[a] *Scire Facias*, is to call one to ſhew Cauſe why Execution of a Judgment ſhould not be made out, or if he can ſay any Thing in Bar of Execution. It is not to be granted till a Year and a Day after the Judgment, [unleſs where the Parties to the Judgment are changed by the Death, Marriage, *&c.* of either of them. See of *Scire Facias* Tit. *Execution*, *infra.*] It is in the Nature of an Action, [b] becauſe the Defendant may plead to it. [See *Weſt.* 2. *ch.* 45] *Within* a Year Execution may

may be by *Capias ad Satiſfaciendum*, *Fieri Facias*, and *Elegit*. [c] It lies not againſt the King.

Significavit, is the ſame with the *Excommunicato Capiendo*; tho' the Ordinary's Certificate in *Chancery* is ſometimes ſo called. *Significavit* is an emphatical Word in the Writ. [See *Excommunicato Capiendo*.]

[d] *Spoliation* (a Way of ſuing, but not mentioned as a Writ in the Regiſter) lieth for one Incumbent againſt another Incumbent in the Spiritual Court, where the Right of the Patronage does not come in Debate; and where a Parſon is made a Biſhop, and has a Diſpenſation to hold his Benefice, and the Patron preſents another Incumbent. Here the Biſhop ſhall have a Spoliation againſt the new Incumbent, *&c.*

Subpœna, is the leading Proceſs in a Court of Equity, to call Perſons to appear in that Court. [See of the *Court* of *Chancery*, *ch.* 1. *ſupra*.]

There is alſo a *Subpœna* made uſe of in the Court of Exchequer in the Office of Pleas. [See of the *Court* of *Exchequer*, *ch.* 1. *ſupra*.] [There is alſo a *Subpœna* iſſuing out of the Courts of Law and Equity, to compel Witneſſes to appear to teſtify the Truth in thoſe Courts.]

[e] *Superſedeas*, may go in ſeveral Caſes. But in general it is a Writ to ſtay further Proceedings in a Suit, *&c.*

[f] *Supplicavit* iſſues out of Chancery directed to the Sheriff, *&c.* for taking Surety of the Peace, when one is in Danger of being hurt in his Body or Goods.

Sur Diſſeiſin in le Poſt, is uſed for paſſing Common Recoveries.

T.

De Telonio Eſſendi Quietum. [See *Eſſendi Quietum*, *&c.*]

Teſtatum, lieth where a Defendant in a Perſonal Action cannot be arreſted upon a *Capias* in the County wherein the Action was laid; and therefore upon teſtifying or returning *Non eſt inventus* by the Sheriff, this Writ ſhall be ſent into another County, where ſuch Perſon is thought to be. [See *Latitat*, *ſupra*.]

[a] *Tolt*, is for a the Plaintiff to remove a Cauſe depending in a Court-Baron into the County-Court.

[b] *Treſpaſs*, lies for every Manner of Treſpaſs done, either directly to the Sheriff to end the Matter in the County-Court, or returnable in the King's Bench or Common Pleas. The Words *Vi et Armis* ſhall be in the returnable Writs, but not in the former. But in Writs of Treſpaſs upon the *Caſe* thoſe Words muſt not be inſerted, tho' returnable in the King's Bench or Common Pleas.

V.

Venditioni Exponas, is a Judicial Writ directed to the Sheriff, requiring him to ſell the Goods, which he had formerly levied, to ſatisfy the Judgment.

Venire Facias, lies to the Sheriff, to cauſe a Jury to appear, when a Cauſe is brought to Iſſue. See 35 *H.* 8. *ch.* 6. 27 *El.* *ch.* 6. 4 *Ann.* *ch.* 16. It is alſo the common Proceſs upon any Preſentment, not being Felony, where no Proceſs is ſpecially appointed by Statute.

Ventre inſpiciendo, [c] is a Writ to ſearch a Woman, that ſays ſhe is with Child, and thereby with-holdeth Lands from the next Heir. The Trial thereof is by a Jury of Women. [See *Aſcough*, v. Lady *Chaplin*, in *C. B.* *Mich*. 4. 2 *Geo.*]

[d] *Vi Laica Removenda*, is directed to the Sheriff, to remove all Lay Force, where two Perſons contend for a Church, and one of them enters into it with a Number of Laymen, and holdeth out the other *Vi et Armis*.

[c] 3 Inſt. 235, 236.

[d] F. N. B. 36, 37.

[e] F. N. B. 236. Finch 453.

[f] F. N. B. 80, D. 81, 82. 3 Wms. 103.

[a] F. N. B. 4 A. Finch 444.

[b] F. N. B. 86, 92.

[c] 2 Wms. (591.)

[d] F. N. B 54.

[e] 3 Inſt. 161.

mis. But the Sheriff ought not to remove the [e] Incumbent out of the Church, whether he is there by Right or Wrong.

W.

[f] F. N. B. 55.

[f] *Waſte*. [See of *Waſte*, *B*. 2. *ch*. 4. *ante*, and of *Actions of Waſte*, *ſupra*.]

[g] F. N. B. 60.

A Writ of [g] *Eſtrepement* is a Prohibition of Waſte in Real Actions.

[h] F. N. B. 68, 69.

[h] *Withernam*, is directed to the Sheriff, for the taking of as many Beaſts or Goods of the Party, when Cattle diſtrained are drove by him out of the County, or into an unknown Place, *&c*. ſo that the Sheriff cannot make Deliverance of them upon a Replevin, *&c*. [See *Weſt*. 2. *ch*. 2. and of an *Action* by *Replevin*, *ſupra*.]

The firſt Ground of a Suit in the *Common Pleas* is an *Orignal*, by *Præcipe* or *Pone* to ſummon, [See of a *Præcipe* of Writs in *Principio* and *Pone* in the Catalogue of Writs, *ſupra*.] and is a Warrant to every *Capias* to arreſt.

An *Arreſt* is the Apprehending or Reſtraining one's Perſon by Proceſs, in Execution of the Command of ſome Court, or Officer of Juſtice. There may be four Defendants Names put in one Writ. But you can have but one Plaintiff in a Writ, unleſs it be in a Joint Action. The *Capias* is to be directed to the Sheriff, to take the Body of the Defendant, who by his Under-Sheriff grants a Warrant thereon to his Bailiffs, to *arreſt* him: [But ſee 12 *G*. 1. *ch*. 29. and 5 *G*. 2. *ch*. 27. *infra*] [See 1 *H*. 5. *ch*. 5. [i] Concerning the *Addition* of the Defendant's Myſtery, *&c*. in original Writs of Actions perſonal, *&c*. and of *Outlawry*, *poſt*. Alſo 5 *El*. *ch*. 23. Where an *Excommunicato Capiendo*, if the excommunicate Perſon hath not a ſufficient *Addition*, he ſhall not incur the Penalties of the Statute. See alſo 27 *El*. *ch*. 7. Concerning the *Addition* of Jurors, *&c*.

[i] 2 Inſt. 665, &c.

By 8 El. ch. 2. *If one doth maliciouſly, or for Vexation or Trouble, cauſe or procure another to be arreſted in the inferior Courts at the Suit of a third Perſon, where there is no ſuch Perſon, or without his Conſent, the Offender ſhall ſuffer ſix Months Impriſonment, and forfeit treble the Damages and Coſts ſuſtained, to the Party grieved; and moreover forfeit ten Pounds to the Plaintiff, if known.* [See 43 *El*. *ch*. 6. 6 *Geo*. 1. *ch*. 21. § 53. Againſt Sheriffs or others making out Warrants for the arreſting Perſons upon Proceſs, without having any Writ, or other Proceſs in their Cuſtody to juſtify the ſame.]

[a] 1 Saund. 228. Lutw. 1571, 1572.

[a] An Action will not lie, for arreſting one without Cauſe, unleſs it is for an exorbitant Sum, on purpoſe that the Defendant ſhould lie in Priſon for Want of Bail. [*Qu*.] 2 *Wilſ*. 376, 302.

[b] See p. 75. ante.

[c] 1 Ventr. 306.

[d] 9 Rep. 66.

It is not ſufficient for the Bailiff, [b] who hath the Sheriff's Warrant upon the Writ, to ſay, *I arreſt you at the Suit of A.* but he muſt lay hold of him, or touch him; otherwiſe it is no Arreſt. [c] If a Bailiff lays hold of one by the Hand (whom he hath a Warrant to arreſt) as he holds it out of a Window, this is ſuch a Taking of him, that the Bailiff may juſtify the Breaking open of the Houſe to carry him away. [d] An Arreſt in the Night is lawful.

[See 22 & 23 *Car*. 2. *ch*. 20. Which prohibits the carrying Priſoners to Victualling-Houſes without their Conſent, or taking of them any illegal Fees for waiting, *&c*. And alſo 32 *G*. 2. *ch*. 28. For the Relief of Debtors with reſpect to the Impriſonment of their Perſons.]

Note, That [e] *Peers* of the Realm are not to be arreſted, unleſs upon Contempts for reſcuing, *&c.* Againſt theſe the Proceſs is by Diſtreſs infinite (*i. e.*) continual Diſtreſs. *Clergymen* doing Divine Service [See 50 *Ed.* 3. *ch.* 5. 1 *Ri.* 2. *ch.* 15.] ſhall not be arreſted. *Corporations* and *Companies* too muſt be made to appear by Diſtreſs infinite of Iſſues upon their Lands; [f] which are chargeable with theſe Iſſues into whoſe Hands ſoever they come. [g] *Members* of *Parliament* are privileged from Arreſts, *&c.* [But ſee the *Statutes*, *infra*.] and *Members* of the *Convocation*. [See the 8 *H.* 6. *ch.* 1.] Alſo [h] *Clerks*, *Attornies* at large, *&c.* belonging to the Courts of Juſtice [ſo long as they continue to practice,] are not to be arreſted: But muſt be ſued by Bill of Privilege; otherwiſe they may plead their Privilege, and come off without Bail. [i] *Perſons attending* upon any Courts of *Record*, upon Buſineſs there, are to be freed and protected from Arreſts by mean Proceſs, but not upon Execution; though the Sheriff may then be committed for a Contempt.

One that is *ſubpœna'd* for a Witneſs, may have a Writ of Privilege, to protect him from Arreſts, in going and returning.

[k] No Arreſts ought to be within the King's Palace at *Weſtminſter*, *&c.* where his Royal Perſon reſides; nor of any the King's Servants in Ordinary in any other Place, without Notice firſt given to the Lord Chamberlain, that he remove them, or make them pay their Debts. No Arreſts ought to be in *Weſtminſter Hall*, and other Courts of Record. [*Quære*, If the Party has no Buſineſs there.] No Arreſts are to be in *Wales*, the *Counties Palatine*, or the Cinque-Ports, by Writs iſſuing from *Weſtminſter Hall.* [But ſpecial *Latitats* and *Capias's* out of the Courts at *Weſtminſter*, directed to the Chancellor of the Duchy, the Chamberlain of *Cheſter*, or the Warden of the Cinque-Ports, (or as the Caſe is) are conſtantly iſſued, commanding them by Writ under the Seal of the County-Palatine, *&c.* to charge the Sheriff to take the Body of the Defendant, who is thereupon arreſted in the County-Palatine or Cinque-Ports: And *Quo Minus's* and *Subpœnas* go into *Wales* from the *Exchequer*: Beſides which, the Right to arreſt in *Wales* and the Counties-Palatine upon Proceſs iſſued out of the Courts at *Weſtminſter*, is recognized by the following Statute; for,

By 11 *&* 12 W. 3. ch. 9. *No Sheriff or other Officer in* Wales, *or the Counties-Palatine, ſhall hold any Perſon to ſpecial Bail, upon any Proceſs iſſued out of any of the Courts at* Weſtminſter, *unleſs an Affidavit be made and filed in the Court of the Cauſe of Action, and that the ſame amounts to twenty Pounds. Bail ſhall not be taken for more than is expreſſed in the Affidavit.*]

[*Note*, This Statute is not repealed [a] by the following Acts.]

By 12 G. 1. ch. 29. *and* 5 G. 2. ch. 27. *No Perſon ſhall be arreſted, or held to ſpecial Bail in ſuperior Court, where the Cauſe of Action does not amount to* 10 l. *or upwards; nor in an inferior Court where the Cauſe of Action does not amount to* 40 s. *or upwards; nor unleſs Affidavit be firſt made of the Cauſe of Action, and the Sum ſpecified in the Affidavit, indorſed on the Writ; but ſhall be ſerved perſonally with a Copy of the Proceſs.*

[*Note*, This Affidavit to hold to Bail, muſt be [b] clear and abſolute, and not cloſed with a Reference, not even in the Caſe of an Action brought by [c] Executors or Adminiſtrators.]

By

[e] Finch 355. 6 Rep. 52, 53. 9 Rep. 68.

[f] Finch 353.

[g] 4 Inſt. 24, 25.

[h] 1 Ventr. 1, 299. Hob. 177.

[i] 3 Inſt. 141. 1 Lev. 159. 1 Ventr. 11.

[k] 3 Inſt. 140, 141. 1 Lev. 159.

[a] 2 Str. 1102.

[b] 2 Str. 1157, 1209, 1226. Kelly v. Devereux, K. B. Mich. T. 26 G. 2. 1 Wilſ. 121, 231, 279, 335. 2 Wilſ. 224.

[c] 2 Str. 1219.

By 29 Car. 2. ch. 7. *Arreſts and Service of Proceſs on the* * Lord's Day, (*except on Eſcape Warrants, by* 5 A. ch. 9.) *are void, and the Perſons ſerving the ſame ſhall ſuffer Damages, as if they had done the ſame without Warrant; except in Caſes of Treaſon, Felony, and Breach of the Peace.*

N. B. Since this Act, Service of a Citation upon a *Sunday* hath been
1 Ld. Ray. 705, &c. held good; but *Qu.* Whether the Delivery of a Declaration on a *Sunday* will be good.

By 12 & 13 W. 3. ch. 3. *Actions may be commenced and proſecuted in the Courts of Record at* Weſtminſter, *Chancery, Exchequer, Duchy, Admiralty, and in Caſes matrimonial and teſtamentary, in the Arches, Prerogative Courts of* Canterbury *and* York, *Delegates and Courts of Appeal* (*By* 11 G. 2. ch. 24. *In any Court of Record, or Court of Equity or Admiralty, or any Court having Cognizance of Cauſes matrimonial, or teſtamentary*) *againſt any Peer, or any Perſon intitled to* Privilege *of* Parliament, *immediately after* Diſſolution *or* Prorogation, *till a new Parliament ſhall meet, or the ſame is again aſſembled; and immediately after* Adjournment of both Houſes for *above* fourteen Days, *till re-aſſembled.*

Provided that the Perſon of any Member of the Houſe of Commons, or any intitled to Privilege of Parliament, ſhall not be ſubject to be arreſted during the Time of Privilege. But Perſons having Cauſe of Action againſt Lords *of Parliament, during ſuch Time as aforeſaid, may have ſuch Proceſs out of the King's Bench, Common Pleas, or Exchequer* (*or by* 11 G. 2. ch. 24. *out of the Great Seſſions in* Wales, *Courts of Seſſion in the Counties-Palatine, Courts of* King's Bench, Common Pleas *and* Exchequer *in* Ireland) *as they might out of Time of Privilege, and may have Proceſs againſt any of the Houſe of Commons, or other Perſon intitled to Privilege of Parliament, during ſuch Time as aforeſaid, out of the ſame Courts by Summons, and Diſtreſs infinite, or by original Bill and Summons, Attachment, and Diſtreſs infinite thereupon, till they appear, or file Common Bail.* [See 1 *Ja.* 1. *ch.* 13. *poſt*, Of *Execution.*]

The King's *original and immediate* Debtor *is not to have Privilege of Parliament, either in Law or Equity. Nevertheleſs ſuch Debtor being a Lord of Parliament, ſhall not be arreſted, or being a Member of the Houſe of Commons, ſhall not be arreſted, during the Continuance of the Privilege of Parliament.*

[See in this *Statute* concerning the Method of proceeding in Courts of *Equity*, againſt any intitled to Privilege of Parliament.]

By 2 Ann. ch. 18. *Any Actions may be proſecuted in the Courts at* Weſtminſter *againſt any* Officer *of the Revenue, or other Officer of publick Truſt, for any Miſdemeanor, Forfeiture, or Breach of Truſt, relating to ſuch Office or Truſt, though ſuch Officer,* &c. *be a Peer or Member of Parliament, or otherwiſe intitled to Privilege of Parliament.*

Provided, That the Perſon of ſuch Officer, being a Peer or Lord of Parliament, ſhall not be arreſted; nor if a Member of the Houſe of Commons, during the Time of Privilege; but Summons, Diſtreſs infinite, &c. *ſhall be iſſued out till the Party appears.*

By 10 Geo. 3. ch. 50. *After* 24*th* June 1770. *Suits may at any Time be proſecuted in Courts of Record, Equity, or Admiralty, and Courts having Cognizance of Cauſes matrimonial and teſtamentary, againſt Peers and Members of the Houſe of Commons, and their Servants* &c.; *but the Perſons of Members of the Houſe of Commons, not to be arreſted or impriſoned.* [See this Statute at large.]

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* *Dies Dominicus non eſt Dies Juridicus.* 2 Inſt. 264.

By 7 Ann. ch. 12. *All Proceſs whereby the Perſon of any* Ambaſſador *or other* Publick Miniſter *of any foreign Prince or State authorized and received as ſuch by the King, or of his Domeſtick, or Domeſtick Servant, may be arreſted, or his Goods diſtrained, ſeized or attached, ſhall be adjudged void. And the Perſons ſuing forth ſuch Proceſs, their Attornies and Solicitors, and the Officers executing the ſame, being convicted thereof by Confeſſion, or the Oath of one Witneſs, before the Lord Chancellor, and the Chief Juſtices, or any two of them, ſhall ſuffer ſuch Penalties, and corporal Puniſhment as they, or any two of them ſhall think fit. But no Merchant or Trader within the Deſcription of any of the Statutes againſt Bankrupts, who ſhall put himſelf into the Service of any ſuch Ambaſſador,* &c. *ſhall have or take any Manner of Benefit by this Act; and no Perſon ſhall be proceeded againſt as having arreſted the Servant of an Ambaſſador,* &c. *by Virtue of this Act, unleſs the Name of ſuch Servant is regiſtered in the Office of one of the Secretaries of State, and tranſmitted to the Sheriffs of* London *and* Middleſex, *who muſt hang it up in ſome publick Place in their Office.*

By 8 & 9 W. 3. ch. 27. *All pretended privileged Places are taken away.* [See 9 *Geo.* 1. *ch.* 28. 11 *Geo.* 1. *ch.* 22.]

See the Mutiny Acts, whereby Soldiers voluntarily inliſting, are privileged from being arreſted for Debts under ten Pounds. And 5 *Geo.* 2. *ch.* 30. Concerning *Bankrupts* in going to, ſtaying with, or coming from, the Commiſſioners, *&c.* who ought not to be arreſted.

In the *King's Bench* the firſt Proceſs is a *Bill* of *Middleſex* only. But if the Defendant lives in any other County than *Middleſex*, there lies a *Latitat* directed to the Sheriff of that other County, [though in all perſonal Actions in the *King's Bench*, except when commenced by Original or Attachment of Privilege, a Bill of *Middleſex* is ſuppoſed to have firſt iſſued] and in the *King's Bench* one may alſo proceed by *Original*.

In the *Exchequer* the Proceſs is by *Subpœna* or *Quo Minus*; which go into *Wales*, the *Counties Palatine*, &c.

In Courts where Writs lie not, the Suit is begun by *Plaint*, *(i. e.)* by entering the Action, and Cauſe of Complaint; as in the County-Courts, Courts-Baron, *&c.* It always concerns Common Pleas.

The King only can begin by [a] *Inquiry*. *Inquiry* for the King is when Matter is found by a Jury called an *Inqueſt* of *Office*; whether it is by Officers themſelves, (as *Sheriffs*, *&c.*) *Virtute Officii*, or *Virtute Brevis*, or by *Commiſſion* to them directed. [See 2 *Ed.* 6. *ch.* 8. Of *Offices*.]

[a] Finch 251, 323, &c. 2 Inſt. 688, 689, &c. 5 Rep. 54, 55, &c. 1 Inſt. 77. b.

Of Outlawry.

III. [b] At the Common Law none could be *outlawed* but for Felony, and in Actions *Vi & Armis*. But ſince by divers Statutes Outlawry lies in many Civil Actions, as in Caſe, Detinue, Account, Debt, Covenant, Annuity, *&c.*

If the Defendant is not taken on the Return, by the Sheriff, of the *Capias Alias*, and *Pluries Capias*, (for if one Precept is not ſerved, another of the like Nature ſhall go forth till it be ſerved, (if poſſible) one may have an *Exigent* and *Proclamation* in Order to an *Outlawry*; [See 31 *El. ch.* 3.] and then the Exigent being returned by the Sheriff of the County, certifying the Non-appearance, the Perſon is outlawed, and a general *Capias Utlagatum* may go to arreſt the Body of the Defendant, or a ſpecial *Capias Utlagatum* againſt his Body, Lands, and Goods.

[b] Finch 346, 355, &c. 1 Inſt. 128. b. 3 Black. Com. 283. 4 Black. Com. 314.

[c] By *Outlawry*, a Man is diſabled to ſue, or to have the Benefit of the Law; for the Word *outlawed*, implies, that he is put *out* of the Law. But he may bring Error [to reverſe the Outlawry] or Attaint, [if outlawed only in a perſonal Action] [See the 23 *H.* 8. *ch.* 3.] Yet Outlawry does not diſable, nor does Error lie upon it, till it appears of Record, either by Return of the *Exigent*, or Removal of the Outlawry by *Certiorari*. And of this Diſability all Men may take Advantage, by pleading the Outlawry againſt him; which Plea ſhall ſtop his Proceedings, till he hath reverſed the Outlawry. Outlawry in a *County Palatine*, *&c.* ſhall not diſable the Plaintiff to ſue in any Court at *Weſtminſter*.

An Executor or Adminiſtrator ſhall not be diſabled by Outlawry: For he ſues in the Right of the Teſtator or Inteſtate. And by the like Reaſon a Mayor and Commonalty ſhall maintain their Action, though the Mayor is outlawed. [See Of *Excommunication*, *ch.* 1. *ante.*] A *Woman* cannot properly be ſaid to be *outlawed*, but *waived*, as one left out, and not regarded; becauſe Women are not ſworn in Leets and Turns to bear Allegiance to the King. Therefore an * *Infant* under twelve Years of Age cannot be outlawed. A Peer of the Realm cannot be outlawed in civil Cauſes, by Reaſon of his Dignity, for it cannot be intended, that a Peer is without Lands.

Judgment of Outlawry is given by the Coroners in the County, in all Places, except *London*; where the Lord Mayor by Cuſtom is Coroner, and Judgment of Outlawry is given by the Recorder.

If one appears *before* he is returned outlawed, he may ſuperſede the Exigent, and appear without Bail, be the Debt never ſo great. So he may if he is returned outlawed upon a *Quare clauſum fregit*, as the uſual Courſe is.

An Outlawry may be [a] *reverſed*, whether the Party is taken or not. 1. By *Motion* to inform the Court of ſome Fault in the Proceedings. 2. By Plea which is out of Uſe. 3. By the King's *Pardon*. 4. By Writ of *Error*. The firſt Way by *Motion* is the moſt uſual; for almoſt any Objection will ſerve. [See the Statute of *Additions*[b], 1 *H.* 5. *ch.* 5. and alſo 31 *El.* *ch.* 3.] He who thus reverſes an Outlawry, muſt have an Attorney of Record preſent, to undertake an Appearance to a new Original; he muſt alſo put in ſpecial Bail, if the Debt or Damage amount to 10 *l.* or above.

An Outlawry after Judgment cannot be reverſed, till the Plaintiff hath acknowledged Satisfaction on Record, or the Defendant hath brought the Money into Court. [See Of *Execution*, *in fine*, *poſt.*]

By 4 & 5 W. & M. ch. 18. *In the* King's Bench, *one may appear by Attorney, and reverſe an Outlawry*; except *in Treaſon and Felony*; *and without Bail, except where ſpecial Bail ſhall be ordered by the Court*[c]. *And if any Perſon is taken upon a* Capias Utlagatum, *other than for Treaſon or Felony, the Sheriff (where ſpecial Bail is not required by the Court, may take an Attorney's Engagement to appear for him, and may thereupon diſcharge the Defendant. And where ſpecial Bail is required, he ſhall take the Defendant's Bond in double the Sum with one or more Sureties, to appear by Attorney,* &c. *and then may diſcharge him.*

[See of the *County-Court*, *ch.* 1. *ante.* Of *Proceſs*, and Of *Forfeiture*, *ch.* 5. *poſt.*]

[c] Lit. 197. 1 Inſt. 122.b. 128, a. b. 288. b. 6 Rep. 53.

[a] 1 Inſt. 128.b. 259. b. 2 Inſt. 670.

[b] 2 Inſt. 665.

[c] 2 Str. 1178. 1 Wilſon, 3.

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* *Minor, qui infra ætatem duodecim annorum fuerit, utlagari non poteſt.* 1 Inſt 128. a.

Of Appearance and Bail.

IV. If the Defendant is arreſted, the Sheriff by his Officers takes a *Bond*, (according to the Nature of the Action) either for his *Appearance*, or for *ſpecial Bail*. If the Action requires only an *Appearance*, then an Attorney for the Defendant may back the Sheriff's Warrant, by indorſing that he will appear for the Defendant at the Return of the Writ, and file *common* Bail. [See 23 *H.* 6. *ch.* 10. and 13 *Car.* 2. *ch.* 2. *infra.*]

[But ſince 12 *G.* 1. *ch.* 29. which ſee *ante*, the Sheriff does not execute the Writ, where it does not require ſpecial Bail, but only a Copy of ſuch Writ is ſerved on the Defendant by the Plaintiff's Attorney; and as to bailable Writs, the Sheriff takes a Bond in double the Sum ſworn to, and indorſed on the Writ, for the Defendant's Appearance at the Return thereof.] But a Bail-Bond taken in a penal Sum, more than double the Debt ſworn to, is good, unleſs there be Circumſtances of Oppreſſion, 2 *Wilſon* 69.

If the Defendant does not appear (*i. e.*) does not find ſpecial Bail, at the Return of the Writ, or within ſuch Time after, as is allowed by the Rules of the Court, the Plaintiff's Attorney muſt call on the Sheriff for a *Return* of the Writ, or for an Anſwer indorſed thereon, whether the Defendant is arreſted or no; or may ſerve him with a Rule to return the Writ, which if he do not, he may be amerced, or he may be ſummoned before a Judge, to ſhew Cauſe, &c. Where a *Cepi Corpus* is returned, and yet no Bail, there may be a Rule to bring in the Defendant's Body, &c. [And if the Sheriff neglect to bring in the Body within the Time preſcribed by the Rule, the Court will grant an Attachment againſt him, or amerce him] But generally the Sheriff having taken good Bail, will on a Rule return a *Cepi*, and aſſign the Bail-Bond to the Plaintiff, and often on Requeſt without a Rule; and then you may arreſt the Defendant and the Bail on the Bond in your own Name. [See 4 *An.* *ch.* 16. *infra.*] This is called Bail to the Arreſt. [You cannot *arreſt* the Defendant, or his Bail, on the Bail-Bond, but can only ſerve them with a Copy of a Writ to compel their Appearance, for they are not obliged to find ſpecial Bail a ſecond Time. And the Plaintiff is not obliged [a] to accept an Aſſignment of the Bail-Bond, but may proceed againſt the Sheriff.

An *Officer* of the *Court* is always in Court, and muſt anſwer an Action, elſe he will be condemned. Thus it is of a Priſoner in the ſame Court. [See 4 & 5 *W.* & *M.* *ch.* 21. *infra.*]

There are but *three* Ways by which a Defendant can appear, (*viz.*) in proper Perſon, by Attorney, by Guardian. The firſt two are the uſual Ways of Appearance; the other is a Privilege, given to Infants, or thoſe that are under Age. [See what Time, after the Return of a Proceſs, the Defendant hath, to cauſe his Appearance or common Bail to be entered and filed, 5 *G.* 2. *ch.* 27.]

The Manner of Appearing is by Bail.

[b] *Bail* (*Ballium*, from *Bail*, a Guardian, Keeper, or Gaoler) is a Freeing or ſetting at Liberty one arreſted or impriſoned upon an Action, under Surety taken for his Appearance at a certain Day and Place. The Priſoner is ſuppoſed to be delivered into the Cuſtody of thoſe that bind themſelves for his Appearance, who are to anſwer the Party, if they do not produce him.

[a] 1 Ld. Ray. 722.

[b] 4 Inſt. 178. 3 Black. Com. 290, 291.

Bail is either *Common* or *Special*. *Common*, becauſe any Sureties are taken of Courſe, as *John Doe* and *Richard Roe*, and is nothing but a mere Form of Appearance. *Special*, becauſe in Cauſes of greater Weight, the Sureties muſt be Men of *ſpecial* Subſtance and Eſtate, anſwerable to the Action. This is to be given at the Return of the Writ before a Judge, or before Commiſſioners in the Country. [See 4 & 5 *W.* & *M.* *ch.* 4. *poſt.*] When accepted, it is to be filed. It doth engage to ſatisfy [c] the Condemnation and Coſts, or render the Defendant to Priſon. The Bail upon a Writ of Error cannot render the Party in their Diſcharge, becauſe they are bound to pay the Money, if Judgment is affirm'd. [See 3 *Ja.* 1. *ch.* 8.] In the *King's Bench*, when the Proceedings are by Bill, the Bail are not bound in a certain Sum to the Plaintiff; but only undertake that the Defendant ſhall pay the Condemnation-Money, or render his Body to Priſon. The Recognizance, being General, ſhall be reduced to a Certainty by the Judgment, but the Bail ſhall not be liable to a larger Sum than is ſworn to, and indorſed on the Writ.] But in the *Common Pleas* the Bail are bound to the Plaintiff in a certain Sum. This is Bail to the *Action*. If the Defendant is indebted to the Plaintiff to the Value of *ten* Pounds, or upwards, he may be forced to put in Special Bail. But in Actions on the Caſe for Words, Common Batteries, Treſpaſs and Ejectment, Covenant, unleſs to pay Money, for Breach of a Condition, upon penal Statutes, a By-Law, and upon Bonds with collateral Conditions, Special Bail is not uſually required, (unleſs by Special Order of the Court or one of the Judges.) Neither will Special Bail be required againſt *Heirs*, *Executors*, or *Adminiſtrators*, in any Action brought againſt them for the Debt of the Teſtator or Inteſtate; unleſs they have waſted the Goods of the Deceaſed, and the Action is grounded on a *Devaſtavit*. Neither will they be forced to give Bail upon a Writ of Error. But in the Courts of *London*, and in other [a] inferior Courts, Heirs, Executors, and Adminiſtrators muſt give Special Bail. [b] Where the Huſband is arreſted for the Act of his Wife, he is bound to appear for himſelf and his Wife, and to put in Special Bail, if the Action requires it. If the *Wife* only is arreſted upon a Writ againſt the Huſband and Wife, ſhe ſhall be diſcharged by *Superſedeas*, upon entering Common Bail.

[c] 4 Inſt. 179. 5 Rep. 70, 71.

[a] 2 Lev. 204. 1 Danv. Abr. 681.

[b] 1 Roll. Abr. 583.

[See 11 & 12 *W.* 3. *ch.* 9. 12 *G.* 1. *ch.* 29. and 5 *G.* 2. *ch.* 27. *ante.*]

Special Bail [c] is required in the *King's Bench*, in all Caſes of Removal by *Habeas Corpus*, Writ of Privilege, *Certiorari*, &c. where Bail was required in the Court below (except in the Caſe of Heirs and Executors or Adminiſtrators, as above.) Privileged Perſons of the Court ſhall not regularly be forced to find Special Bail. But if they bring Actions againſt another Perſon (who is not privileged) they ought to have Special Bail to their Actions, though under 10 *l.* [*Qu.* But certainly this cannot be ſo ſince the Statutes abovementioned.]

[c] 1 Danv. Abr. tit. Bail.

The Cognizors of Bail muſt juſtify themſelves in open Court, either by Oath made in *Court*, or before one of the Judges of the Court, or by *Affidavit* before ſuch Commiſſioners, as took the ſaid Bail, that they are Houſekeepers and worth double the Plaintiff's Debt, over and above their Debts.

[d] Pledges for the Plaintiff are now ſet down only as Matter of Form. [See 4 *An.* *ch.* 16.]

[d] 4 Inſt. 180.

By 23 H. 6. ch. 9. *Sheriffs,* &c. *ſhall let out of Priſon all Perſons arreſted by them in any Perſonal Action, or on Indictment of Treſpaſs, upon reaſonable* Surety *of ſufficient Perſons,* &c. *to keep their Days in ſuch Place, as the Writ, Bill, or Warrant ſhall require; except Perſons in their Ward by Condemnation,* [See 2 *H.* 5. *ch.* 2.] *Execution,* Capias Utlagatum, *or* Excommunicatum, *Surety of the Peace, or committed by Command of any Juſtice, or Vagabonds refuſing to ſerve according to the Statute of Labourers.* 10 Rep. 99, &c.

The Sheriff, &c. *ſhall take no Bond of any ſuch Perſon arreſted, but for Appearance at the Day and Place, and to themſelves only. Bonds otherwiſe taken, by Colour of their Office, to be void; and the Sheriff,* &c. *to forfeit treble Damages to the Party grieved, and* 40 l. *to be divided betwixt the King and Proſecutor.*

Sheriffs, *&c.* could not let ſuch Perſons arreſted to Bail before this Act. 10 Rep. 100.

The Act extends only to Perſons in their Cuſtody, and not to an Obligation made to the Sheriff, *&c.* or to the Plaintiff for Payment of the Money due on an Execution by *Fieri Facias.*

An Obligation with a Condition to ſave the Sheriff harmleſs (who let one to Bail, who was not bailable) is void by the Common Law.

By 13 Car. 2. St. 2. ch. 2. *None arreſted by Proceſs out of the King's Bench or Common Pleas, in which Proceſs the true Cauſe of Action is not expreſſed, and for which the Defendant is bailable by* 23 H. 6. ch. 2. *ſhall be forced to enter into Bond with Sureties for Appearance in any Sum exceeding* 40 l. *which Bond after Appearance by Attorney ſhall be diſcharged.*

This Act ſhall not extend to Writs of Cap. Utlagatum, *Attachments upon Reſcous, Privilege or Contempt.*

This Act was the Occaſion of inſerting the Words *Ac etiam Billæ* in Writs iſſuing out of the *King's Bench* to hold to Special Bail. † † Judic. Author Maſ. Rolls 197.

[By 12 *Geo.* 1. *ch.* 29. 5 *Geo.* 2. *ch.* 27. Where the Defendant is not to be held to Bail, he ſhall not be arreſted, but ſerved with a Copy of the Proceſs. And ſee 32 *G.* 2. *ch.* 28. For the Demeanor of Officers and Gaolers towards Perſons under Arreſt.]

By 4 & 5 W. & M. ch. 4. *Two Judges of the King's Bench, Common Pleas, and Exchequer (whereof the Chief Juſtice and Chief Baron in the reſpective Courts to be one) may by* Commiſſions *under the Seals of the ſaid Courts, impower Perſons (other than Common Attornies and Solicitors) in every County, to take Recognizances of* Bail *in Cauſes depending in their ſeveral Courts.*

The Juſtices and Barons reſpectively may make ſuch Rules for juſtifying *ſuch Bails, as to them ſhall ſeem meet, by* Affidavits *duly taken before the Commiſſioners; ſo as the Cognizors be not compelled to appear in Perſon in the ſaid Courts to juſtify themſelves, unleſs they live in* London *or* Weſtminſter, *or within ten Miles thereof.*

Any Judge of Aſſize may take ſuch Recognizance of Bails, &c.

[See 4 *&* 5 *W. & M. ch.* 18. As to Bail upon a *Capias Utlagatum,* Title, *Outlawry, ſupra.*]

By 1 An. St. 2. ch. 6. *Where Perſons eſcape out of Priſon and are retaken, the Bail for ſuch Perſon ſhall be diſcharged on a Writ directed to the Sheriff, commanding him to keep the Priſoner in Diſcharge of the Bail.*

By 4 An. ch. 16. *The Sheriff may* aſſign *the Bail-Bond to the Plaintiff, which he may ſue in his own Name.* [See 21 *Ja.* 1. *ch.* 26. 4 *&* 5 *W. & M. ch.* 4. As to the Puniſhment for perſonating Bail, *&c.*]

One that is Bail cannot be a Witneſs for the Defendant upon the Trial; but the Court upon a Motion will diſcharge ſuch Bail, upon giving other ſufficient Bail.

[a] Terms of the Law, v. Bail. 4 Inſt. 179, 180. H. P. C. 96. 3 Black. Com. 128.

[a] *Mainpriſe*, (*Manu Captio*, a Taking into the Hand) ſignifies taking a Man into friendly Cuſtody, who might otherwiſe be committed to Priſon, upon Security given for his appearance at a Time and Place aſſigned. He is ſuppoſed to go at large, and to be at his own Liberty, under no Poſſibility of being confined by his Mainpernors or Sureties, as in the Caſe of Bail. Mainpriſe is more large than Bail. For every Bail is Mainpriſe, but every Mainpriſe is not Bail. [See of *Bail* in criminal Caſes. *ch.* 5. *poſt.*]

When the Plaintiff and Defendant appear, then follows the Declaration.

Of the Declaration. [b] 1 Inſt. 17. a. 303, a. & b. Finch 357. 3 Black. Com. 293. [c] 2 Ventr. 259, &c.

V. [b] The *Declaration*, (*Narratio*, the ſame in Effect which the Civilians call a *Libel*) is a ſetting forth in Writing the Demand or Complaint of the Demandant or Plaintiff againſt the Tenant or Defendant, who is ſuppoſed to have done the Wrong. It is grounded upon the Writ in the Common Pleas, but upon the *Bill* in the King's Bench. [c] In the Common Pleas it is uſual to declare in any Action upon a *Quare Clauſum Fregit*, as they do upon a *Latitat* in the King's Bench. Theſe Courts do differ ſometimes in the Forms of their Declarations. What I call in general a Declaration, is more properly called a *Count* in *real* Actions, and a *Declaration* in *perſonal Actions*, tho' theſe ſometimes are confounded.

The Declaration muſt ſet forth the Plaintiff's and Defendant's Names, the Nature of the Action, the Cauſe or Matter of Complaint, and the Manner of it, the Time and Place, and the Damage ſuſtain'd. For it is an Expoſition of the Writ with the Addition of Time and Place, *&c.* It ought to be true, clear and certain, for the Court is not to take Things in it by Implication. But it is not neceſſary to ſet forth Matters of Fact, as in Bills in *Chancery*, &c. For thoſe are to be heard and tried by a Jury. If a Declaration, *&c.* is defective, it may be aided ſometimes by *Statutes*. They are call'd the Statutes of *Jeofails* from *J'ay faillé*, I have fail'd. [See 8 *H.* 6. *ch.* 12. and 15. 32 *H.* 8. *ch.* 30. 18 *El. ch.* 14. 27 *El. ch.* 5. 21. *Ja.* 1. *ch.* 13. 16 & 17 *Car.* 2. *ch.* 8. 4 *An. ch.* 16. 9 *An. ch.* 20. 5 *G.* 1. *ch.* 13. 4 *G.* 2. *ch.* 26. 5 *G.* 2. *ch.* 27. 6 *G.* 2. *ch.* 6, 14. And ſee 1 *Danv. Abr.* Tit *Amendment.*]

3 Black. Com. 404.

An *Audita Querela* and a *Scire Facias* are in the Nature of Declarations, and do ſet forth at large the cauſe of the Plaintiff's Action.

By 36 Ed. 3. St. 1. ch. 15. *All Pleas, which are pleaded in any of the King's Courts, ſhall be pleaded and judged in the* Engliſh *Tongue, but entered and enrolled in* Latin. [See *infra.*]

[a] 5 Rep 121. 10 Rep, 133.

Where there is a [a] *Latin* Word, which is falſely Engliſhed, the *Engliſh* Word ſhall be adjudged void, and the *Latin* Word ſhall ſtand. And where there is no *Latin*, yet if it is ſignificant, and hath the Countenance of *Latin*, by adding an *Anglice* to it, it is good. As *Velvetum, Anglice Velvet, Operimentum, Anglice a Rug*, &c. But where ſenſeleſs Words, which ſignify nothing, are uſed in a Declaration, they are to be rejected; yet they ſhall not hurt the Declaration, if it is good without them. There are Words ſignificant and known to the Lawyers, though they have no Countenance of *Latin*; as *Meſuagium, Toftum, Gardinum, &c.* There are then *four* Sorts of Words, that paſs under the Name of *Latin.*

Latin. 1. *Good Latin,* allow'd by Lawyers and Grammarians. 2. *Falſe* or incongruous *Latin,* which ſhall abate original Writs; but ſhall not make void any judicial Writ, Declaration, Plea, nor any Grant or Deed: Eſpecially if a made Word has any Countenance of *Latin,* and an *Anglice* added to it. 3. *Senſeleſs* Words and of no Signification, and which have not any Countenance of *Latin.* 4. Words of *Art,* ſignificant and known only to the Sages of the Law, though not to Grammarians, which may be called *Lawyers Latin.* Senſeleſs Words only are abſolutely rejected: [But now theſe Diſtinctions are of little Uſe. For,

By 4 G. 2. ch. 26. 5 G. 2. ch. 27. 6 G. 2. ch. 6, *and* 14. *All Writs, Pleadings, Rolls, Entries, and Proceedings, ſhall be in the* Engliſh *Language.*

The Plaintiff after the Return of the Writ hath two Terms, to declare; the Term, in which the Writ was returnable, being reckoned for one. If he does not deliver to the Defendant's Attorney a Copy of the Declaration before the *Eſſoin* Day of the ſecond Term, the Defendant is not obliged to plead 'till the third Term. [*Qu.* if the Defendant's Attorney is obliged to accept the Declaration at all after the End of the ſecond Term, although no *Nonproſs* be ſigned.] The *Eſſoin* [b] Day, is [for *Eſſoins*] a kind of *Imparlance, Licentia Interloquendi,* or a Craving of a longer Time, and lies in [a] Real, Mixt, and Perſonal Actions. If no Declaration comes in before the Riſing of the Court the laſt Day of the ſecond Term (after a Rule given for that Purpoſe is out) [without any Rule to declare in the King's Bench, unleſs the Proceedings are by Original] the Plaintiff may be *nonſuit,* and the Defendant may ſign a *Non Proſ. (Non Proſequitur)* and have his Coſts for not declaring in two Terms. [See 13 *Car.* 2. *ch.* 2.] A *Nonſuit,* is different from a *Retraxit.* A *Nonſuit* is when the Plaintiff upon Demand ſhould appear in Court, and he makes Default by not proſecuting his Suit with Effect, or elſe by refuſing to ſtand a Verdict upon Trial. But a [b] *Retraxit* is a voluntary Renouncing of the Suit or Plea by the Plaintiff or Defendant preſent in Court. Upon a *Nonſuit* before Appearance, and ſo regularly after Appearance, one may commence his Action again, but not upon a *Retraxit.* But in a *Quare Impedit* it is peremptory; becauſe the Defendant ſhall have a Writ to the Biſhop. And Nonſuit after Appearance is alſo peremptory in an Appeal, and on Attaint. The King cannot be nonſuit; but his Attorney General may enter an *Ulterius non vult Proſequi* which hath the Effect of a Nonſuit. But an Informer, *qui tam, &c.* may be nonſuit.

b See p. 447. ante.

a 2 Inſt. 125.

bF N. B. 48. 8Rep. 58, 59. 1Inſt. 138. b. 139. a. & b. 1 Roll. Abr. 584. 3Cro. 551.

By 4 & 5 W. & M. ch. 21. *Where the Defendant is taken, or charged in Cuſtody upon any Writ out of any of the Courts at* Weſtminſter, *and impriſon'd or detain'd for Want of Sureties for Appearance, the Plaintiff, before the End of the next Term after the Writ is returnable, may* declare *againſt the* Priſoner, *and may cauſe a Copy to be delivered to the Priſoner or to the Gaoler or Keeper; to which Declaration the Priſoner ſhall appear and plead; or otherwiſe the Plaintiff ſhall have Judgment; as if the Defendant had appear'd, and refuſed to plead.*

[See 8 & 9 *W.* 3. *ch.* 27. Concerning the Delivery of a Copy of a Declaration againſt a Priſoner in the Fleet. 4 *Ann. ch.* 16. Concerning the filing of Warrants by the Attorney of the Plaintiff and Defendant.]

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[b] *Qui ſemel actionem renunciavit, amplius repetere non poteſt.* 8 Rep. 59.

Note

[c] Finch 431. Regula Placit. 62, 63. 1 Inſt 134. b.
[d] 2 Ld. Ray. 872
1 Str. 492.

Note, That there muſt be a [c] *Continuance* from Day to Day till the End of the Suit. *Day* in legal Underſtanding is the Day of Appearance of the Parties or Continuance of the Suit. [In the King's Bench they never enter Continuances [d] till the Plea comes in, and the Continuances may be enter'd on the Roll only from Term to Term.] If the Plaintiff doth nothing, it is call'd a *Diſcontinuance* (*viz.*) of the *Proceſs*, and he muſt begin his Suit again. [See 1 *Ed.* 6. *ch.* 7. 8 *El. ch.* 2. 4 & 5 *W. & M. ch.* 18. 1 *Ann. St.* 1. *ch.* 8.]

Of Pleas.
3 Black. Com. ch. 20. Of Pleading.

VI. *Pleadings* (*Placita*) largely taken, are all the Sayings of the Parties to the Suit or Action after the Declaration, until Iſſue in Law or Fact is join'd. But here I take them for the Defendant's Anſwer to the Declaration of the Plaintiff. If a Copy of the Declaration is delivered to the Defendant's Attorney before the Eſſoin Day, he may be compell'd to plead that Term, or elſe Judgment may be entered againſt him. By Courſe of the Court, the Defendant is to plead the ſame Term in which he appears, if it is an *iſſuable* Term, and the Writ be returnable at the Beginning thereof. But uſually the Defendant hath Time to plead till the next Term. [See the late Rules, made in the *Common Pleas*, *Eaſter* 3 *G.* 2. and in the *King's Bench*, *Trin.* 5 & 6 *Geo.* 2. that on Proceſs returnable the firſt or ſecond Return of any Term, if the Plaintiff declares in *London* or *Middleſex*, and the Defendant lives within twenty Miles of *London*, the Defendant ſhall plead within four Days; otherwiſe within eight Days. [But in both theſe Caſes the Declaration muſt be delivered four Days before the End of the Term, or the Defendant will be intitled to an Imparlance till the next Term.]

After the Declaration, and before the Defendant can be forced to plead, there is often a Prayer of *Oyer* (or Demand to hear) and of Copy of a Deed upon which one is ſued. And then an *Imparlance* (from *Parler*, to ſpeak) which is Leave given by the Court for the Defendant to plead till the next Term. and this Imparlance is either *General* or *Special*. *General*, which is ſet down in general Terms without any ſpecial Clauſe. *Special*, with ſuch like Clauſe inſerted, (*viz.*) ſaving all Advantages againſt the Juriſdiction of the Court, to the Writ, and Declaration, &c. [See of *Demurrer*, *infra*.]

[a] Finch 362, 363, 364.

[a] The Plea or Defence is either *Dilatory*, or a *Plea* to the *Action*.

3 Black. Com. 301.
[b] Lit. 196, &c. 1 Inſt. 128. a. &c.

1. *Dilatory*, either in *Diſability* or *Abatement*. In *Diſability*, to the *Juriſdiction* of the Court, or to the Perſon of the Plaintiff; as that he cannot commence any Suit by Reaſon that he is an [b] *Alien* Enemy, outlaw'd, under a *Præmunire*, under Attainder, excommunicated. In *Abatement* for ſome Fault in the Writ, Declaration, &c. Diſability in the Perſon only ſtops the Cauſe for a while till the Defects are remov'd, [See 8 & 9 *W.* 3. *ch.* 11. as to Abatement, where the Plaintiff or Defendant dies, &c.]

By 1 Ed. 6. ch. 7. *Creations of Honour, depending Suit, ſhall not abate Writ or Action.*

[c] 1 Inſt. 303. a.

The Defendant muſt obſerve this [c] Order in his Pleading, (*viz.*) 1. To the Juriſdiction of the Court. 2. To the Perſon, Plaintiff or Defendant. 3. To the Declaration. 4. To the Writ. 5. To the Action.

By 4 Ann. ch. 16. *No* Dilatory *Plea is to be received without* Affidavit *of the Truth thereof, or ſome probable Matter ſhewn.*

2. [d] A *Plea* to the *Action* is that which goes to the Merits of the Cauſe or Action; and is either *General* to the Declaration, as in Caſe, Treſpaſs, and Trover, *Not Guilty*; in Debt upon a Contract without Specialty, *Nil Debit per Patriam*; in an Action of the Caſe upon *Aſſumpſit*, *Non Aſſumpſit*; in Covenant, *Performance* of Covenants; in Debt on Bond, *Non eſt Factum*, *&c.* or *Special*, which ſetteth forth the Matter pleaded at large with apt Concluſion to the Declaration or Action. The Special Pleas are many, as *Per Dures*, *Per Minas*, Pleas in Juſtification, as *Son Aſſault Demeſne* in Aſſault and Battery, (*i. e.*) That the Plaintiff ſtruck the firſt Blow, *&c.* that therefore the Battery was occaſioned by his own Aſſault. [e] In Treſpaſs, if the Fact was committed, and one hath Cauſe of Juſtification and Excuſe, he muſt confeſs the Fact and plead the Special Matter. But if he pleads Not guilty, he cannot give the Special Matter in Evidence. In Detinue, the Defendant on *Non Detinet* pleaded cannot give in Evidence, that the Goods were pawn'd to him. In Waſte, on *Nul Waſte* pleaded, one may give in Evidence Lightening, Enemies, or any Thing that proves it to be no Waſte. But he cannot give in Evidence juſtifiable Waſte; as that he cut down Trees to repair the Houſe, or any other ſpecial Matter. In all theſe Caſes and the like, one muſt confeſs and plead *Specially*.

[d] Finch 378. 3 Black Com. 303.

[e] 1 Inſt, 282. b. 283. a. 5 Rep. 119.

[a] If the Defendant in any Action pleadeth a Plea, which is a ſufficient Anſwer, and deſtroyeth the Action of the Plaintiff, it is a *peremptory* Exception, and is called a *Plea* in *Bar*; becauſe it *barreth* the Plaintiff of his Action. As a Releaſe, the Statute of Limitations, [b] Eſtoppels, (*i. e.*) when a Man's own Act or Acceptance ſtoppeth him to alledge or plead the Truth; Accord or Agreement with Satisfaction, Arbitrement, or an Award, Performance of the Condition of a Bond, *&c.* If one under Age pretends that he is of full Age, and enters into Bond, tho' he may avoid it by pleading Nonage, yet you may indict him for a Cheat. [*Qu.*] There are alſo *temporary* Pleas in Bar, or that Bar only for ſome Time.

[a] 1 Inſt. 372. a. 303. b.

[b] 1 Inſt. 352. a. & b.

There is alſo a Plea call'd a *Foreign Plea*, as to an Action in the *Marſhalſea* Court, that the Cauſe of Action did ariſe out of the Juriſdiction of that Court; and the like as to other inferior Courts, that the Lands in Queſtion are Ancient Demeſne, and to be impleaded for in the Court of the Manor, of which they are holden.

[c] *Confeſſion* is alſo a Plea to the Action, where the Defendant confeſſes the Plaintiff's Action to be good.

[c] Finch 387. 3 Black. Com. 397.

This is the ſtrict Signification of a Plea. But in a large Senſe, when the Defendant has pleaded, the *Plaintiff* pleads too, and anſwers the Defendant's Plea; which is called a Replication. The [d] *Replication* muſt not vary from the Declaration; but muſt purſue, and maintain the Cauſe of the Plaintiff's Action. Otherwiſe it will be a *Departure* in Pleading, a Going to another Matter, and a Saying and Unſaying; which the Law will not allow. [e] A *Rejoinder* (*Triplicatio*) is the Defendant's Anſwer, to the Replication of the Plaintiff. A *Surrejoinder* (*Quadruplicatio*) is the Plaintiff's Anſwer to the Defendant's Rejoinder. Sometimes, though very rarely, the Parties go ſo far in Pleading, that it comes to a *Rebutter*. A *Rebutter* (from *Bouter*, *repellere*, to put back) is the Anſwer of the Defendant to the Plaintiff's Surrejoinder. *Surrebutter* is the Replication or Anſwer of the Plaintiff to the Defendant's Rebutter.

[d] 1 Inſt. 303. b. 304. a, Finch, B 4. ch. 34.

[e] 1 Inſt. 303. b. 304. a. Finch, ch. 34.

Some Particulars often ariſe in the Courſe of Pleading, (*viz.*) *Traverſes*, *Averments*, *Proteſtando's*, *Uncore Priſt*, *Quæ eſt Eadem*, *&c.* *Colour*, [f] *Departure*, *&c.* which ſome think to be full of curious Learning. [But ſee 4 *Ann. ch.* 16. 5 *Geo.* 1. *ch.* 13.]

For theſe, See Doctrina Placitandi, and Books of Entries.

[f] 10 Rep. 90, &c.

3 Black. Com. 312. To *Traverſe* (*Traverſer*, *Transfigere*, to ſtrike through) ſomething particularly charged in the Declaration or Pleadings, is no more than particularly to deny it to be true in theſe Words (*viz.*) *Abſque hoc*, *Without that*, &c. It may be of the *Matter*, or *Manner*, of the *Day*, *Year*, or *Place*. A Traverſe is good when it traverſes that Part which ſtrikes through, or makes an End of the Cauſe, when the Point is determined by the Jury. [See 4 *Ann. ch.* 16.] Every Plea ought to be triable, otherwiſe the Cauſe will never be at an End.

a 1 Inſt. 303. a. All Pleas in the Affirmative ought to be [a] *averr'd* with *Hoc Paratus eſt Verificare*; but a Negative cannot be averr'd, becauſe it cannot be proved. [See 4 *Ann. ch.* 16.] This Affirmative is what is call'd an *Averment*, and is *General* as before mentioned, with *Hoc Paratus, &c.* *Particular*, as where the Life of Tenant for Life or in Tail, or the Age of a Perſon, *&c.* are averr'd. [For *Proteſtando's*, *Confeſſing* and *Avoiding*, *Uncore Priſt*, *Quæ eſt Eadem*, *&c.* See *Regula Placitandi*, *Bohun's Inſtitutio Legalis*, *&c.* And the Books of *Entries*; of which there are great Variety.]

b 1 Inſt. 303. a. & b. [b] Every Plea muſt be direct, and not by Way of Argument or Rehearſal: A double Plea will be diſallow'd

[*But by* 4 Ann. ch. 16. *Any Defendant or Tenant, in any Action or Suit, or Plaintiff in Replevin, in any Court of Record, with Leave of the Court, may plead as many ſeveral Matters as are neceſſary.*]

* The Pleading of every one ſhall be taken ſtrongly againſt himſelf. For every one is preſumed to make the beſt of his own Cauſe.

c 5 Rep. 119. 1 Inſt. 283. a. 1 Roll. Abr. 328, &c. When one is [c] authorized to do any Thing by the Common Law, by Grant, Commiſſion, Act of Parliament, or by Cuſtom, he ought to purſue the Subſtance and Effect of the ſame accordingly. And regularly when one doth any Thing by Force of a Warrant or Authority, he muſt plead it. But generally in late Statutes there is a Clauſe to empower one, that is ſued for executing an Authority given by them, to plead Not guilty, and to give the Special Matter in Evidence. [See *infra* of *Iſſues*.]

d 1 Inſt. 283. a. Whenever one cannot have the Advantage of the Special Matter by Way of Pleading, [d] he ſhall take Advantage of it in Evidence.

e 1 Inſt. 303. b. 2 Ld. Ray. 869. Special Pleadings which amount to the [e] general Iſſue, are not to be allow'd, but are demurrable to.

[See where a Defendant will not plead, *Of Judgment by Default*, *infra*. And 4 *Geo.* 1. *ch.* 11. For *Tranſportation* of unlawful Exporters of Wool that refuſe, while in Priſon for want of Bail, to plead to the Declaration, *&c.*]

Of Iſſues. VII. When the Parties by Plea, Replication, Rejoinder, *&c.* are come to ſomething affirmed by one, and denied by the other, they are at *Iſſue*.

f 1 Inſt. 126. a. 11 Rep. 10. Finch, B. 4. ch. 35. 3 Black. Com. 313, 314. [f] *Iſſue*, (from *Iſſuer*, *Emanare*, to flow, *Exitus*) is a ſingle, certain, and material Point, iſſuing out of the Allegations or Pleas of the Plaintiff and Defendant, conſiſting regularly of an Affirmative and Negative, to be tried by twelve Men. Upon a Writ of Right it is call'd the [g] *Miſe*

g 1 Inſt. 294. b. Finch 398.

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* *Ambiguum placitum interpretari debet contra proferentem.* 1 Inſt. 303. b.

[f] *Oportet quod res certa deducatur in exitum aut judicium.* 5 Rep. 35, 38, 61.

(from *Mitto*) becauſe the whole Cauſe is *put* upon that Point. *Miſe* is alſo taken for Expences, as *Miſæ et Cuſtagia*.

Iſſue has ſeveral Significations in Law. Sometimes it is taken for the Children begotten between a Man and his Wife, ſometimes for Americiaments and Fines, and ſometimes for Profits of Lands and Tenements. But here it is taken for the Point of the Cauſe depending in Suit, whereupon the Parties join, and put their Cauſe to Trial; which is properly a *Traverſe*.

Iſſues in this laſt Senſe are of two Kinds, (*viz.*) Upon Matter of *Law*, or upon Matter of *Fact*.

1. An Iſſue joined upon Matter of [a] *Law*, is to be determined by the Judges; and this is called a *Demurrer*. A *Demurrer* (from *Demorari*, to abide) is an abiding in Point of Law, and a referring to the Judgment of the Court, whether the Declaration or Plea of the adverſe Party is ſufficient in Law to be maintained. When the Demurrer is joined, the Caſe is made a *Conſilium*, and is to be argued by Council on both Sides; and then the Judges give Judgment; taking it for granted, that he that demurreth in Law, confeſſeth all Matters of Fact, that are well and ſufficiently pleaded; but not otherwiſe. If the Judges are equally divided, or conceive great Doubt of the Caſe, the Cauſe may be adjourned into the Exchequer-Chamber, to be argued by all the Judges. [See 14 *Ed.* 3. *St.* 1. *ch.* 5.]

A Demurrer is either *general* or *ſpecial*. *General*, which ſhews no Cauſe. *Special*, which ſheweth the Cauſe of Demurrer, and does particularly ſpecify it. [See 27 *El. ch.* 5. 4 *Ann. ch.* 16.]

If the Point is difficult to be decided, it is publickly argued by the Judges of the Court. [See of *Judgment*, *infra*.]

2. An Iſſue of *Fact* (*i. e.*) Whether the Fact is true or falſe, is either touching a Matter of *Record*, upon pleading *Nul tiel Record*, or no ſuch Record; or touching a Matter in *Pais* or *Fact* out of Court, as whether ſuch a Deed was ſealed and delivered by the Defendant; whether he promiſed Payment, &c. If a Plea is ſufficient in Law, and the Matter of Fact thought to be falſe, Iſſue is taken thereupon, and tried by a Jury.

The King may wave a Demurrer, and take Iſſue at his Pleaſure.

Iſſues of Fact too are [b] *general* or *ſpecial*. *General*, when it is left to the Jury, whether the Defendant hath done any ſuch Thing as the Plaintiff layeth to his Charge; as when he pleads *Not Guilty* to a Treſpaſs, &c. *Special*, when ſome ſpecial Matter, or ſome material Point alledged by the Defendant in his Defence, is to be tried by the Jury; as in Aſſault and Battery, where the Defendant pleads that the Plaintiff ſtruck firſt, &c.

There may be an Iſſue to *Part*, and a Demurrer to *Part*. [See Of a *Demurrer* to *Evidence*, *infra*.]

In many Inſtances, by Virtue of ſeveral Acts of Parliament, one may plead the *general Iſſue*, and give the *ſpecial Matter* in Evidence for Excuſe or Juſtification; it is to be wiſhed, that it was ſo in more Caſes. [c] For theſe Acts are made for avoiding Prolixity and Captiouſneſs of Pleading, which is chargeable and dangerous. Upon the general Iſſue, the Defendant in ſuch Caſes may give any Thing in Evidence, which proves the Plaintiff hath no Cauſe of Action. [See 23 *H.* 8. *ch.* 5. 1

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[a] Finch, Book 4. chap. 40. 1 Inſt. 71. b. 72. a. 5 Rep. 104. 10 Rep. 88, &c. 3 Black. Com. 314.

3 Black. Com. 315.

[b] 1 Inſt. 126. a.

[c] 1 Inſt. 283. a.

Ja. 1. *ch.* 15. 7 *Ja.* 1. *ch.* 5. 21 *Ja.* 1. *ch.* 12, *&c.* See alſo of *Evidence, poſt.*]

[d] 1 Inſt. 126 a. Finch 398.

[d] If the Tender of the Iſſue comes on the Part of the Plaintiff, the Form is, *Et hoc petit quod Inquiratur per Patriam.* If on the Part of the Defendant, it is, *Et de hoc Ponit ſe ſuper Patriam.* [See again 4 *Ann. ch.* 16. for Coſts on Demurrer.]

[*By* 14 G. 2. ch. 17. *If the Plaintiff neglects to bring on his Iſſue to be tried according to the Courſe of the Court, the Court upon Motion may give Judgment for the Defendant, as in the Caſe of a Nonſuit.*]

Of Trial.

[a] 1 Inſt. 124. b. 125. a. Finch, ch. 36. 3 Black. Com. 330.

VIII. [a] *Trial* is an Examination of the Truth of the Point in Iſſue, or of the Queſtion betwixt the Parties, whereupon Judgment may be given. The Trial of the Truth of the Fact is according to the Nature of the Iſſue. As,

[b] 9 Rep. 30, 31. 1 Roll. Abr. 572. 2 Roll. Abr. 572, 573, 578. 3 Black. Com. 331.

1. Trial by [b] *Inſpection*, upon a Writ of Error to reverſe a Fine levied by an Infant, or in *Auditâ Querelâ* to avoid a Recognizance or Statute acknowledged during Minority. Here the Infant may be viewed and examined by the Court. But there ought to be other concurrent Proof; for the Court may be deceived, if they rely only upon View of the Party. Alſo *Mayhem* ſhall be under the Inſpection of the Court, to increaſe the Damages, if the Court thinks fit.

[c] 9 Rep. 30. 1 Inſt. 6. b. 4 Inſt. 479. Finch, ch. 38. 2 Roll. Abr. 575, 675. 3 Black. Com. 336.

2. Trial by [c] *Witneſſes*, as where Iſſue is in Dower, whether the Huſband is living or no. Here two Witneſſes at leaſt are requiſite, becauſe this Trial is by Witneſſes, not by a Jury. [So two Witneſſes are required to prove the Suggeſtion on a Prohibition to a Suit for Tithes, by 2 & 3 *Ed.* 6. *ch.* 13. § 14.]

[d] 1 Inſt. 74. a. 261. a. 9 Rep. 24, 31. 2 Roll. Abr. 579, 580, 581, 583, 584, 585, 586, &c. 3 Black. Com. 333.

3. Trial by [d] *Certificate* of the *Marſhal* of the King's Hoſt, in Times of War out of the Realm, whether the Party is in the King's Service or no. Of the *Chief Officer* of the Place out of the Realm in Time of Peace; as if it be alledged in Avoidance of Outlawry, that the Defendant was in Priſon at *Bourdeaux* in *France*, it ſhall be tried by the Certificate of the Mayor of *Bourdeaux*. But it is ſaid, that this muſt be underſtood, when the ſaid Town was Part of the King's Dominions. For Matters within the Realm, by the Certificate of the *Lord Mayor* and *Aldermen* of *London*, by the Mouth of the Recorder, of a Cuſtom of *London*, unleſs the Lord Mayor and Aldermen are intereſted in the Action; of the *Sheriffs* of *London*, whether one hath the Privilege of a Citizen or is a Foreigner; of the *Judges* concerning Records in their Cuſtody, when Iſſue is joined upon *Nul tiel Record*, or whether there is ſuch a Record or no; by Certificate [Examination] of the *Sheriff*, whether he made ſuch a Return or no; of the *Ordinary* in Cauſes Eccleſiaſtical, as of Loyalty or Lawfulneſs of Marriage, General Baſtardy, Excommunication, Plenarty by Inſtitution into a Church, Ability of the Parſon, *&c.* If a Defendant claims his Privilege as a Scholar, *&c.* of the Univerſity, the Claim is by the Certificate of the *Chancellor* or *Vice-Chancellor*. But not if the Parties are at Iſſue, whether the Defendant is of ſuch a College, *&c.*

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[a] *Eventus judiciorum ſunt incerti.* 8 Rep. 40.

4. Trial *by* [e] *Wager of Law*, or the Defendant's Oath, as in Debt upon a ſimple Contract, Detinue, *&c.*

To wage Law (*Vadiare Legem*) is to take an Oath at the Bar, that he oweth not the Debt demanded of him upon a ſimple Contract, or any Part thereof: But he ought to bring with him eleven of his Neighbours, or ſo many Perſons as the Court ſhall order, that will avow upon their Oaths, that they *believe* he ſayeth the Truth. But this may be diſpenſed with at the Diſcretion of the Court.

Note, Though the Books mention eleven Compurgators, yet it is the Courſe in the Common Pleas to have but ſix.

But Actions *on the Caſe* are now brought for Debts upon ſimple Contract; and Trover and Converſion for Detinue, *&c.* where the Defendant cannot wage his Law; upon which Account Wager of Law is much out of Uſe. It *may* be ſtill in Actions of Debt upon a *By-Law* or an *Amerciament* in a Court-Baron, unleſs the Lord does preſcribe to determine Pleas by a Jury. No Wager of Law ſhall be againſt the King. And in every *Quo Minus* brought by the King's Debtor in the Exchequer, againſt one indebted on a ſimple Contract, the Defendant ſhall not wage his Law, for the Benefit of the King.

[e] 1 Inſt. 294. b. 295. a. 2 Inſt. 45. 4 Rep. 95. 9 Rep. 32, 87, 88, 89, 90. Finch, Book 4. ch 39. Exod. xxii. v. 10, 11. 3 Black. Com. 341. 1 Ld. Ray. 500.

[a] *Trial* by *Battle* is diſuſed. Trial by *Ordeal* is taken away by *Statute* not printed.

[a] 9 Rep. 32, 33. 3 Black. Com. 338.

5. Trial of *Matters* of [b] *Law* is by the *Judges* upon Demurrers, ſpecial Verdicts and Exceptions to Evidence. Alſo upon the Cuſtoms and Uſages of every Court.

If a Judge is doubtful or miſtaken in Matter of Law, a Stander-by (as *Amicus Curiæ*) may be allowed to inform the Court.

9 Rep. 30. 1 Inſt 125. a. 155. b. Finch, 227. 3 Inſt. 29. 137, 230. 3 Black. Com. 314.

6. Trial of Matters of [c] *Record* is to be by the *Record* itſelf. The Proceedings of Courts *not* of Record, ſhall be tried by a Jury.

[c] 1 Inſt. 117. b. 3 Black. Com. 330. 9 Rep. 31. 2 Roll. Abr. 574, 575, 576.

7. Trial by twelve Men, or by [d] *Jury*, is the common Method, and of daily Practice. Matters of Fact are to be tried and decided by them; though if they take upon themſelves the Knowledge of the Law, and give a general Verdict, it is good. But to find the ſpecial Matter is the ſafeſt Way.

[d] 9 Rep. 24, 30. Finch 399, 400. Litt. 368. 1 Inſt. 228. a.

In this Way of Trial by Jury, let us conſider the *Proceſs* to bring in the Jury, *Challenges* of the Jury, the Evidence to be given to the Jury, the *Verdict*.

See of Trial by Peers, ch. 5. poſt. 3 Black. Com. ch. 23.

Of the Trial by Jury.

1. The *Proceſs* to bring in the Jury in the *Common Pleas*, is by *Venire facias* and *Habeas Corpora Juratorum*; a *Diſtringas Juratores* goes out of the *King's Bench* to the ſame Intent as the *Habeas Corpora Juratorum*. Upon this Writ of *Venire* the Sheriff ſhall return a Jury in a Panel, or little Piece of Parchment, annexed to the Writ; on which Account the

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[b] *Ex facto jus oritur.* 2 Inſt. 226. b. 2 Inſt. 49. 3 Inſt. 29. *Ad quæſtionem juris non reſpondent juratores, ſed judices.* 1 Inſt. 125. a. 155. b. 226. a. 9 Rep. 24.

[d] *Ad quæſtionem facti non reſpondent judices, ſed juratores.* 1 Inſt. 125. a. 155. b. 226. a. 9 Rep. 24.

Ja. 1. *ch.* 15. 7 *Ja.* 1. *ch.* 5. 21 *Ja.* 1. *ch.* 12, *&c.* See alſo of *Evidence, poſt.*]

d 1 Inſt. 126. a.
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[*By* 14 G. 2. ch. 17. *If the Plaintiff neglects to bring on his Iſſue to be tried according to the Courſe of the Court, the Court upon Motion may give Judgment for the Defendant, as in the Caſe of a Nonſuit.*]

Of Trial.
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[a] *Eventus judiciorum ſunt incerti.* 8 Rep. 40.

4. Trial *by* [e] *Wager of Law*, or the Defendant's Oath, as in Debt upon a ſimple Contract, Detinue, *&c.*

To wage Law (*Vadiare Legem*) is to take an Oath at the Bar, that he oweth not the Debt demanded of him upon a ſimple Contract, or any Part thereof: But he ought to bring with him eleven of his Neighbours, or ſo many Perſons as the Court ſhall order, that will avow upon their Oaths, that they *believe* he ſayeth the Truth. But this may be diſpenſed with at the Diſcretion of the Court.

Note, Though the Books mention eleven Compurgators, yet it is the Courſe in the Common Pleas to have but ſix.

[e] 1 Inſt. 294. b. 295. a.
2 Inſt. 45.
4 Rep. 95.
9 Rep. 32, 87, 88, 89, 90.
Finch, Book 4. ch 39.
Exod. xxii. v. 10, 11.
3 Black. Com. 341.
1 Ld. Ray. 500.

But Actions *on the Caſe* are now brought for Debts upon ſimple Contract; and Trover and Converſion for Detinue, *&c.* where the Defendant cannot wage his Law; upon which Account Wager of Law is much out of Uſe. It *may* be ſtill in Actions of Debt upon a *By-Law* or an *Amerciament* in a Court-Baron, unleſs the Lord does preſcribe to determine Pleas by a Jury. No Wager of Law ſhall be againſt the King. And in every *Quo Minus* brought by the King's Debtor in the Exchequer, againſt one indebted on a ſimple Contract, the Defendant ſhall not wage his Law, for the Benefit of the King.

[a] *Trial* by *Battle* is diſuſed. Trial by *Ordeal* is taken away by *Statute* not printed.

[a] 9 Rep. 32, 33.
3 Black. Com. 338.

5. Trial of *Matters* of [b] *Law* is by the *Judges* upon Demurrers, ſpecial Verdicts and Exceptions to Evidence. Alſo upon the Cuſtoms and Uſages of every Court.

If a Judge is doubtful or miſtaken in Matter of Law, a Stander-by (as *Amicus Curiæ*) may be allowed to inform the Court.

[c] 9 Rep. 30.
1 Inſt 125. a. 155. b.
Finch, 227.
3 Inſt. 29. 137, 230.
3 Black. Com. 314.

6. Trial of Matters of [c] *Record* is to be by the *Record* itſelf. The Proceedings of Courts *not* of Record, ſhall be tried by a Jury.

[c] 1 Inſt. 117. b.
3 Black. Com. 330.
9 Rep. 31.
2 Roll. Abr. 574, 575, 576.

7. Trial by twelve Men, or by [d] *Jury*, is the common Method, and of daily Practice. Matters of Fact are to be tried and decided by them; though if they take upon themſelves the Knowledge of the Law, and give a general Verdict, it is good. But to find the ſpecial Matter is the ſafeſt Way.

In this Way of Trial by Jury, let us conſider the *Proceſs* to bring in the Jury, *Challenges* of the Jury, the Evidence to be given to the Jury, the *Verdict*.

[d] 9 Rep. 24, 30.
Finch 399, 400.
Litt. 368.
1 Inſt. 228. a.
See of Trial by Peers, ch. 5. poſt.
3 Black. Com. ch. 23.
Of the Trial by Jury.

1. The *Proceſs* to bring in the Jury in the *Common Pleas*, is by *Venire facias* and *Habeas Corpora Juratorum*; a *Diſtringas Juratores* goes out of the *King's Bench* to the ſame Intent as the *Habeas Corpora Juratorum*. Upon this Writ of *Venire* the Sheriff ſhall return a Jury in a Panel, or little Piece of Parchment, annexed to the Writ; on which Account the

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[b] *Ex facto jus oritur.* 2 Inſt. 226. b. 2 Inſt. 49. 3 Inſt. 29.
Ad quæſtionem juris non reſpondent juratores, ſed judices. 1 Inſt. 125. a. 155. b. 226. a. 9 Rep. 24.

[d] *Ad quæſtionem facti non reſpondent judices, ſed juratores.* 1 Inſt. 125. a. 155. b. 226. a. 9 Rep. 24.

Jury is ſaid to be *impanelled*; and then ſhall go the Writ of *Habeas Corpora*, to bring in the Jury. [See the Catalogue of Writs, *ſupra*, for *Venire facias*, *Habeas Corpora*, and *Diſtringas Juratores*, and 13 *Car.* 2. *St.* 2. *ch.* 2. 7 & 8 *W.* 3. *ch.* 32.]

By 4 An. ch. 16. *By Virtue of ſpecial Writs of* Diſtringas *or* Habeas Corpora, *ſix Jurors may* view [a] *the Houſes, Lands, or Places in Queſtion.* [See 3 *G.* 2. *ch.* 25.]

Now the Plaintiff's Attorney ought to give the Defendant's Attorney ſufficient Notice of Trial in Writing.

[*By* 14 G. 2. *ch.* 17. *He muſt give ten Days Notice at leaſt, if Defendant reſides above forty Miles from* London; *and*

Countermand of Notice muſt be at leaſt ſix Days before the intended Trial, or elſe the Plaintiff ſhall pay Coſts, as if there had been no Countermand.

But for the Sittings in *London* or *Middleſex*, if the Defendant lives within forty Miles from *London*, eight Days Notice of Trial, excluſive, is ſufficient; if above forty Miles there muſt be fourteen Days; and if the Defendant lives within forty Miles, two Days Countermand is ſufficient.]

When the Jury appear upon the Proceſs, if the Defendant does not appear, the Plaintiff may pray, that the Inqueſt may be taken by Default, and his Petition will be granted, whether the Defendant afterwards appears or not. In ſuch Caſes the Uſage is to go into the Evidence for the Plaintiff, and take a Verdict for him.] But if the Plaintiff makes Default, he ſhall be *nonſuited*, and the Defendant ſhall have Coſts. [See 7 & 8 *W.* 3. *ch.* 32. and for the Writ of *Proviſo* the *Catalogue* of *Writs*, *ſupra*, v. *Proviſo*.]

2. The [b] *Jury* (*Jurata*, from *Jurare*, to ſwear) ſignifieth twelve Men (*Liberos et Legales*, Freemen, indifferent, and not outlawed or infamous) who are ſworn Judges upon Evidence in Matters of Fact. The Words *Aſſize*, *Inqueſt*, and *Homage*, are ſometimes taken for a Jury.

[c] Aliens, Men attainted of any Crime, ought not to ſerve on Juries. Clergymen, Infants under fourteen Years of Age, and Perſons ſeventy Years old, &c. are exempted. [See *Weſt.* 2. *ch.* 38. for Perſons *ſeventy* Years old. 6 *W.* 3. *ch.* 4. for *Apothecaries.* 7 & 8 *W.* 3. *ch.* 32. for the County of *York*, and for the Inhabitants of *Weſtminſter*, &c. And ſee *Non ponendis in Aſſiſis et Juratis* in the *Catalogue* of *Writs*, *ante*.]

There is a Jury ſometimes *Per medietatem Linguæ* (*i. e.*) half of the Jury are to be Aliens, where one of the Parties is an Alien. [See 27 *Ed.* 3. *St.* 2. *ch.* 8. 28 *Ed.* 3. *ch.* 13. 8 *H.* 6. *ch.* 29. 1 & 2 *Ph.* & *M.* *ch* 4.] But this is not allowed in [d] High Treaſon.

If both Parties [e] are Aliens, the Jury ſhall be all *Engliſh*.

Sometimes a *ſpecial Jury* is granted (*viz.*) that the Sheriff ſhould attend the Prothonotary with his Book of Freeholders, that the Prothonotary, in the Preſence of the Attornies on both Sides, may take out forty-eight, from which each Party ſtrike out twelve, and then the Sheriff may impanel the reſt.

[See 7 & 8 *W.* 3. *ch.* 32. For the Conſtable's Duty to return to the Quarter-Seſſions a Liſt of all thoſe that are qualified to ſerve on Juries, &c. See 3 *Geo.* 2. *ch.* 25. and 4 *Geo.* 2. *ch.* 7. for chooſing Juries by Ballot, &c. and the Method of appointing Views, and ſpecial Juries, and 24 *Geo.* 2. *ch.* 18. touching ſpecial Juries, and for returning Juries *de*

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[a] 1 Inſt. 158. b.

[b] Finch 400. 1 Inſt. 154. b. 155 a. & b. 2 Inſt. 27. 3 Inſt 221.

[c] F. N. B. 166. 2 Inſt. 447.

[d] 3 Inſt. 27. H. P. C. 260.

[e] 21 H. 6. pl. 4. Trials per pais 196. Hawk. P. C. B. 2. p. 420.

Corpore Comitatus on Iſſues upon penal Statutes, and for altering the Law for returning a Knight upon the Panel where a Peer of the Realm is a Party.]

[a] *Tales*-Men (*Tales de Circumſtantibus*) are By-Standers to ſupply the Want of Jurymen of the principal Panel, who were impanell'd on the Jury, and did not appear; or at their Appearance were challenged by either Party as not indifferent. In which Caſe the Judge of *Niſi Prius*, upon Motion of the Plaintiff or Defendant, grants a Supply to be made by the Sheriff, *&c.* of one or more preſent in the Court, to make a full Jury, which he could not do by the *Common Law.* [See 35 *H.* 8. *ch.* 6. 4 & 5 *Ph. & M. ch.* 7. 5 *El. ch.* 25. 14 *El. ch.* 9. 4 & 5 *W. & M. ch.* 24 and eſpecially the 7 & 8 *W.* 3. *ch.* 32.] There is alſo a *Decem Tales*, as when a full Jury doth not appear at a Trial at the Bar, there goes out *a Writ to the Sheriff*, *Apponere Decem Tales.*

3. There may be *Challenges* of a Jury. *A* [b] *Challenge* (*Calumnia*, a feign'd Word in this Caſe) in legal Senſe, as applied to a Jury, is an Exception againſt them that are return'd to be Jurors. This Challenge is twofold (*viz.*) to the *Array* and to the *Polls.*

1. A Challenge to the *Array* (ſo called becauſe the Jurors Names are arrayed and rank'd one under another) is to the Array of the *principal Panel*, or to the Array of the *Tales*. A Challenge to the *Array* of the *principal Panel* is at once to except againſt all the Perſons ſo arrayed or impanell'd. And here may be a *principal Cauſe* of Challenge to the Array, and a Challenge to the *Favour*. 1. A *principal Cauſe*, in reſpect of *Partiality* or *Default* of the Sheriff, or other that made the Return of the Jury, and not in reſpect of the Perſons return'd. *Partiality* of the Sheriff may be by Reaſon of Kindred or Affinity to the Plaintiff or Defendant, or if one of the Jury is return'd at the Nomination of the Plaintiff or Defendant, *&c.* His *Default* may be by not returning a Knight, when a Peer of the Realm is either Plaintiff or Defendant, [but the Challenge for this Cauſe is taken away by 24 *Geo.* 2. *ch.* 18.] or if the Array is return'd by the Bailiff of a Franchiſe, and the Sheriff returns it as of himſelf. 2. To the *Favour*; which is not ſo ſelf-evident an Exception, but is left to the Judgment of *Triers*, two of them that are impanell'd being appointed by the Court for that Purpoſe; as if the Plaintiff or Defendant is Tenant to the Sheriff, or if the Sheriff's Son hath married the Daughter of the Party, *&c.* This Exception to the *Favour* may be left to ſuch a Trial, and the whole Array may be quaſh'd for it. The King may take a principal Challenge, or to the Favour; and it ſhall be tried according to the uſual Courſe. But where the King is Party, or in caſe of Life, one ſhall not challenge the Array for Favour, though the King may do it. A Subject may take a principal Challenge. If one Man is ſworn, the *Array* cannot be challenged, either for a principal Cauſe of Challenge, or for Favour. Yet if the Challenge to the *Array* is found againſt the Party that takes it, he ſhall have his Challenge to the Array of the *Tales*, and his particular Challenge to the *Polls.*

2. A Challenge to [c] the *Polls* is an Exception againſt one or more particular Jurors return'd. And this may be *Peremptory*, *Principal*, for *Favour*, for Default of *Hundredors*.

1. *Peremptory*,

[a] 10 Rep. 102, 103, 104, 105. Finch 414. 2 Roll. Abr. 671, 672. 2 Ld. Ray. 1170.

[b] 1 Inſt. 55. b. 156. a. & b. Terms of the Law, v. Challenge. Finch 400, 401, 412, 413. 2 Roll. Abr. 636, 637, 638, 639, 640, 641, &c. 3 Black. Com. 359.

[c] 1 Inſt. 156 b. 157. a & b. 158. a. 172. b. Kitchen 181, &c. 3 Black. Com. 361.

3 Black.Com. 361. 1. *Peremptory*, without ſhewing any Cauſe, which is only in Treaſon or Felony, in Favour of Life.

2. *Principal*, ſo call'd, becauſe if it is found true, it is ſufficient, without leaving it to Triers. Principal Challenge to the Polls may be reduced to *four* Heads, (*viz.*) *Propter Honoris Reſpectum*, *Propter Defectum*, *Propter Affectum*, *Propter Delictum*.

Propter Honoris Reſpectum, in reſpect of *Honour*, as becauſe he is a Peer of the Realm.

Ibid. 362. *Propter Defectum*, in reſpect of ſome *Defect*, or Default; as of *Birth*, becauſe *Alien* born; or of *Age*, becauſe a * *Minor*; or of *Eſtate*. For,

By 4 & 5 W. & M. ch. 24. *and* 7 & 8 W. 3. ch. 32. *Jurors* Eſtates *ought to be* 10l. per Ann. *at leaſt*, *for Life in* Freehold *or* Copyhold *Lands or Tenements*, *or Rents*; *and in* Wales, *Six Pounds* per Ann. *excepting Strangers return'd* Per Medietatem Linguæ. Tales-*Men muſt be Freeholders or Copyholders of the County*, *of Five Pounds a Year*; *and within* Wales *of Three Pounds a Year. Saving to all Cities, Boroughs, and Towns Corporate, their ancient Uſage of returning Jurors in ſuch Manner as hath been accuſtom'd.*

[*By* 3 Geo. 2. ch. 25. *A Leaſe for* 500 *Years*, *or for* 99 *Years, determinable on a Life or Lives, of the yearly Value of twenty Pounds over and above the reſerved Rent, is a Qualification. And by* 4 G. 2. ch. 7. *A ſhort Leaſe of* 50l. *improved Rent, over and above the Ground Rent in* Middleſex. *And the Sheriffs of* London *may impanel any Houſholder who hath Lands, Tenements, or Perſonal Eſtate to the Value of one Hundred Pounds.*]

[See 2 *H.* 5. *St.* 2. *ch.* 3. 8 *H.* 6. *ch.* 29. 4 *H.* 8. *ch.* 3. 23 *H.* 8. *ch.* 13. 35 *H.* 8. *ch.* 6. 27 *El. ch.* 6. See alſo 7 & 8 *W.* 3. *ch.* 32. 3 & 4 *Ann. ch.* 18. 10 *Ann. ch.* 14. For the County of *York*.]

[a] 1Cro. 413. Theſe Statutes ſpeak only of Jurors Eſtates betwixt [a] Party and Party, which extend not to the King, where he is Party. But here the Juror ought to have ſome Freehold as at Common Law.

[*But by* 3 Geo. 2. ch. 25. § 20. *Sheriffs or others ſhall not impanel any Perſon to ſerve on any Jury in any County, City, or Place, for the Trial of any capital Offence, who at the Time of ſuch Return would not be qualified to ſerve as a Juror in a civil Cauſe, in ſuch County, City, or Place: And the ſame Matter and Cauſe alledged by way of Challenge, and ſo found, ſhall be taken as a principal Challenge; and the Perſon ſo challenged may be examined upon Oath, as to the Truth of ſuch Matter.*]

[b] 1Inſt.156.b. 157.a.&b. 158.a. Hob. 294. 1 Saund.344. 1 Str. 643. 3 Black.Com. 363. [b] *Propter Affectum*, working a *principal* Challenge, or to the Favour. *Principal*, when there is expreſs Favour, or expreſs Malice. If a Body Politick or Incorporate brings an Action that concerneth the Body, if the Juror is of Kindred to any of that Body, it is a principal Challenge. So if one of the Parties is of Conſanguinity or Affinity to a Juror; if a Juror hath given a Verdict before for the ſame Cauſe, Matter, or Title, tho' betwixt other Perſons; if one labours a Juror, and gives him any Thing for his Verdict; if after he is return'd, a Juror doth eat and drink at the Charge of either Party; if a Juror hath been an Arbitrator, choſen

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* *Minor jurare non poteſt.* 1 Inſt. 172. b.

by the Plaintiff or Defendant in the ſame Cauſe. To the *Favour*, [See *Poſtea.*]

Propter Delictum, for *Crime*, as if the Juror is convicted or attainted of Treaſon, Felony, Perjury as a Witneſs, adjudged to the Pillory, Tumbrel, *&c.* or to be branded or ſtigmatized, or to have any other corporal Puniſhment, whereby he becometh * infamous, or if he is outlaw'd or excommunicated. 3 Black.Com. 363.

Theſe are all *principal* Challenges, becauſe they are betwixt the Parties to the Record. [a] In this and all other Caſes he that challengeth muſt ſhew the Record, if he will have it take place as a principal Challenge; otherwiſe he muſt conclude to the Favour; unleſs it is a Record of the ſame Court. [a] 1 Inſt. 157.b.

3. For [b] *Favour*; when either Party cannot take any principal Challenge, but ſheweth Cauſe of Favour; which muſt be left to the Diſcretion of the Triers, upon hearing of the Evidence, as upon a Challenge of the Array for Favour. But ſome of them come nearer to a principal Challenge than others. The Cauſes of Favour are infinite, but thereof ſomething may be gathered from what hath been ſaid. In general it is a Rule, that a Juror muſt ſtand indifferent, as he ſtands unſworn. [b] 1 Inſt. 157.b. 3 Black.Com. 363.

4. For Default of † *Hundredors*. But,

By 4 Ann. ch. 16. *For preventing Delays which happen by Reaſon of Challenges to the Array of Panels of Jurors and to the Polls, for Default of* Hundredors, *every* Venire Facias *for Trial of Iſſue in any Action or Suit in any Court of Record at* Weſtminſter, *ſhall be awarded of the* Body *of the proper* County, *where ſuch Iſſue is triable. This is not to extend to Appeals of Felony or Murder, or to any Indictment or Preſentment of Treaſon or Felony, or to any Writ, Bill, Action or Information upon any penal Statute.* [See 27 *El. ch.* 6.] *But by* 24 Geo. 2. ch. 18. *it ſhall extend to Actions and Informations upon penal Statutes.*

The Time to challenge a Juror is before he is ſworn, otherwiſe if the Cauſe of Challenge ariſes after he is ſworn.

The Juror himſelf may be examined upon a [c] *Voire Dire* (to ſpeak the Truth) upon his Oath, to inform the Triers of the Truth of the Challenge, if the Cauſe of Challenge tends not to his Diſcredit. But the Triers are not bound by his Oath. [c] Finch 413. 1 Inſt. 158.b.

No Challenge can be made to a Jury impanell'd upon a Writ of Inquiry. [See of *Judgment*, *infra.*]

[See of *Trial* and *Challenge*, *ch.* 5. *poſt.*].

4. Each Juror muſt take the Oath appointed by Law, and muſt be ſworn well and truly to try the Iſſue of *Niſi Prius* according to the Evidence.

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* *Repellitur à ſacramento infamis:* 1 Inſt. 158. a.

† *Vicinus facta vicini præſumitur ſcire.* 1 Inſt. 158. b.

[a] Terms of the Law, v. Evidence. 1 Inſt. 283. a. 3 Black. Com. 367.

‡ [a] *Evidence*, (*Evidentia*) is generally uſed for ſome Proof either by *Writing* or *Witneſſes*.

This Word *Evidence* doth not only contain Matters of *Record*, as Letters Patent, Fines, Recoveries, Inrollments of Bargain and Sale, *&c.* and *Writings* under Seal, as Charters and Deeds (tho' the Seal is broken off) and other Writings without Seal, as Court-Rolls, Accounts, Letters, *&c.* which are call'd *Inſtruments*; but in a larger Senſe it containeth alſo the *Teſtimony* of *Witneſſes*, and other Proofs to be produced and given to the Jury, for finding the Iſſue join'd betwixt the Parties. It is call'd Evidence, becauſe thereby the Point in Iſſue is to be made *evident* to the Jury. If it *tends* towards ſuch Evidence, it is alſo call'd Evidence in legal Underſtanding, though not in common Speech.

Where the Evidence proves the Effect and Subſtance of the Iſſue, it is good.

1. As to *Writings*.

[b] Trials per Pais 177, 178, 232, 233. 1 Str. 446.

[b] *General* Acts of Parliament may be given in Evidence, and need not be pleaded. And of theſe the printed Statute Book is good Evidence. A *private* Act of Parliament in many Caſes ought to be pleaded, and the printed Statute is not allowed as Evidence, tho' in the ſame Volume with the general Statutes printed by the King's Printer; but a Copy, whether printed or written, examined by the Record or Parliament-Roll, and proved to be a true Copy, is ſufficient Evidence.

[c] 9 Rep. 31. 1 Inſt. 117. b. 260. a. 2 Roll. Abr. 574, 575, 576. [d] 10 Rep. 92, 93. 1 Inſt. 128. a. & b. 3 Inſt. 173. [e] Trials per Pais 166.

[c] *Records* and *Inrollments* prove themſelves, and cannot be proved by Witneſſes. The [d] Copy of a Record or Inrollment may be given in Evidence, being ſworn to be a true Copy. No Razure or Interlining ſhall be intended in a Record. But the ſureſt Way is to *exemplify* a Record under the Great Seal, or under the Seal of the Court, to prove a Record upon *Nul tiel Record* pleaded; and then the Exemplification of a Record may be offered in Evidence; if the whole Record, not a Part of it, is exemplified. [e] But if one takes out a Copy of Part of a Record, he muſt at leaſt take out ſo much as concerns the Matter in Queſtion, and make Oath that there is no more of it that concerns the Iſſue; [but *Qu.* if this is ſufficient.]

By 3 & 4 Ed. 6. ch. 4. 13 El. ch. 6. *An Exemplification of the Inrollment of* Letters Patent *under the Great Seal ſhall be ſufficient, to be* pleaded, *and* ſhew'd *forth in Court.*

[f] Inſt. 225. b.

The [f] Letters Patent themſelves were to be ſhew'd at Common Law. [See the Difference betwixt an *Exemplification* and a *Conſtat*, and of an *Inſpeximus*, *Innoteſcimus*, and *Vidimus*, 5 *Rep.* 53, 54.]

By 5 H. 4. ch. 14. 23 El. ch. 3. 27 El. ch. 9. Inrollments *of* Fines *and* Recoveries *are of as great Validity as the Originals.*

[g] Trials per Pais 167, 209.

[g] A Fine or Common Recovery may be given in Evidence, tho' it is not under the Great Seal, or Seal of the Court, and without vouching the Roll of the Recovery. The Part indented is the uſual Evidence that there is ſuch a Fine. But again it is ſaid on the contrary, that the Fine muſt be ſhew'd with the Proclamations, under Seal. And that the Chyrograph or Indenture will not be ſufficient; (that is, where the

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[a] *Probationes debent eſſe evidentes, perſpicuæ et faciles intelligi.* 1 Inſt. 283. a.

[‡ *Evidence*] What is legal Evidence is well performed in *Gilbert's* Treatiſe of Evidence; a Work, which it is impoſſible to abſtract or abridge, without loſing ſome Beauty; and breaking the Chain of the whole; and which hath lately been ingrafted into that uſeful Work, *The Introduction to the Law of* Niſi Prius, 4to. 1767.

Fine *with Proclamations* is to be a Bar to a Stranger, there muſt be an examined Copy from the Roll of the Fine and Proclamations.)

An Inrollment of a Deed proves itſelf, the Court being certified of it by a Copy of the Inrollment, examined and atteſted upon Oath. Inrollments ought to be credited, the Deeds being firſt acknowledged to be the Deeds of the Parties before a Maſter in Chancery, if inrolled in the Chancery; or before a Judge of the Court where it is inrolled. The Tranſcripts too are made by Officers of Truſt. But the Inrollment of a Deed, which needs no Inrollment, or [a] where the Eſtate doth not paſs by it, is only Evidence to ſome Purpoſes, and when it can be proved to a Jury by Circumſtances, that there was ſuch a Deed, which is loſt or burnt.

a Trials per Pais 194, 206.

By 10 Ann. ch. 18. *If an Indenture of* Bargain *and* Sale [b] *is pleaded, a Copy of the Inrollment thereof, examined and ſigned by the proper Officer, and proved upon Oath to be a true Copy, is as good Evidence as the original Indenture of Bargain and Sale.* [See 5 *El. ch.* 26. 5 *Ann. ch.* 18. 6 *Ann. ch.* 35. 7 *Ann. ch.* 20. and 12 *Ann. Seſſ.* 2. *ch.* 14. where Examinations of Popiſh Patrons, *&c.* 1 *Geo.* 1. *ch.* 10. where *Entries* of Augmentations, *&c.* or Copies thereof are Evidence.]

b See p. 249, ante.

A Copy of a *Conviction* upon an *Indictment* is not ſufficient Evidence ſingly by itſelf in an [c] *Action* of Treſpaſs, for the ſame Aſſault and Battery, but with other Evidence it may. [*Qu.*] An expreſs Confeſſion upon an Indictment is full Evidence; not an implied Confeſſion, where the Defendant ſubmits to a Fine, rather than contend with the King.

c Terms of the Law, v. Battery. Trials per Pais 25, 166.

A Record of an *inferior Court*, has been rejected in Evidence, and the Party has been put to prove, what has been done, in the inferior Court. So much of Evidence by *Records*, as they come under the Head of Evidence by Writings.

Concerning *Deeds* and *Writings* not of *Record.*

Every [d] *ancient Deed* proves itſelf, where Poſſeſſion hath gone accordingly; and tho' it has no Seal to it, or tho' the Execution of it cannot be proved. But *later* Deeds muſt be proved by Witneſſes. If the Seal is broken off, yet the Deed may be given in Evidence. If all the Witneſſes are dead, the Handwriting of one of them muſt be proved. A Deed cannot be proved by a [e] *Copy*, for the original Deed might be interlined, razed, or not ſufficient in Law, or not ſealed or delivered. Yet in Caſes of Extremity, as where the Deed was burnt, *&c.* the Judges may at their Diſcretion allow a Copy to be proved by Witneſſes. A Copy of a Deed will be allowed, when the Defendant has the Deed, and will not produce it, upon Notice. If an original Deed is in Being, or may be had, the [f] *Counterpart* cannot be produced in Evidence; otherwiſe if the Original cannot be procured. Nay, a Copy of a Counterpart of a Leaſe, the Leaſe being loſt, has been admitted. The [g] *Recital* of a Deed is no good Evidence, without ſhewing the Deed itſelf; unleſs it can be proved, that there was ſuch a Deed in Being, and that it is loſt. There cannot be an *Exemplification* of a [h] Copy of a Deed, though the Copy is inrolled. *Writings* not of Record, as *Leiger Books* of Corporations, where Leaſes and Grants are entered, and ſuch Paper Books cannot be exemplified under the Great Seal, or other Seal in Courts of Record, but the Original muſt be produced; for a Leiger Book itſelf is but a Copy. Therefore it muſt be abſurd to offer a Copy

d 1 Inſt. 6. b. 2 Inſt. 118. Trials per Pais 166, 220, 232, 233.

e 1 Inſt. 225. a. & b. 10 Rep. 92. Trials per Paris 232. 1 Mod. 4.

f 1 Lev. 25. Trials per Pais 232. 1 Salk. 287.

g 1 Inſt. 352. b. Vaugh. 74, 75. 2 Lev. 108.

h 3 Inſt. 173, 174. Trials per Pais 231.

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[d] *Ex diuturnitate temporis omnia præſumuntur ſolemniter acta.* 1 Inſt. 6. b. 2 Inſt. 362.

of a Copy. Original *Letters* muſt be ſhewed, not a Copy of them. [a] A *Pedigree* drawn by a Herald at Arms, for one that claims to be Heir, *&c.* will not be accepted as Evidence, without ſhewing the Records or ancient Books from whence it was taken. A Regard will be had to very ancient Books. But a Copy of an Inſcription on a Grave-ſtone has been admitted in Evidence, to prove a Pedigree. [b] A *Church-Book* ought not to be allowed in Evidence. [But a Pariſh-Regiſter, or a Copy or Extract thereof, proved, to have been examined, and to be a true Copy, is Evidence.] [c] A *Shop-Book* is no Evidence after a Year. [See 7 *Ja.* 1. *cap.* 12.] Methinks the Book only of a Merchant or Trader ſhould be no good Evidence to prove a Debt due to himſelf; though it is good Evidence for the adverſe Party to prove a Debt againſt him. [It hath been held [d] not to be Evidence, *of itſelf*, even within the Year.] The Book of [e] *Domeſday* brought into Court, is good Evidence, to prove Lands to be *ancient Demeſne*. An *Almanack* has been allowed ſufficient Evidence to prove a Day to be *Sunday*. [f] An Almanack, wherein a Father had writ the Day of the Birth of his Son, was allowed as good Evidence, to prove the Non-Age of his Son.

Proceedings in *Courts not of Record*, as County-Courts, Hundred-Courts, Courts-Baron, *&c.* may be denied, and tried by a Jury. They cannot be proved by the Rolls, but muſt be proved by Witneſſes; and then the Rolls may be Evidence too. A *Copy* of the *Court-Rolls* of a *Court-Baron* regularly will not be admitted in Evidence, [g] though Copies of the Court-Rolls are the only Evidence, in Point of Alienation, concerning the Tenements of Copyholders. The Court-Rolls themſelves muſt be ſhewn. But there hath been an unſettled Practice in this Caſe, [h] the Judges having allowed Copies of Copyhold Admittances to be given in Evidence, where the Rolls have been in Being, as well as where they have been loſt. [And this ſeems to be the preſent practice.] If Copies of Court-Rolls are ſhewed, to prove a cuſtomary Eſtate, the Enjoyment thereof alſo as ſuch, ought to be proved. Upon Motion a Copy-holder hath obtained a Rule, for the Steward of a Court-Baron to grant Copies, and that the Court-Rolls may be produced at Trials; becauſe all the Tenants of a Manor have an Intereſt in the Court-Rolls. But this has been alſo denied.

[i] A *Bill* by a *Complainant* in the Court of *Chancery*, has been allowed as Evidence againſt him, but looked upon to be but ſlight Evidence [*Qu.* [k]] [i] A Defendant's *Anſwer* is Evidence againſt himſelf, though not againſt others [unleſs they claim under him] if the Bill is proved to have been filed. *Depoſitions* of Witneſſes in Chancery betwixt the ſame Parties may be accepted if the Witneſſes are dead [m], proving the Bill and Anſwer filed [n]. A *Decree* is no Evidence in a Court of Common Law. [But *Qu.* if [o] Decrees as well as Sentences of Eccleſiaſtical Courts, have not been often admitted; and if made in a Cauſe where the Court had a competent Juriſdiction, it ſeems to be abſurd not to admit them.] An *Affidavit* made before a Maſter in Chancery, is not to be allowed as Evidence, though the Party is dead; unleſs one can make Oath, that ſuch an *Affidavit* was made in his Preſence; it may be allowed as a Note or Letter. *Affidavits* may be read in Courts upon Motions, but not upon Trials. [See 5 *Geo.* 1. *ch.* 24. to prove the Bankruptcy, *&c.*]

[a] *Depoſitions* in the *Eccleſiaſtical Court* cannot be given in Evidence; [but *Qu.* if this muſt not be underſtood, if taken in a Cauſe where the Court hath no Juriſdiction, as in a Cauſe relating to Lands or the like] but a *Sentence* may in a Cauſe of Tithes, *&c.* and the Sentence may be alledged

[a] 2 Roll. Abr. 686, 687. Trials per Pais 165. 218.

[b] Trials per Pais 180. Contra, 1 Cro. 411.

[c] Trials per Pais 173, 232.

[d] 2 Ld. Ray. 873. 1 Salk. 285. S. C. 2 Salk. 690. 1 Ld. Ray. 732 S C. 745.

[e] 9 Rep. 31. Hob. 188.

[f] Raym. 84.

[g] Lit. 75.

[h] Trials per Pais 178, 228.

[i] 1 Vent. 66. Trials per Pais 167, 168, 207, 208, 234, 239.

[k] 1 Chanc. Caſ. 64

[l] 1 Ld. Ray. 311.

[m] 2 Ld. Ray. 1166

[n] 4 Mod. 146. 1 Salk. 278. S. C.

[o] 2 Mod. 231. 2 Str. 960, 961.

[a] 1 Inſt. 303. a. 2 Roll. Abr. 679. Trial per Pais 167, 212. 1 Salk. 290. 2 Str. 960, 961.

alledged ſummarily. [See 29 *Car.* 2 *ch.* 8. as to Evidence of *Augmentations* to ſmall Vicarages and Curacies by the *Regiſter*'s Book, *&c.*] A [b] *Probate* of a *Will* as to *perſonal* Eſtate ſhall be admitted. But if Iſſue is taken upon it, as that the Seal is forged, or that there was *Bona Notabilia*, it ſhall be tried by a Jury. [c] A Will, under which Title to *Land* is made, muſt be ſhewed; not a Copy of it, or the Probate, or any Proceedings about it in the Spiritual Court; unleſs perhaps the Original cannot be found. Yet if the Will is proved in *Chancery*, examined Copies of the Depoſitions taken there will be admitted in Evidence, [that is, if all the Witneſſes are dead, or if the Will is ſo ancient as that it muſt be preſumed they are not living, or if the original Will is loſt; for otherwiſe it is not the beſt Evidence that can be had.] [d] An *Account* of an Executor or Adminiſtrator allowed by the Ordinary, ſhall not be given in Evidence, nor any Regard had to it, upon *Plene Adminiſtravit.* [e] The Acts of the Eccleſiaſtical Court have been admitted to prove the Grant of an *Adminiſtration.* In a *Quare Impedit* a Copy of a *Retainer*, which was entered in the *Court* of *Faculties*, was offered in Evidence on the Behalf of a Chaplain, but was not allowed.

[b] 2 Roll. Abr. 678. Trials per Pais 193, 211, 220, 225. 1 Lev. 236.
[c] Trials per Pais 234, 235.
[d] Trials per Pais 211, 235.
[e] 1 Lev. 25.

By 7 & 8 W. 3. ch. 7. *If any Perſon ſhall make a falſe or double Return of a Member of Parliament, he ſhall forfeit* 300 l. *to be divided betwixt the King, the Poor of the Place, and the Informer, and the Party proſecuting may give in Evidence the* Book *of the* Clerk *of the* Crown, *or a* Copy *thereof.*

2. Of * *Witneſſes.*

[f] Witneſſes cannot teſtify a Negative, but only an Affirmative. [But a Witneſs may well teſtify that *A.* was not preſent at ſuch a Place, as that he was, or the like; and as the Iſſue admits of a Negative or Affirmative, there may be Proof on each Side, ſo that this Rule, if underſtood according to common Speech, is at leaſt *too general.*]

[f] 2 Inſt. 662. 3 Black. Com. 369.

Witneſſes muſt ſwear to ſpeak the Truth, and nothing but the Truth of what they have heard or ſeen, not what they [g] *believe* or *remember*, or to the *beſt* of their *Remembrance.* [The Oath uſually adminiſtered to Witneſſes, is general, *to ſpeak the Truth, the whole Truth, and nothing but the Truth:* But a Witneſs may teſtify to the beſt of his Remembrance or Belief, in Caſes where, from the Nature of the Thing, or the Length of Time ſince the Tranſaction, it cannot be expected he ſhould be more poſitive; but as to what he has heard, unleſs it be from the Party himſelf as Evidence againſt him, ſuch *Hearſay* Evidence, *in general*, is not admiſſible.]

[g] 3 Inſt. 166.

To a Jury *one* Witneſs is ſufficient. But if a Witneſs [a] is *infamous* (*i. e.*) attainted of a falſe Verdict, or of a Conſpiracy, at the Suit of the King, or convicted of Perjury, where a Pardon cannot reſtore his Credit, [See 5 *El. ch.* 9.] [*Qu.* if [b] convicted of Perjury at Common Law only] or convicted of a *Præmunire*, Forgery upon the Statute of 5 *El. ch.* 14. (not upon the Statute of the 1 *H.* 5. *ch.* 3.) or convicted of cheating at

[a] 1 Inſt. 6. a. & b.
[b] 2 Salk. 689.

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* *Judex non poteſt eſſe teſtis in propria cauſa.* 4 Inſt. 279.
Plus valet unus oculatus teſtis, quam auriti decem. Ibid.
Teſtibus deponentibus in pari numero, dignioribus eſt credendum. Ibid.
Allegans contraria non eſt audiendus. Ibid.
Juramentum in parte verum, in parte falſum, non eſt admittendum. Ibid
Allegans ſuam turpitudinem non eſt audiendus. Ibid.

[c] Hob. 81. 1 Ventr. 349. Kely 37. 38.
[d] 1 Inſt. 6. b. 3 Inſt. 219, 3 Lev. 426, 427.
[e] 2 Salk. 689. 1 Ld. Ray. 39.
[f] Pendock, on Demiſe of Mackinder, v. Mackinder, C. B. Hil. T. 28 G. 2. 2 Wilſon 18.

Cards and Dice on the Statute of 9 *Ann. ch.* 14. or convict of Felony, and not [c] pardoned, (A Burning of the Hand upon Conviction, is in the Nature of a Statute-Pardon,) [See 18 *El. ch.* 7.] or if one by Judgment hath loſt his [d] Ears, or ſtood in the Pillory or Tumbrel, or hath been ſtigmatized, or branded, or whipt, *&c.* [*Qu.* [e] unleſs the Judgment be *pro Crimine falſi*, as for Perjury, Forgery, or for ſtealing or the like; for it is now generally agreed that it is the [f] Crime, and not the Puniſhment that makes a Man infamous.] All theſe ought to be rejected from giving their Teſtimony while the Judgment is in Force. But the Record of theſe Convictions or Attainders muſt be produced in Court. You ſhall not be allowed to aſk the Witneſs any Queſtions, to accuſe himſelf of any of theſe Crimes. You may impeach his Credit by other Witneſſes as to his Character and Reputation in general; but ſhall not be admitted to make Proof of particular Crimes, whereof he never was convicted; for this is not a proper Time for his Trial.

[g] 1 Inſt. 6 b. 3 Inſt. 108. 4 Inſt. 279.
[h] 1 Inſt. 6. b. 3 Cro. 488, 492. 1 Vent. 243. 244. Hutt. 116. Raym. 1.
[i] See p, 405, ante.
[k] 1 Wms. 288, &c.
[l] 2 Ld. Ray. 1008, 1 Salk. 286. 1 Str. 101.

[g] An Infidel (not a Jew, for he ſhall be ſworn on the Old Teſtament) one of *non ſane* Memory, or not of Diſcretion, a Party intereſted in the Suit, a [h] Wife for or againſt her Huſband, *et econtra*, becauſe they are but one Perſon (except in Caſe of Treaſon, and as to the Wife, upon the Statute of 3 *H.* 7. *ch.* 2. for forcibly taking away and marrying her) the Party to an uſurious Contract againſt the Uſurer, in an Information upon the Statute of Uſury, ought alſo not to be heard as a Witneſs. [But [i] an Infidel, that is, one who is neither Jew nor Chriſtian, according to the later Determinations, may be admitted to be a Witneſs.] In Chancery, where a Witneſs at the Time of his Examination was [k] diſintereſted, and he afterwards became intereſted, and Plaintiff in the Cauſe; his Depoſitions were allowed to be read. [But *Qu.* [l] if in ſuch a Caſe they can be read at Common Law].

[m] 2 Ld. Ray. 1166.

[m] A Grantee, who is a bare Truſtee, is a good Witneſs to prove the Execution of the Deed to himſelf.

[n] Ibid. 1 Str. 34.
[o] 2 Str. 833.

[n] If the Obligee in a Bond makes the ſurviving ſubſcribing Witneſs his Executor; in an Action brought by him on the Bond, though he cannot be examined himſelf, yet Evidence may be admitted to prove his Hand, as a Witneſs dead in Law. [So if a ſubſcribing Witneſs becomes infamous.[o]]

[a] 1 Inſt. 6. b. 2 Roll. Abr. 685. 1 Sid. 315.

[a] Kinſmen, tho' never ſo near, Tenants, Servants, Maſters, Counſellors, Attornies, one of the Jury upon Trial, one that is Bail to the Arreſt, not to the Action, and all others that are not infamous, or want Underſtanding, or not Parties in Intereſt, may be Witneſſes.

A Legatee may be admitted to prove a Will, if his Legacy is but ſmall; or if he hath received his Legacy, or releaſed it. [See 25 *G.* 2. *ch.* 6. For avoiding and putting an End to certain Doubts and Queſtions relating to the Atteſtation of Wills and Codicils concerning real Eſtates.] Kinſmen, Servants, *&c.* may be ſworn; but their Credit ſhall be left to the Jury. [See 7 & 8 *W.* 3. *ch.* 34. 1 *Geo.* 1. *ch.* 6. 8 *Geo.* 1. *ch.* 6. Concerning the ſolemn Affirmation of *Quakers.*]

A Witneſs, laying a Wager, that the Party for whom he is to be a Witneſs, will carry the Cauſe, ſhall not make him incapable to be a Witneſs. For then by ſuch Art no unwilling Witneſs could be made uſe of.

[b] 2 Roll. Abr. 685, 686. 1 Mod. 73, 74.

[b] In an Action againſt the *Hundred* upon the Statute of *Wincheſter*, the Party robb'd may be a Witneſs for himſelf. If a Maſter delivereth Money to his Servant, and his Servant is robb'd, he may be admitted to prove the Delivery of the Money to his Servant, tho' the Maſter is Plaintiff in the Action. (*Qu.*) For he might have had other Witneſſes,

to prove the Delivery. A Leſſor, that lives out of the Hundred, may be a Witneſs for the Hundred; for his Tenant of the Land pays the Contribution to the Loſs by Robbery, if a Tax is levied. Hundredors, tho' they have no Lands, and pay no Taxes, cannot be Witneſſes for the Hundred; becauſe when the Money recovered againſt the Hundred comes to be levied, they may be worth ſomething; and becauſe they are compellable to Watch and Ward. Sojourners, Servants, and thoſe that receive Alms, may be Witneſſes.

[c] *Members* of *Corporations* ſhall be admitted, or refuſed, to give Evidence, in Actions brought by Corporations, as their Intereſt is either ſmall or great, whereby it may be preſumed, whether they will be partial, or not. But to avoid ſuch Debates, it is the beſt way to disfranchiſe them. [See 3 *W.* & *M. ch.* 11. 1 *An. ch.* 18. and *B.* 1. *ch.* 7. *ante*, Concerning the Accounts of Churchwardens, Overſeers of the Poor, and of decay'd Bridges.]

[c] 2 Lev. 231, 236.
2 Str. 1069.

[d] An *Informer* may be a Witneſs, tho' he is to have Part of the Forfeiture, (*i. e.*) where other Witneſs cannot in the nature of the Thing be had, but not otherwiſe.

[d] 3 Mod. 114.
Forteſ. Rep. 248.
1 Str. 316.

[e] A Counſellor, Attorney, Solicitor, ought not to be examined *againſt* their Clients, becauſe they are obliged to keep their Secrets. But of their own Knowledge before Retainer, they may be examin'd as Witneſſes, if ſerv'd with a *Subpœna*.

[e] 1 Vent. 197.

The [f] *King* cannot be a Witneſs under his Sign Manual.

[f] 2 Roll. Abr. 686.

Things done in a [g] *foreign Country* may be given in Evidence to a Jury. And upon Trial of Things done beyond Sea, the Teſtimony of a publick Notary from thence is good Proof. [*Qu.*]

Hob. 213, contr.
[g] 6 Rep. 47.

To prove the *Confeſſion* of the Party, is oftentimes ſlender Evidence, if there is no Proof of a Dealing betwixt the Plaintiff and Defendant. However a [h] Confeſſion muſt not be taken as to Part only. As if it be ſworn that the Defendant confeſſed the Debt, but ſaid at the ſame Time that he had paid it, the whole ſaying muſt be taken together.

2 Roll. Rep. 346.
2 Cro. 542.
[h] Trials per Pais 209.

If a Witneſs is not able to travel, a Judge may excuſe his Non-appearance, and certify his Examination. Where a Witneſs cannot be preſent at the Trial, by the Conſent of the Plaintiff and Defendant, or by Rule of Court, he may be examin'd upon Interrogatories at a Judge's Chamber.

[a] Outlawry in a perſonal Action is no Exception againſt a Witneſs, tho' it is againſt a Juror.

[a] 1 Inſt. 6. b.

By 5 El. ch. 9. *If one ſerved with Proceſs of* Subpœna *out of a Court of* Record *to teſtify as a Witneſs* (*being tendered convenient Charges and having no reaſonable Let*) *ſhall make Default, he ſhall forfeit to the Party grieved ten Pounds and his Damages.*

3 Cro. 522, 540.

By 29 Car. 2. ch. 3. *A Deviſe of Lands*, &c. *muſt be in the Preſence of* three *ſubſcribing Witneſſes at leaſt.*

In criminal Cauſes if a Witneſs refuſes to appear upon a *Subpœna*, the Court may put off the Trial, and grant an Attachment againſt him for his Contempt. [See 7 & 8 *W.* 3. *ch.* 3. 1 *An. St.* 2. *ch.* 9.]

2 Str 810.
2 Ld. Ray. 1528.

See what Evidence by *Writings* or *Witneſſes* may be admitted upon *general* or *ſpecial* Iſſues, 2 *Roll. Abr.* 676 *to* 687. *Trials per Pais*, *ch.* 15. *Nelſon's Law of Evidence per Tot'.*

In many Caſes by *Statutes* ſpecial Evidence may be given upon the general Iſſue as before obſerved. See of *Iſſues*, *ante*, and of *Evidence* and *Witneſſes*, *ch.* 5. *poſt.*]

Many Times Juries are induced, together with other Matter, by [b] *Preſumption*; whereof there are *three* Sorts, (*viz.*) *Violent*, *probable*, and *light.*

[b] 1 Inſt. 6. b.

[c] *Violent*

[e] 1 Inſt. 6. b. 373. a. & b. 4 Black. Com. 352.

[e] *Violent* is often full Proof; as if one is run through the Body with a Sword in a Houſe, whereof he inſtantly dieth, and it was proved by a Witneſs, that one was ſeen to come out of the Houſe with a bloody Sword, and no other perſon was at that Time in the Houſe. So if all the Witneſſes to a Deed are dead, continual and quiet Poſſeſſion is a violent Preſumption of the Truth of it. But the Deed may receive further Credit by Compariſon of the Hands and Seals. Again, if a Defendant pleads Payment to a Bond, and it appears, that the Debt is of ſo long ſtanding by the Bond, and it hath not been demanded, nor Intereſt paid[d], for many Years [for twenty Years or more] it ſhall be preſumed that the Money was paid, though the Plaintiff hath the Bond in his Cuſtody. If a Rent is behind for twenty Years, and the Landlord makes an Acquittance for the laſt Year that is due, all the Reſt are preſumed to be, paid, *&c.* [*Qu.* if the like Preſumption would not lie *merely* on the Acquittance for the laſt Year.] [See 19 *Car.* 2. *ch.* 6. 6 *An. ch.* 18. where an abſent Perſon ſhall be *preſum'd* to be dead, with reſpect to one in Remainder, Reverſion, or Expectancy of any Eſtate after his Death.]

[d] 2 Ld. Ray. 1370. 2 Str. 826.

[e] 1 Inſt. 6. b.

[e] *Probable* Preſumption proves but little, and *light* Preſumption nothing at all.

[f] 3 Inſt. 232.

In general, the Court ought not to judge too haſtily upon bare Preſumption in Caſe of[f] Life and Death.

[a] 1 Inſt. 232. b.

[a] Wrong ſhall never be preſum'd.

[b] 1 Inſt. 373. a. & b.

No Proofs ſhall be admitted againſt the Preſumption of[b] *Law* in many Caſes, though the general Rule is otherwiſe.

[c] 9 Rep. 9.

Note, That Evidence is never[c] pleaded; but the Matter of Fact only; which if it be denied, the Evidence ſhall be given to the Jury, not to the Court.

[d] 5 Rep. 104. 1 Inſt. 72. a. 3 Black. Com. 373.

There may be a[d] *Demurrer* to *Evidence*. As if the Plaintiff ſhews in Evidence any Records, Deeds, or *Writings*, or any Sentence in the Eccleſiaſtical Court, upon which a Queſtion at Law doth ariſe, and the Defendant offereth to demur in Law upon it, the Plaintiff muſt join in Demurrer, or waive his Evidence. So if the Plaintiff produces *Witneſſes*, to prove a Fact, upon which a Matter of Law ariſes, if the Defendant admitteth their Teſtimony to be true, there alſo the Defendant may demur in Law upon it. So may the Plaintiff demur upon the Defendant's Evidence. In theſe Caſes the Counſel of the Plaintiff and Defendant muſt agree the Matter of Fact in Diſpute, and the Jury muſt be diſcharged and the Matter of Law referred to the Judges to determine. But if Evidence is given for the King in an Information, or other Suit, and the Defendant offers to demur upon it, the King's Counſel are not obliged to join in Demurrer, but the Court ought to direct the Jury, to find the ſpecial Matter. And indeed becauſe Juries uſually of late find a doubtful Matter ſpecially, Demurrers upon Evidence are ſeldom uſed.

[e] 9 Rep. 13. 2 Inſt. 426, 427, 428. 1 Salk. 288. 3 Black. Com. 372.

There may be alſo a[e] *Bill* of *Exceptions* to the [Directions concerning the] *Evidence*; as when one of the Parties for the Inſufficiency of the Evidence on the other ſide (as he conceives) doth offer to demur upon the ſame, and the Judge doth not agree to it; then the Judge ought upon Requeſt to ſeal the Bill of Exceptions tendered to him in Writing; which upon a Writ of Error may be heard. [See *Weſt.* 2. *ch.* 31.]

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[a] *Omnia præſumuntur legitime facta, donec probetur in contrarium.* 1 Inſt. 232. b.
Injuria non præſumitur. Ibid.
Odioſa et inboneſta non ſunt præſumenda. 10 Rep. 56. 1 Inſt. 78. b.

[b] *Stabitur præſumptio, donec probetur in contrarium.* 1 Inſt. 373. b. 2 Rep. 48. 4 Rep. 71.

In [f] criminal Caſes no Bill of Exceptions to the Evidence is to be allow'd. For the Statute above-mentioned extends only to Civil Cauſes.

Note, [g] That when the Trial is by twelve Men, the *Judgment* is not given upon Witneſſes, or other Kind of Evidence, but upon the Verdict, as the Verdict is given upon the Evidence. [h] The Evidence to the Jury is no Part of the Trial. For by Law the Trial here is not by Witneſſes, but by Verdict of the Jury. *Evidence* to a Jury and *Trial* by a Jury are different.

Oftentimes when the Evidence hath been heard, the Parties doubting of the Verdict, do conſent that a Juror ſhall be withdrawn or diſcharged, But if not, Then

5. The Jury muſt give their *Verdict*.

After the Evidence given upon the Iſſue, [i] the Jury ought to be kept together in ſome convenient Place without Meat or Drink, Fire, or Candle; otherwiſe than with Leave of the Court. They ought not to be allow'd to ſpeak with any Stranger, unleſs with the Bailiff that attends them, and with him only after they are agreed upon their Verdict.

[a] *Verdict* (*Vere dictum*) is the Anſwer of the Jury concerning the Matter of Fact referred to them by the Court upon the Iſſue. This Anſwer they may make without Teſtimony, or againſt Teſtimony, if they themſelves know the Fact. Every one of the twelve Jurors muſt agree together before there can be a Verdict; and then, when they are agreed, it muſt be delivered by the Foreman.

A Verdict may be either [b] *General* or *Special*. *General*, which is poſitively given either in the Affirmative or Negative; as Guilty or Not guilty, *&c.* *Special*, where the Jury find the ſpecial Matter, or the Fact at large, and leave it to the Judges, to determine what is the Law, that ariſes from the Fact. It may be either upon a general or ſpecial Iſſue. Likewiſe this ſpecial Verdict may be either in Civil, or Criminal Cauſes, that concern Life or Member. And the Court cannot refuſe a ſpecial Verdict, if it is pertinent to the Matter in Iſſue. But a Verdict finding Matter uncertainly, or abiguouſly, is inſufficient, and no Judgment ſhall be given upon it.

There is alſo a [c] *publick* and *privy* Verdict. *Publick*, which is given in open Court. *Privy*, which is given out of the Court, before any of the Judges of the Court. It is call'd a privy Verdict, becauſe it ought to be kept ſecret and privy from each of the Parties litigant, till it is affirmed in open Court. But the Jury may Vary from their privy Verdict; and tho' they found for the Plaintiff by the privy Verdict they may find for the Defendant afterwards in open Court by their publick Verdict. After the Verdict is recorded, they cannot vary from it; but before it is recorded, they may vary from it.

In [d] *criminal* Matters, as Treaſon, Felony, Larceny, the Jury cannot give a privy Verdict, but muſt give it openly in Court.

[e] Tho' the Verdict doth not find the preciſe Iſſue, yet if the Subſtance or Matter of the Iſſue is found, it may be good. As if in Aſſize of *Darrein Preſentment*, the Plaintiff alledges the Avoidance of the Church by Deprivation, and the Jury finds the Avoidance by Death, the Plaintiff ſhall have Judgment; for the Voidance is the Matter of the Iſſue. And this Rule holds in criminal Caſes; as in an Indictment of Murder, and

[f] Kely 15. 2 Inſt. 427.

[g] 1 Inſt. 6. b.

[h] 3 Inſt. 26, 27.

[i] 1 Inſt. 227. b. 3 Black. Com. 375, 376, 377, 378.

[a] 1 Inſt. 226 a.

[b] 1 Inſt. 226. b. 227, a. 2 Ld. Ray. 864, 1521. 1 Str. 514.

[c] 1 Inſt. 227 b.

[d] 3 Inſt. 110. See of Verdicts ch. 5. poſt.

[e] 1 Inſt. 227 a. 281. b. 282. a. 1 Ld. Ray. 141.

Plea Not guilty, the Verdict may find Manſlaughter; becauſe the Killing is the chief Point, and the Malice ſet forth is only Circumſtance.

f 1 Inſt. 227.b.
2 Str. 984.
Cont. Kel 52.
See of Verdicts, ch. 5. poſt.
3 Black.Com. 386.

A Jury ſworn and charged in caſe of Life and Member, cannot be [f] diſcharged, till they give a Verdict. But in civil Caſes a Subject or common Perſon (not the King) may be nonſuit; and then upon Non-appearance of the Plaintiff to attend the Verdict, the Jury may be diſcharged without giving any Verdict at all.

But if a Verdict is given, the *Poſtea* muſt be returned by the Judge of *Niſi Prius* on the back of the Record. The Subſtance of the Return is, *Quod Poſtea, &c.* (viz.) *That afterwards the Plaintiff and Defendant appeared by their Attornies before the Judge of Aſſize, and the Jury was ſworn,* &c. *and found this Verdict,* &c. *and gave ſuch Coſts.* But Coſts of Increaſe are to be taxed by the Prothonotary.

a 1 Inſt. 227.b.
1 Ventr. 125.
2 Lev. 140, 205.
Comy. 525.
1 Str. 64[illegible].
1 Ld. Ray. 148.
2 Ld. Ray. 1410.

[a] Notwithſtanding all this, the Verdict may be ſet aſide. 1. If the Jury after their Evidence given at the Bar, and before they are agreed on their Verdict, do eat or drink at the Charge of the Plaintiff, if the Verdict is given for him; but otherwiſe if it is given for the Defendant; and ſo *Vice Verſa.* If after they are agreed of their Verdict, they eat or drink at the Charge of him for whom they do paſs, it ſhall not avoid the Verdict. They may eat and drink at the Coſt of both Parties, if they agree to it; or by Licence of the Judge. If they eat or drink at their own Charges, it is only finable: The Verdict alſo may be ſet aſide, if they throw up Croſs or Pile, or caſt Lots, whether they ſhall find for the Plaintiff or Defendant, *&c.* 2. If the Plaintiff, or any in his Behalf, after the Jury are gone from the Bar, do deliver any Letter, *&c.* to any of the Jury concerning the Matter in Iſſue, which was not given in Evidence, it ſhall avoid the Verdict, if it is found for the Plaintiff. But not if it is found for the Defendant; and ſo *è Converſo.* And if a Witneſs, before ſworn on the Part of the Plaintiff or Defendant, is ſent for by the Jury after they are gone from the Bar, and repeats again his Evidence to them, and afterwards they give their Verdict for him whoſe Witneſs he was, the Verdict is void. 3. A Verdict may be ſet aſide by the Court, if it appears to the Judge before whom the Cauſe was tried to be given againſt Evidence, or againſt his Direction, or where they give exceſſive Damages, *&c.* and the Court may order a new Trial. 4. If one of the Jury dies before the Verdict, or if they cannot all agree, the Verdict of the Reſt is void, and a new Inqueſt muſt be awarded. 5. The Verdict may be ſet aſide by Writ of Attaint. [See *infra.*] It might be noted, that in ſome of theſe Caſes, the Trial, *&c.* is recorded, and the Verdict ſet aſide by Judgment of the Court upon Record; in others (as in the Caſe of a Verdict againſt Evidence) the Trial is ſet aſide by Rule of Court, and the Return of the *Diſtringas, &c.* is not entered, as being ſuppoſed void.

See of *Embracery, B.* 3. *ch.* 3. *ante.*

Of Judgment.
b 1 Inſt. 39.a. 167.b. 168.a.
2 Inſt. 236.
Finch 459.
3 Black.Com. ch. 24.
Of Judgment and its incidents per totum.

IX. The [b] *Judgment* (*Judicium, quaſi Juris Dictum*) is the Determination, Decree, or Sentence of the Court upon the Suit. Regularly, it ought to be given according to the Original Writ.

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[b] *Judicium redditur in invitum.* 5 Rep. 28.
Intereſt Reipublicæ res judicatas non reſcindi. 2 Inſt. 360.
Res judicata pro veritate habetur. 1 Inſt. 39. a. 2 Inſt. 360, 573.
Intereſt Reipublicæ ut judicia rata ſint. 2 Inſt. 84, 360.

A Judgment is either *Interlocutory* or *Final*. *Interlocutory*, as upon dilatory Pleas, where the Judgment in many Caſes is *Reſpondeat Ouſter*, *(i. e.)* Anſwer over to the Merits of the Cauſe. [Or where it is proviſional, before the aſcertaining the Damages to be recover'd.] [See 8 & 9 *W.* 3. *ch.* 11. where if the Plaintiff or Defendant dies after an Interlocutory Judgment, the Action ſhall not abate.] The Judgment againſt the King is never [c] Final. [But ſee 6 *Ed.* 1. or the Statute of *Glouceſter*, 18 *Ed.* 1. or *Statutum de quo Warranto.*]

[c] Finch 460. Cont.

Judgment may be given upon *Default*, upon *Confeſſion*, upon *Demurrer*, and upon *Trial* of the Iſſue. [a] Outlawry is a Judgment in itſelf.

2 Inſt. 282, 495.
[a] Finch 457.

1. Judgment may be ſuffered to go by Default, as upon *Nil dicit*, [b] *Default* is taken for Non-appearance in Court. But the Default may be ſaved in ſeveral Inſtances. A Recovery by Default againſt an Infant is erroneous. But the Infant muſt reverſe it by Writ of Error during Minority.

[b] 1 Inſt 259 b. 2 Inſt. 483, 484.

2. By *Confeſſion* of the *Defendant*, by entering *Cognovit Actionem*, or that he acknowledges the Action; or by Conſent of the *Attorney* for the Defendant, by entering *Non ſum Informatus, &c.* This is often done by Conſent, with a Stay of Execution till a certain Time, to ſave Charges, where the Action is juſt.

In theſe Caſes, where the Judgment is *without* Trial, or interlocutory, and Damages only are to be recovered, and not a Debt certain, there muſt be a *Writ* of *Inquiry* of *Damages* executed before the Sheriff, or his Under-Sheriff; of which the Plaintiff is to give the Defendant Notice, and of the Time and Place of the executing the ſame. The Sheriff hereupon ſummoneth a Jury of Twelve Men, or of a [c] fewer Number, [it is the conſtant Practice to have twelve upon this Jury, tho' the Number, is not mentioned in the Writ] (which cannot be challenged) examines Witneſſes, and makes a Return to the Writ, in order to final Judgment and Execution.

[c] Finch 413, 484
1 Inſt. 158 b.

If one is under an Arreſt, [d] and gives a Warrant of Attorney to confeſs a Judgment, and no Attorney for the Defendant is then preſent to ſubſcribe the Warrant, the Court will ſet aſide the Judgment, ſuppoſing it to be obtain'd through Force or Fear. [But *Qu.* [e] If he was not under Arreſt at the Suit of the *ſame* Perſon.] If one gives a Warrant to confeſs a Judgment, and dies before it is entered up, [f] this is a Countermand of the Warrant. But if the Judgment is ſigned on the *ſame Day* he dies, tho' after his Death, it is good: [Or if it is regularly enter'd *as of* a Term preceding his Death, [g] tho' *in fact* not entered up till after his Death, it is good, and this Kind of Warrant cannot be revoked.]

[d] 2 Str. 902, 1245, 1247.
[e] 2 Ld. Ray. 797.
[f] 1 Ventr. 310.
Raym. 18.
2 Str. 1081.
[g] 2 Ld. Ray. 849
2 Str. 882.

By 4 An. ch. 16. *All the Statutes of* Jeofails *ſhall be extended to Judgments upon* Nil Dicit, Confeſſion, *or* Non ſum Informatus *in any Court of Record; ſo as there be an Original Writ, or Bill, and Warrants of Attorney duly filed.*

3. Upon *Demurrer*; [h] as when the Defendant in an Action of Debt pleads an ill Plea in Bar, and the Plaintiff demurs in Law upon it, and the Court gives Judgment for the Plaintiff to recover his Debt and Damages and Coſts. [See 4 *Ann. ch.* 16] But if it were in an Action of the

[h] 2 Ld Ray. 1047.

the Caſe, a Writ of *Inquiry* of Damages muſt be awarded before final Judgment. If Judgment upon the Demurrer is for the Defendant againſt the Plaintiff, the Judgment is, That the Plaintiff *Nihil Capiat per Breve*, or *per Billam*, and that the Defendant *Eat inde ſine Die*. [See 3 *W.* & *M. ch.* 14. Concerning *Heirs*, and 4 *Ann. ch.* 16. as to Coſts on Demurrers.]

4. Judgment may be given upon *Trial* of the Iſſue, according to the various Methods of Trial above-mention'd, where the Jury upon the Trial having aſſeſſed the Damages and Coſts, the Court gives Judgment for the ſame, and alſo for Coſts of Increaſe, which Judgment is final.

There may be a *Stay* or *Arreſt* of Judgment, for want of due Notice of Trial; or becauſe the Plaintiff before the Trial treated the Jury, or for that the Record differs from the Deed pleaded in ſome material Point, &c. or you may arreſt Judgment for that which may appear upon the Iſſue-Roll; as for ſome material Defect in Pleading, which is Matter of Subſtance, tho' there is a Verdict. [But ſee 5 *Geo.* 2. *ch.* 13. *poſt.*] Therefore to move in Arreſt of Judgment, is to ſhew Cauſe why Judgment ſhould be ſtopp'd. But regularly no Motion for Arreſt of Judgment ought to be made but within the firſt four Days in the Term, [or before the Rule given in the King's Bench upon the *Poſtea* expires, if there be four Days within Term, in civil Caſes, [a] but any Time before Judgment ſigned in criminal Matters. There is no Rule for final Judgment given in the Common Pleas, but you ſtay the ſame Time there as in the King's Bench before you can ſign final Judgment, that is, four Days, not reckoning Sunday.]

[a] 2 Str. 845.

Here all Matters of Fact muſt be made out by *Affidavit*. [See 29 *Car.* 2. *ch.* 5. See alſo 17 *Car.* 2. *ch.* 8. Where the Death of either Party between Verdict and Judgment, ſhall not be alledged for Matter of Error.]

8 Rep. 156, &c. At the Common Law the Judges may amend the Miſpriſions of Clerks in their Judgments, or any Part of the Record, in the ſame Term. But of another Term they could not before 14 *Ed.* 3. *ch.* 6. [See 8 *H.* 6. *ch.* 12. what Defects in Records may be amended.]

By 5 Geo. 1. ch. 13. *Where any Verdict hath been given in any Action in any Court of Record in* England *or* Wales, *the Judgment ſhall not be* ſtaid, *for any Defect in Form or Subſtance in any Bill, Writ original, or judicial, or for any Variance in ſuch Writ from the Declaration or other Proceedings.*

See 13 *El. ch.* 5. Concerning fraudulent Judgments, to avoid the Debt, &c. of another, 29 *Car.* 2. *ch.* 3. and 4 & 5 *W.* & *M. ch.* 20. *Acts* for the better Diſcovery of Judgments; and from what Time Judgments affect Lands, and may be good againſt Purchaſers and Mortgagees; and have Preference againſt Heirs, Executors, or Adminiſtrators. 8 *Geo.* 1. *ch.* 25. For ſetting down the Time of ſigning Judgments in the Principality of *Wales* and *Counties Palatine*. And ſee 5 *Ann. ch.* 18. Concerning the Regiſtering of Judgments for the *Weſt-Riding* of the County of *York*; 6 *Ann. ch.* 35. For the *Eaſt-Riding*; 8 *G.* 2. *ch.* 6. For the *North-Riding*; and 7 *Ann. ch.* 20. For the County of *Middleſex*.

* If the Plaintiff or Defendant prevails in the Suit, they ſhall be allow'd their *Coſts*, (*i. e.*) legal Coſts of the Suit; but not Coſts and Expences of Travel or Loſs of Time. Coſts are given by Statutes; [b] for the Common Law does not give Coſts in any Caſe. [For Damages and Coſts of Suit, ſee the 6 *Ed.* 1. *ch.* 1. & 14. 23 *H.* 8. *ch.* 15. 8 *El. ch.* 2. 18 *El. ch.* 5. 4 *Ja.* 1. *ch.* 3. 5 & 6 *W.* & *M. ch.* 12. 8 & 9 *W.* 3. *ch.* 11.] In which laſt Statute Coſts of Suit are granted in ſeveral Actions; as where there are ſeveral Defendants, and *one* is acquitted; upon *Demurrers*; if Judgment is affirmed for the Defendant upon a *Writ* of *Error*; [See 3 *H.* 7. *ch.* 10.] In *Waſte*, and in Debt upon the Statute for *Tithes*, where the ſingle Value or Damage found by the Jury ſhall not exceed 20 Nobles; in all Suits upon Writs of *Scire Facias*, *Prohibition*, *wilful*, and malicious *Treſpaſſes*, certified to be ſuch. [See alſo 4 *Ann. ch.* 16. For Coſts upon Inſufficiency of Matter in *Demurrers* join'd, at the Diſcretion of the Court, and upon a Verdict on any Iſſue in a Cauſe, where there are ſeveral Matters pleaded, unleſs the Judge certify, that the Party had a probable Cauſe to plead ſuch Matter as ſhall be found againſt him.

By 43 El. ch. 6. *In perſonal Actions in the Courts at* Weſtminſter (*not being for Land or Battery*) *if the Judge will certify, that the Debt or Damage does not amount to* 40 s. or above, the Plaintiff ſhall have no more Coſts than Damages, but leſs at Diſcretion of the Court.

By 21 Ja. 1. ch. 16. *In Actions on the Caſe for* Words [a] *no more Coſts than Damages, if the Jury aſſeſs Damages under* 40 s.

By 22 & 23 Car. 2. ch. 9. *In all Actions of Treſpaſs, Aſſault and Battery, and other perſonal Actions, where the Judge ſhall not certify, That a Battery was proved; or the Title of the Land chiefly in Queſtion; no more Coſts than Damages, if the Jury find the Damages under* 40 s. [But ſee 8 & 9 *W.* 3. *ch.* 10.]

See 11 & 12 *W.* 3. *ch.* 9. Which extends the 22 & 23 *Car.* 2. *ch.* 9. before-mentioned to the Courts in *Wales*, and the Counties Palatine of *Cheſter*, *Lancaſter*, and *Durham*.

No Coſts againſt the King; [See 24 *H.* 8. *ch.* 8.] nor againſt Executors or Adminiſtrators; nor againſt one that ſues *in Forma Pauperis*. [See 11 *H.* 7. *ch.* 12.]

By ſome Statutes there are *treble* or *double* Damages or Coſts given; as by 7 *Ja.* 1. *ch.* 5. 21 *Ja.* 1. *ch.* 12. There are double Coſts given to Juſtices, Mayors, and other Officers, where Actions are brought againſt them. By 2 *W.* & *M. Seſſ.* 1. *ch.* 5. Treble Damages and Coſts [b] upon a *Reſcous* of a Diſtreſs for Rent, &c. double Coſts upon a *Judgment* after a Verdict *affirmed* on a Writ of Error, by 13 *Car.* 2. *ch.* 2.

Note, [c] That when a Statute doth increaſe Damages to the double or treble Value, &c. where Damages before were given, there the Plaintiff ſhall recover his double and treble Damages and Coſts; and the Coſts being Parcel of the Damages ſhall be doubled or trebled. But where double or treble Damages are in an Action newly given, where no Damages were formerly recoverable, there the Plaintiff ſhall recover thoſe Damages only, and no Coſts, unleſs the Coſts too are expreſly given by the Statute.

[b] 2 Inſt. 288.

[a] 2 Ld. Ray. 831, 1588.

[b] 1 Ld. Ray. 19, 342.

[c] 2 Inſt. 289. 10 Rep. 116. 2 Str. 1048. 1 Ld. Ray. 19.

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* *Ubi damna dantur, victus victori in expenſis condemnari debet.* 2 Inſt. 289.

There are no Coſts given in a *Quare Impedit*. [See *Weſt*. 2. or 13 *Ed*. 1. *ch*. 5.]

By 23 H. 8. ch. 15. *He that ſues* in Forma Pauperis [See 11 *H*. 7. *ch*. 12.] *ſhall not pay Coſts, but ſhall ſuffer ſuch Puniſhment as the Juſtices or Judge of the Court ſhall think fit.*

See 2 *Inſt*. 112, 200, 288, 289. *Danv. Abr*. Tit. *Coſts*, Tit. *Damages*.

Of Execution. 3 Black. Com. ch. 26. per tot.
[a] 1 Inſt. 154. a. 2 Inſt. 394, 395. 3 Rep. 11, 12. Finch 470, 471.

X. After Judgment Proceſs of *Execution* doth begin. It begins where the Action doth end.

[a] *Execution* is the obtaining of actual Poſſeſſion of any Thing acquired by Judgment of Law. At Common Law, where a Subject ſued Execution upon a Judgment for Debt or Damages, he could not have the *Body* of the Defendant or his Lands in Execution, (unleſs in ſpecial Caſes) but only his Goods and Chattels, and his Corn and other *preſent* Profit that grew upon his Land: For this Reaſon he had only a *Fieri facias* to levy upon Goods and Chattels, and a *Levari facias*, to levy the Debt or Damages upon the Lands and Chattels. Both were to be ſued out within the Year. But now Execution may be otherwiſe by *Statutes*, (*viz.*) by *Capias ad Satisfaciendum* in many Caſes againſt the *Body*, and by *Elegit* againſt the *future* Profit of *Land*.

Execution is either in *perſonal*, *real*, or *mixt* Actions.

[b] 1 Inſt. 289. a. 3 Rep. 11, 12. 5 Rep. 86, 87. F. N. B. 93.

1. In [b] *perſonal* Actions, Execution may be three Ways, (*viz.*) By *Capias ad Satisfaciendum*, *Elegit*, and *Fieri Facias*.

[c] See of Writs ante. 3 Black. Com. 415.

1. By *Ca. Sa.* or by *Capias ad Satisfaciendum* [c], to impriſon the Body after Condemnation till Satisfaction. It lies not againſt Peers of the Realm, or their Wives, except perhaps in ſome ſpecial Caſes, nor againſt Executors or Adminiſtrators for the Debt of the Teſtator or Inteſtate, except a *Devaſtavit* is returned; and then a *Ca. Sa.* lies againſt the Body, or *Fieri Facias* againſt their Goods. Regularly it lies only againſt ſuch Perſons, againſt whom a *Capias* doth lie at the Commencement of the Suit. [See 5 & 6 *W. & M. ch*. 12. An Act to take away the Proceſs for the *Capiatur* Fine in the Courts at *Weſtminſter*.]

If one is in Execution on a *Ca. Sa.* no other Execution can be ſued againſt him, his Lands, or Goods. But,

By 21 *Ja*. 1. *ch*. 24. *The Party at whoſe Suit any Perſon ſhall ſtand charged in Execution for Debt or Damages recovered, his Executors or Adminiſtrators may, after the Death of the Perſon ſo charged in Execution, ſue forth new Executions againſt the Lands, Goods, and Chattels of the Perſon deceaſed. Howbeit this Act ſhall not extend to Lands ſold* Bona Fide (*after the Judgment*) *when the Money raiſed thereon is paid, or ſecured to be paid to Creditors in Diſcharge of due Debts.*

[See 1 *Ja*. 1. *ch*. 13. *infra*, and the Statutes concerning *Eſcapes*, in *p*. 78, *ante*. See alſo 32 G. 2. *ch*. 28. for the Relief of Priſoners in

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[a] *Executio eſt fructus et finis legis.*
Juris effectus in executione conſiſtit.
Parum eſt latam eſſe ſententiam, niſi mandetur executioni.
Executio juris non habet injuriam. 1 Inſt. 289. b.
Ea quæ in curia noſtra rite acta ſunt, debite executioni demandari debent. 2 Inſt. 84.

Execution, not charged with more than the Sum of one hundred Pounds.]

2. An [d] *Elegit* is a judicial Writ given by Statute, either upon a Recovery for Debt or Damages, or upon a Recognizance in any Court that hath Power to take it. For,

[d] 1 Inſt. 289 b. Reg. Orig. 299, 301. 3 Black. Com. 418.

By Weſt. 2. *or* 13 Ed. 1. ch. 18. *He that recovereth a Debt or Damages, or upon a Recognizance, in the King's Court, may at his Election have a* Fieri Facias *of the Goods and Chattels of the Debtor, or a Writ of* Elegit *to the Sheriff, to deliver to him all the Chattels of the Debtor* (except *Oxen and Beaſts of the Plough) and the* Moiety *of his* Land, *by reaſonable* Price *and* Extent, *till the Debt is* levied.

[a] Executors and Adminiſtrators of a Plaintiff or a Recognizee, or Succeſſors of a Cognizee, have this *Election*, though not named in the Statute; otherwiſe of an Aſſignee. [See of *Scire facias, infra.*]

[a] 2 Inſt. 395.

Though the [b] *Sheriff* is only mentioned in this Act, a Serjeant at Mace, and every other immediate Officer to a Court of Record, is included by the Equity of the Act, who by Precept in the Nature of an *Elegit* may extend Lands, *&c.*

[b] 2 Inſt. 395. 4 Rep 65.

Where there are two Judgments, and the Plaintiff is in Poſſeſſion by Virtue of an *Elegit* on the laſt Judgment, yet the Plaintiff in the firſt Judgment may afterwards ſue out an *Elegit* upon his firſt Judgment, and have the Lands delivered to him, and ſhall recover the ſame from the Plaintiff in the laſt Judgment, though he had the firſt Extent.

By the *Moiety of the Land*, [c] only ſuch Land is to be underſtood, which the Defendant had at the Time of the Judgment given, or of the Recognizance acknowledged, unleſs his Land hath been before conveyed away by Fraud to deceive Creditors. I ſay, *at the Time of the Judgment*; that is, where the Action is brought in reſpect of the Perſon, not of the Land. But if an Action of Debt is brought againſt an Heir, and he alieneth hanging the Writ, the Land, which he had at the Time of the Original purchaſed, ſhall be charged. [See 3 *W. & M. ch.* 14. *infra.*] By Virtue of theſe Words the *Moiety of the Land*, [d] the Sheriff may extend Lands in ancient Demeſne, a Term for Years, an Annuity, Rents, *&c.* The Sheriff may *extend* or *ſell* a Leaſe, becauſe it is a Chattel. But Copyhold Lands cannot be extended by *Elegit*; for it would be prejudicial to the Lord, if any Stranger ſhould have Intereſt in the Lands holden by Copy without Admittance of the Lord. The Plaintiff may have Execution againſt the Body, Goods and Chattels of a Copyholder. [See for the Time of binding the Property of *Goods*, 29 *Car.* 2. *ch.* 3. *infra.*]

[c] 1 Inſt. 102. a. & b. 2 Inſt 396, 397.

[d] 2 Inſt. 396, 397. 3 Rep. 9. 4 Rep. 74. 5 Rep 105. 8 Rep. 171. 1 Roll. Abr. 888. 2 Cro. 78, 79.

By *reaſonable Price and Extent.*——[e] *Price* refers to Goods and Chattels: *Extent* refers to Land. And this *Appraiſement* and *Extent* upon the *Elegit* muſt be found by Inqueſt of *twelve* Men returned of Record. An Obligee cannot pray, that the Extenders ſhall take the Land, *&c.* at the Rate at which they appraiſe them in an *Elegit*; but on a Statute-Merchant, or Staple he may. The Goods are not to be *ſold*, but are to be delivered to the Party at a reaſonable Price upon the Appraiſement, [f] If upon an *Elegit* there is only Execution to be had on the Goods, becauſe there are no Lands; if it happens that the Goods are not ſufficient, the Plaintiff may have a *Capias*. For here the *Elegit* is in Effect but a *Fieri facias*; otherwiſe if *Lands* were extended.

[e] 4 Rep 74. 1 Inſt. 289. b. 2 Inſt. 396. 1 Ld. Ray. 346.

[f] Hob 58, 59. 2 Cro. 338, 339. 1 Str. 226. 2 Ld. Ray. 1451. Contra, 2 Inſt. 395.

Till the Debt is levied.——[g] Yet if the Party pays and ſatisfies the Debt of Record, he ſhall enter into his Land. And ſo the Tenant of the Land may enter, when the Tenant by *Elegit* is ſatisfied by the Extent, or Receipt of the Profits or Rents. But not in caſe of an Extent upon the Statute: For he muſt have a *Scire facias.*

If the Chattels are ſufficient to pay the Debt, and it appeareth ſo to the Sheriff, then the Sheriff ought not to extend the Land.

Before the Extent is filed, [a] The Court may ſtay the filing of the Writ, and grant another, if they find any Fraud or Partiality.

An *Elegit* lies in *Wales, &c.* for *that the King's Writs run not in* Wales, *&c.* is to be underſtood of *Original* Writs.

See of *Eſtate* by *Elegit, B.* 2. *ch.* 1. Of *Purchaſe, B.* 2. *ch.* 3. And the *Catalogue of Writs ſupra, verb. Elegit,* 32 *H.* 8. *ch.* 5. For Remedy where Lands in Execution are evicted or recovered by elder Title, and the Expoſition of that Act, 1 *Inſt.* 289. *b.* 290 *a.* 2 *Inſt.* 678, *&c.* 4 *Rep.* 66.——13 *El. ch.* 5. Concerning fraudulent Judgments and Executions of Lands and Tenements, Goods, Chattels, to defraud Creditors, *&c.* 16 & 17 *Car.* 2. *ch.* 5. Concerning Extents upon Judgments, Statutes, or Recognizances, where Part of the Lands extendible are omitted, *&c.* and 29 *Car.* 2. *ch.* 3. where Execution may be upon Lands held for one in Truſt; and when the Writ of Execution ſhall bind the Property of Goods, *infra.*

3. [b] *Fi. fa.* or *Fieri facias* (from the Words in the Writ *Quod Fieri facias de Bonis, et Catallis, &c.*) [See *Weſt.* 2. *ch.* 18. *ſupra.*] lies againſt the Goods and Chattels of him againſt whom Judgment has been given for Debt or Damages. It alſo lies againſt Executors or Adminiſtrators, to be levied of the Teſtator's Goods. [See of *Scire facias, infra.*] But by *Fieri facias* the Sheriff cannot break open Doors to take the Goods.

By the Seizure of the Goods [c], the Sheriff hath a Property in them; and after the Debt levied, the Sheriff is Debtor to the Plaintiff.

This Writ is only againſt the Goods and Chattels. By Virtue of it a *Term* for *Years* may be *ſold,* as well as any other Goods, and without an Inqueſt or Jury. Alſo Corn growing may be ſold. And the Sale ſhall take Effect, [d] though the Judgment is afterwards reverſed; elſe no one would buy. But the Plaintiff ſhall be reſtored to the Value. The Sheriff cannot deliver the [e] Goods taken by him in Execution to the Plaintiff in Satisfaction of his Debt; becauſe his Authority is, to ſell the Goods. Goods pawned, or Goods of a Stranger, in the Poſſeſſion of the Defendant, Things annexed to the Freehold, Goods bought *Bonâ Fide* pending the Action, ſhall not be ſubject to the Execution. [f] The Sheriff, *&c.* at his Peril muſt take Notice, whoſe Goods they are. But if the Sheriff inquires by a Jury, where the Property is lodged, and it is found that they are the Defendant's Goods, when they are not, this will excuſe the Sheriff. [In an Action of Treſpaſs perhaps; but *Qu.* if it will in an Action of Trover brought by the true Owner.]

If you levy only Part of the Debt on a *Fieri facias,* you may have a *Capias ad Satisfaciendum* for the Reſidue.

[g] If the Defendant is a beneficed Clerk, and the Sheriff returns *Quod eſt Clericus Beneficiatus, nullum habens laicum feodum,* a Writ goes to the Biſhop of the Dioceſe, to levy the Debt and Damages *De Bonis Eccleſiaſticis;* who thereupon ſends forth a Sequeſtration of the Profits of the Clerk's

[g] 2 Inſt. 395, 396. 4 Rep. 67.

[a] 1 Ld. Ray. 346, 718.

[b] 1 Inſt. 290. b. 351. a. 5 Rep. 92, 93. 1 Ld. Ray. 252. 2 Cro. 555, 556. See of Writs, ante. 3 Black. Com. 417.

[c] 2 Ld. Ray. 1075.

[d] 8 Rep. 96, 143. 1 Roll. Abr. 893. 1 Cro. 278.

[e] 1 Ld. Ray. 346.

[f] Dalt. Sher. 60.

[g] 2 Inſt. 4. 472, 627. 2 Roll. Abr. 474.

Clerk's Benefice, directed to the Churchwardens, *&c.* to gather up the ſame; and to pay them over, to him that had the Judgment, till the Debt is paid. But this Writ of Sequeſtration muſt be renewed every Term, and the Biſhop uſually takes Bond of the Plaintiff to ſave him harmleſs.

Note, [a] That there is an Execution on *Body*, *Lands*, and *Goods*, upon *Statute-Merchant*, *Staple*, or *Recognizance* in the Nature of a Statute-Staple. The Manner of this Execution is directed by the 11 *Ed.* 1. 13 *Ed.* 1. *St.* 3. 27 *Ed.* 1. *St.* 2. *ch.* 9. 23 *H.* 8. *ch.* 6.

[a] Finch 472, 473, 474, 475. 1 Inſt. 289. b. 2 Inſt. 678.

[See where one may have Execution upon a Recognizance, after the firſt Day of Failure, without ſtaying till all the Days are paſt, in *p.* 181, & 277, and Of Actions of Debt, *ante.*]

By 1 Ja. 1. ch. 13. *If one in Executiou is delivered by Privilege of Parliament, when the Privilege ceaſes, the Plaintiff, his Executors, or Adminiſtrators, may ſue out a new Execution againſt him.*

By 16 & 17 Car. 2. ch. 5. *When any Judgment, Statute, or Recognizance for Payment of Money, ſhall be extended, it ſhall not be avoided or delayed, becauſe Part of the Lands extendible are omitted; ſaving to the Party whoſe Lands are extended his Remedy for Contribution. This Act is not to give any Extent or Contribution againſt an Heir within Age*, &c.

By 29 Car. 2. ch. 3. *Sheriffs may deliver in* Execution *all Lands whereof others ſhall be ſeiſed in* Truſt *for him againſt whom Execution is had upon a Statute, Judgment*, &c.

No Writ *of* Execution *ſhall bind the* Property *of* Goods, *but from the Time of its Delivery to the Sheriff, or Coroners; who upon Receipt thereof (without Fees) ſhall indorſe the Day of the Month, and the Year when they received it.*

See 1 Wilſon, 44.

By 3 W. & M. ch. 14. Execution *upon a Judgment, where an* Heir *hath made over Lands deſcended to him, may be taken againſt ſuch Heir for the Debt of his Anceſtor, as if it was his own Debt.*

[See 8 *Ann. ch.* 14. Concerning the Payment to a Landlord of *one Year's Rent* before Execution, *&c. p.* 190, *ante.*]

2 Wilſon, 40.

2. In *real* or *mixt* Actions, the Writs of Execution are, 1. An *Habere facias ſeiſinam*, to put one in Poſſeſſion of Freehold Lands recovered; which is done by the Delivery of a Bough of a Tree, Clod of the ſame Land, or of a Ring of a Door to give Poſſeſſion of a Houſe, *&c.* in the Name of Seiſin. 2. *Habere facias Poſſeſſionem*, to put a Plaintiff in actual Poſſeſſion of his Term again, when he hath been ejected out of his Term, and hath recovered it by Judgment in Ejectment. The Sheriff in executing both theſe Writs, may break open Doors, and deliver Seiſin or Poſſeſſion thereof to the Plaintiff. For after Judgment, it is not the Houſe of the Tenant or Defendant. [See Of the *Sheriff*, *B.* 1. *ch.* 7, *ante.*]

3 Black. Com. 412.

Ibid.

See 29 *El. ch.* 4. 3 *Geo.* 1. *ch.* 15. For the Sheriff's *Fees* for executing any Writ of *Capias ad Satisfaciendum*, *Fieri facias*, *Elegit*, *Habere facias Seiſinam*, *Habere facias Poſſeſſionem*, *&c.*

Note, [b] That if any of theſe Writs, whether in perſonal or real Actions, are not executed within a Year and a Day after the Judgment; then to revive the Judgment, and to obtain Execution, there muſt be a Writ of *Scire facias* iſſued out of the ſame Court where Judgment was given, to ſhew Cauſe why Execution ſhould not be awarded. [See [c] *Weſt.*

[b] Lit. 505. Finch 469, 477. 1 Inſt. 290 b. 2 Inſt. 395, 471. 2 Ld. Ray. 806. 1 Str. 301.

[c] 2 Inſt. 469, &c.

a 1 Str. 100.

2. *ch.* 45. But if the Plaintiff ſueth out any Execution within the Year, [a] he may continue the ſame after the Year, 'till he hath Satisfaction. If Judgment is againſt a Teſtator, there muſt iſſue a *Scire facias* againſt the Executor (though within the Year) to ſhew Cauſe why Execution ſhould not be awarded. The like againſt an Adminiſtrator of an Inteſtate. And ſo on the Plaintiff's Part, if Heir, Executor, or Adminiſtrator, becauſe the Perſon is alter'd. If one recovers againſt a Feme Sole, and ſhe is married within the Year and Day, a *Scire facias* muſt go againſt the Huſband, to ſhew Cauſe, *&c.*

By 4 An. ch. 16. *Payment is a good Plea in Bar to a* Scire Facias *upon a Judgment for Debt.*

If you proceed not by Writ of *Scire Facias*, an Action may be brought upon the Judgment.

Where the Plaintiff hath obtained Judgment againſt the Defendant, in an Action where ſpecial Bail hath been given, the Plaintiff may take the Defendant in Execution, or proſecute his Bail.

b Lit. 505. 1 Inſt. 290. b. 2 Inſt. 470.

A Defendant cannot [b] *plead* to any of theſe Writs of Execution. But if he hath any Matter ſince the Judgment, to diſcharge him of Execution, he may have *Auditâ Querelâ*; or plead in Bar of Execution to a *Scire Facias*; as a Releaſe of all Actions or Executions, Outlawry, *&c.*

Upon Judgment againſt the King in a Petition, he is preſently out of Poſſeſſion.

c 1 Roll. Abr. 887. Finch 470, 471.

[c] In Courts-Baron Execution is only by Diſtreſs and Impounding till the Party is ſatisfied.

In all Caſes where the Defendant cannot be taken, or hath no Land or Goods to pay the Debt, *&c.* he may be *outlaw'd* after Judgment in the *Common Pleas*; and when a Suit is commenced by Original in the *King's Bench*, or is removed into that Court by Writ of Error out of the *Common Pleas*, the Defendant too may be outlaw'd after Judgment.

Of Writs in Nature of Appeals.

3 Black. Com. ch. 25. per totum.

XI. If any one hath juſt Cauſe to be relieved againſt theſe Proceedings, he may have *Writs* in the Nature of *Appeals* to reverſe them. This may be done by Writ of *Error*, Writ of falſe *Judgment*, Writ of *Attaint* and *Auditâ Querelâ*.

d F. N. B. 20. D. 1 Inſt. 288. b. 5 Rep. 111, 6 Rep. 11, 12. 11 Rep. 39, 41. e Finch. 480. Cont. F.N.B. 20.

1. A [d] *Writ of Error* lieth where one is grieved by any Error in the Foundation, Proceedings, Judgment, or Execution in any Court of *Record*, that hath Power to hold Plea of Debt or Treſpaſs above 40 *s.* It muſt be returnable in the *King's Bench*; [e] for no Writ of *Error* is returnable in the *Common Pleas*: but Writs of falſe Judgment lie there to inferior Courts.

It lies not upon an interlocutory Judgment.

By 31 Ed. 3. St. 1. ch. 12. *Erroneous Judgments in the* Exchequer *ſhall be examined before the Lord Chancellor and Treaſurer, and ſome of the Juſtices*; (*but ſee* 31 El. ch. 1. 16 Car. 2. ch. 2. *and* 20 Car. 2. ch. 4. *whereby it is ſufficient if either the Lord Chancellor or Treaſurer be preſent*) *and if any Error is found they may correct the Rolls, and afterwards ſend them into the Exchequer.*

By 27 El. ch. 8. 31 El. ch. 1. *A Writ of Error upon a Judgment in any Action of Debt, Detinue, Covenant, Account, Action upon the Caſe,* Ejectione Firmæ, *or Treſpaſs, firſt commenced in the* King's Bench *is returnable in the* Exchequer-Chamber, *other than where the King is Party. And the Cauſe of Error ſhall be heard and determined before the Juſtices of the* Common Pleas, *and the Barons of the* Exchequer; *except Error* *concerning the* Juriſdiction *of the* King's Bench, *or for any want of Form in the Proceedings. Upon Judgment affirmed or reverſed, the Record ſhall be ſent back to the King's Bench to proceed, and to award Execution thereon.*

The Party grieved may be heard again by a further Writ of Error in the Upper Houſe of Parliament.

Quære, If the Statute of 27 *El.* extends to a Judgment in the *King's Bench* upon a *Scire Facias* only? For it ſeems to be *Caſus Omiſſus*.

[a] No Writ of Error lies to reverſe a Judgment in an Action *Qui tam, &c.* in the Exchequer-Chamber, becauſe the King is Party; nor upon the Statute *De Scandalis Magnatum*.

[a] 3 Cro. 142. 1 Ventr. 49. Contr. 1 Cro. 294. 2 Ld. Ray. 954.

[b] If in the King's Bench the Proceedings are commenced by *original* Writ, the Writ of Error is returnable directly before the King and the Lords in Parliament.

[b] Finch 482, 483.

[c] There is alſo another Writ of Error, which is when the Record is already in Court, and therefore called a Writ of Error *De Recordo Quod Coram Vobis Reſidet*. It lies on a Judgment in the King's Bench, for any Error in the Record, as want of an Original, [*Qu.*] *&c.* or touching Matters of Fact, as Nonage, Death of the Party, *&c.* Here is no need of bringing a Writ of Error in Parliament, to reverſe the Judgment in this Court, if the Errors are only Matters of Fact, becauſe it may be brought in the ſame Court to reverſe it. Error in Fact is not the Fault of the Judges, therefore it may be decided by them. This may be done in the Common Pleas, in the ſame Term without Writ. [*Qu.*]

[c] F. N. B. 21. 3 Rep. 15. 2 Str. 975. 2 Ld. Ray. 883.

Upon a Judgment given in the King's Bench in *Ireland*, the Writ of Error ſhall be ſued and returned in the King's Bench in *England*. See 6 G. 1. *ch.* 5.] So a Writ of Error muſt be returned upon a Judgment given in the *Counties Palatine*.

[By 3 Ja. 1. ch. 8. *No Execution ſhall be ſtayed by Writ of Error on any Judgment in any Action of Debt upon ſingle Bond, or upon any Obligation with Condition for Payment of Money only, or upon any Action of Debt for Rent, or upon any Contract ſued in any of his Majeſty's Courts of Record at* Weſtminſter, *or the* Counties Palatine, *or the Great Seſſions in* Wales (*or by* 13 Car. 2. St. 2. ch. 2. *after a Verdict on Action of Debt for not ſetting out Tithes, or on any Action upon Promiſe for Payment of Money, or any Action of Trover, Covenant, Detinue, or Treſpaſs perſonal; or by* 16 & 17 Car. 2. ch. 8. *after Verdict on any Action*), *unleſs the Party bringing the Writ enter into a Recognizance with two Sureties in double the Sum recovered,* (*or by* 16 & 17 Car. 2. ch. 8. *on any Writ of Dower or Ejectment after Verdict, in ſuch Sum as the Court ſhall think fit*) *to proſecute the Writ with Effect, and ſatisfy all Damages and Coſts.*]

By 5 G. 1. ch. 13. *All Writs of Error, wherein there ſhall be any Variance from the original Record, or other Defect, may be* amended *by the Court, where ſuch Writs are returnable.*

Where any Verdict hath been given in any Court of Record in England *or* Wales, *the* Judgment *ſhall not be* reverſed *for any Defect in* Form or Subſtance *in any Bill or Writ original, or judicial, or any Variance in ſuch Writ from the Declaration or other Proceedings.*

This Act not to extend to any Appeal of Felony or Murder, or to Proceſs on any Indictment, Preſentment, or Information.

[See 3 *H.* 7. *ch.* 10. 13 *Car.* 2. *St.* 2. *ch.* 2. 16 & 17 *Car.* 2. *ch.* 8. 8 & 9 *W.* 3. *ch.* 11. 4 *An. ch.* 16. For Recovery of Coſts upon Writs of Error for the Plaintiff or Defendant.]

Though a Judgment is reverſed, yet the Plaintiff may bring a new Action for the ſame Cauſe.

By 10 & 11 W. 3. ch. 14. *No Fine, or common Recovery, nor any Judgment in any real or perſonal Action, ſhall be reverſed for any Error therein, unleſs the* Writ *of* Error *or Suit for reverſing ſuch Fine, Recovery, or Judgment, be commenced, and proſecuted with Effect, within twenty Years. Saving the Right of Infants, Femes Covert, Perſons* Non Compos, *in Priſon, or beyond the Seas.*

[a] F. N. B. 17, 18.

2. A Writ of [a] *falſe Judgment* lieth for falſe Judgment in a Court *not* of Record.

[b] F.N.B. 105. 1 Inſt. 294. b. Finch 484, &c. 1 Ld. Ray. 469.

3. A Writ of [b] *Attaint* lies againſt a Jury, and is to examine whether a Jury of twelve Men gave a falſe Verdict, or contrary to Evidence, in a Court of Record upon Iſſue joined, that upon Conviction of the Jury the Judgment following upon it may be reverſed. But this Writ of Attaint is almoſt out of Uſe; and inſtead thereof Motions are uſually made for new Trials, when a Verdict is againſt Evidence. [See 11 *H.* 7. *ch.* 21. 23 *H.* 8. *ch.* 3.]

[c] F.N.B. 102. 1 Inſt. 290. b. 2 Str. 1198. 1 Ld. Ray. 439. See the Catalogue of Writs, ante.

4. [c] An *Audita Querela* lies, where one being in Danger of Execution, or is actually in Execution, may be relieved upon good Matter of Diſcharge, which hath happened ſince the Judgment. As if the Plaintiff after Judgment *releaſes* to the Defendant all Executions, *&c.* The Defendant is driven to his *Audita Querela*; for he cannot *plead* this Releaſe to any of the Writs of Execution abovementioned.

[d] 1 Inſt. 168. a. 2 Inſt. 351, 387.

Theſe are the *general* Parts of the Proceedings in *Civil* Suits or Cauſes. I ſhall only add, that [d] *Forms* of Writs, Declarations, Pleas, Iſſues, Judgments and Executions, do much contribute to the right Underſtanding of the Law, and the Reaſon of it; which therefore a Student muſt endeavour to be acquainted with, by reading and ſtudying the Books of Entries and Pleadings; many of which are of good Authority, as *Coke's* Entries and Reports, *Raſtal's* Entries, *Saunders*, &c. &c.

CHAP. V.

Of the Proceedings *in* Criminal *Cauſes*, (viz.) *Of the* Proceſs *for the Arreſt or Outlawry of the Criminal*, *of* Bail, Indictments, Approvers, Appeals, Informations, Arraignment, *of the* Behaviour *of the Offender upon his Arraignment*, *of* Trial, Conviction *and* Attainder, Judgment, Forfeiture, Arreſt *or* Reverſal *of* Judgment, *and* falſifying Attainders, Execution, Reprieve, Reſtitution.

TO ſhew the *Proceedings* in *Criminal* Cauſes, or *Pleas* of the *Crown*, It will be Neceſſary, to give a *General* Account of the *Proceſs* for the *Arreſt* or *Outlawry* of the *Criminal*, Of *Bail*, *Indictments*, *Approvers*, *Appeals*, *Informations*, *Arraignment*, Of the

Behaviour of the Offender upon his Arraignment, Of *Trial*, *Conviction*, and *Attainder*, *Judgment*, *Forfeiture*, *Arreſt* or *Reverſal* of *Judgment*; and *Falſifying Attainders*, *Execution*, *Reprieve*, *Reſtitution*.

I. The *Proceſs* is ſo called, becauſe it proceedeth or goeth forth upon former Matter, either Original or Judicial. [a] *Proceſs largely* taken, is all the Proceedings in Real and Perſonal Actions, and Criminal Pleas. But if taken *ſtrictly*, it is all the Proceedings after the Original, out of the Plea-Roll, before Judgment. In this Senſe Pleas of the Crown are not included; therefore I take it in the larger Meaning.

Of the Proceſs for the Arreſt or Outlawry of the Criminal.

[a] 8 Rep 157. See of Writs in ch. 4. ante. and See 4Black. Com. ch. 21, Of Arreſts.

An *Arreſt* is the Apprehending or Reſtraining of One's Perſon by Proceſs in Execution of the Command of ſome Court or Officer of Juſtice, as I have ſaid before in the former Chapter concerning Writs and Arreſts in Civil Cauſes. To this Arreſt all Perſons, Eccleſiaſtical or Lay, Men or Women, are ſubject in Criminal Caſes. This Arreſt is the Beginning of Impriſonment, But,

By Magna Charta, *or* 9 H. 3. ch. 29. *No one ſhall be taken or impriſoned, or diſſeiſed of his Freehold or Liberties, or free Cuſtoms, or be outlaw'd or baniſh'd his Country, or in any Sort deſtroyed, nor will we paſs upon him, or condemn him, unleſs by lawful Judgment of his Peers, or according to the Law of the Land.*

Let us conſider the ſeveral Parts of this Chapter.

[b] *No one ſhall be taken or impriſoned*, *i. e.* attached, *arreſted*, or reſtrained of his Liberty, but according to Law, either by Command or Order of a Court of Record, or by lawful Warrant, or the King's Writ.

[b] 2 Inſt. 46. &c. 3 Inſt. 209.

Or *diſſeiſed of his Freehold*, *&c. i. e.* [c] His Lands or Tenements, Goods or Chattels, ſhall not be ſeized into the King's Hands, or he ſhall not be diſſeiſed of his Lands or Tenements, or be diſpoſſeſſed of his Goods or Chattels, but according to the Law of the Land.

[c] 1 Inſt. 46.

Or Outlaw'd, *i. e.* [a] Put out of the Law, or deprived of the Benefit of the Law, but according to the known Law of the Land.

[a] 1 Inſt. 47.

Or Baniſh'd his Country, [b] but either by Authority of *Parliament*, or in caſe of *Abjuration* for Felony by the Common Law, where one took an Oath before the Coroner, to leave the Realm for ever. [c] But Abjuration, being founded on the Privilege of the Sanctuary of the Church, or Churchyard, is wholly taken away by the 21 *Ja.* 1. *ch.* 28. [See 35 *El. ch.* 1. Concerning *Recuſants*.]

[b] 2 Inſt. 47, 201.

[c] 3 Inſt. 115, 116.

Or in any Sort deſtroy'd, *i. e.* [d] Forejudged of Life, or Limb, diſinherited, or put to Torture or Death, or ſuffer in any Way that tends to his Deſtruction, but according to Law. All [e] *Torture*, or Torments of Perſons accuſed are againſt the Common Laws of *England*; neither can it be warranted by any Preſcription or Statute. But it is ſaid, that Irons may be put upon Perſons impriſon'd for any Cauſe. [*Qu.* [f] Unleſs for Treaſon or Felony, or where the Gaoler hath juſt Reaſon to fear an Eſcape.] [See *Weſt.* 2. *ch.* 11. 7 *Ja.* 1. *ch.* 4.]

[d] 2 Inſt. 46, 48.

[e] Forteſcue, ch. 22. 2 Inſt. 381, 316. 3Inſt. 34, 35. 3 Rep. 44. Bract. l. 3. fol. 137. a. Layer's Trial 4.

[f] 1 H. H. P. C. 631.

Unleſs by lawful Judgment of his Peers. [g] It is ſaid *Judgment* not *Verdict*, becauſe the Lords of Parliament are not ſworn, but give their Judgment upon their Honour. *His Peers*, *i. e.* His Equals. [h] For as every one of the Nobility (being a Lord of Parliament) is a Peer to all the other Lords of Parliament, tho' they are of ſeveral Degrees; ſo the Commons are Peers to one another, tho' diſtinguiſhed into Knights, Eſquires,

[g] 2 Inſt. 49.

[h] 2 Inſt. 29, 49.

By 10 & 11 W. 3. ch. 14. *No Fine, or common Recovery, nor any Judgment in any real or perſonal Action, ſhall be reverſed for any Error therein, unleſs the* Writ *of* Error *or Suit for reverſing ſuch Fine, Recovery, or Judgment, be commenced, and proſecuted with Effect, within twenty Years. Saving the Right of Infants, Femes Covert, Perſons* Non Compos, *in Priſon, or beyond the Seas.*

[a] F. N. B. 17, 18.

2. A Writ of [a] *falſe Judgment* lieth for falſe Judgment in a Court *not* of Record.

[b] F.N.B. 105. 1 Inſt. 294. b. Finch 484, &c. 1 Ld. Ray. 469.

3. A Writ of [b] *Attaint* lies againſt a Jury, and is to examine whether a Jury of twelve Men gave a falſe Verdict, or contrary to Evidence, in a Court of Record upon Iſſue joined, that upon Conviction of the Jury the Judgment following upon it may be reverſed. But this Writ of Attaint is almoſt out of Uſe; and inſtead thereof Motions are uſually made for new Trials, when a Verdict is againſt Evidence. [See 11 *H.* 7. *ch.* 21. 23 *H.* 8. *ch.* 3.]

[c] F.N.B. 102. 1 Inſt. 290. b. 2 Str. 1198. 1 Ld. Ray. 439. See the Catalogue of Writs, ante.

4. [c] An *Audita Querela* lies, where one being in Danger of Execution, or is actually in Execution, may be relieved upon good Matter of Diſcharge, which hath happened ſince the Judgment. As if the Plaintiff after Judgment *releaſes* to the Defendant all Executions, *&c.* The Defendant is driven to his *Audita Querela*; for he cannot *plead* this Releaſe to any of the Writs of Execution abovementioned.

[d] 1 Inſt. 168. a. 2 Inſt. 351, 387.

Theſe are the *general* Parts of the Proceedings in *Civil* Suits or Cauſes. I ſhall only add, that [d] *Forms* of Writs, Declarations, Pleas, Iſſues, Judgments and Executions, do much contribute to the right Underſtanding of the Law, and the Reaſon of it; which therefore a Student muſt endeavour to be acquainted with, by reading and ſtudying the Books of Entries and Pleadings; many of which are of good Authority, as *Coke's* Entries and Reports, *Raſtal's* Entries, *Saunders*, &c. &c.

CHAP. V.

Of the Proceedings *in* Criminal *Cauſes*, (viz.) *Of the* Proceſs *for the Arreſt or Outlawry of the Criminal*, *of* Bail, Indictments, Approvers, Appeals, Informations, Arraignment, *of the* Behaviour *of the Offender upon his Arraignment*, *of* Trial, Conviction *and* Attainder, Judgment, Forfeiture, Arreſt *or* Reverſal *of* Judgment, *and* falſifying Attainders, Execution, Reprieve, Reſtitution.

TO ſhew the *Proceedings* in *Criminal* Cauſes, or *Pleas* of the *Crown*, It will be Neceſſary, to give a *General* Account of the *Proceſs* for the *Arreſt* or *Outlawry* of the *Criminal*, Of *Bail*, *Indictments*, *Approvers*, *Appeals*, *Informations*, *Arraignment*, Of the

Behaviour of the Offender upon his Arraignment, Of *Trial*, *Conviction*, and *Attainder*, *Judgment*, *Forfeiture*, *Arreſt* or *Reverſal* of *Judgment*, and *Falſifying Attainders*, *Execution*, *Reprieve*, *Reſtitution*.

I. The *Proceſs* is ſo called, becauſe it proceedeth or goeth forth upon former Matter, either Original or Judicial. [a] *Proceſs largely* taken, is all the Proceedings in Real and Perſonal Actions, and Criminal Pleas. But if taken *ſtrictly*, it is all the Proceedings after the Original, out of the Plea-Roll, before Judgment. In this Senſe Pleas of the Crown are not included; therefore I take it in the larger Meaning.

Of the Proceſs for the Arreſt or Outlawry of the Criminal.

[a] 8 Rep 157. See of Writs in ch. 4. ante. and See 4 Black. Com. ch. 21, Of Arreſts.

An *Arreſt* is the Apprehending or Reſtraining of One's Perſon by Proceſs in Execution of the Command of ſome Court or Officer of Juſtice, as I have ſaid before in the former Chapter concerning Writs and Arreſts in Civil Cauſes. To this Arreſt all Perſons, Eccleſiaſtical or Lay, Men or Women, are ſubject in Criminal Caſes. This Arreſt is the Beginning of Impriſonment, But,

By Magna Charta, *or* 9 H. 3. ch. 29. *No one ſhall be taken or impriſoned, or diſſeiſed of his Freehold or Liberties, or free Cuſtoms, or be outlaw'd or baniſh'd his Country, or in any Sort deſtroyed, nor will we paſs upon him, or condemn him, unleſs by lawful Judgment of his Peers, or according to the Law of the Land.*

Let us conſider the ſeveral Parts of this Chapter.

[b] *No one ſhall be taken or impriſoned, i. e.* attached, *arreſted*, or reſtrained of his Liberty, but according to Law, either by Command or Order of a Court of Record, or by lawful Warrant, or the King's Writ.

[b] 2 Inſt. 46. &c. 3 Inſt. 209.

Or *diſſeiſed of his Freehold, &c. i. e.* [c] His Lands or Tenements, Goods or Chattels, ſhall not be ſeized into the King's Hands, or he ſhall not be diſſeiſed of his Lands or Tenements, or be diſpoſſeſſed of his Goods or Chattels, but according to the Law of the Land.

[c] 1 Inſt. 46.

Or Outlaw'd, i. e. [a] Put out of the Law, or deprived of the Benefit of the Law, but according to the known Law of the Land.

[a] 1 Inſt. 47.

Or Baniſh'd his Country, [b] but either by Authority of *Parliament*, or in caſe of *Abjuration* for Felony by the Common Law, where one took an Oath before the Coroner, to leave the Realm for ever. [c] But Abjuration, being founded on the Privilege of the Sanctuary of the Church, or Churchyard, is wholly taken away by the 21 *Ja.* 1. *ch.* 28. [See 35 *El. ch.* 1. Concerning *Recuſants.*]

[b] 2 Inſt. 47, 201.

[c] 3 Inſt. 115, 116.

Or in any Sort deſtroy'd, i. e. [d] Forejudged of Life, or Limb, diſinherited, or put to Torture or Death, or ſuffer in any Way that tends to his Deſtruction, but according to Law. All [e] *Torture*, or Torments of Perſons accuſed are againſt the Common Laws of *England*; neither can it be warranted by any Preſcription or Statute. But it is ſaid, that Irons may be put upon Perſons impriſon'd for any Cauſe. [*Qu.* [f] Unleſs for Treaſon or Felony, or where the Gaoler hath juſt Reaſon to fear an Eſcape.] [See *Weſt.* 2. *ch.* 11. 7 *Ja.* 1. *ch.* 4.]

[d] 2 Inſt. 46, 48.

[e] Forteſcue, ch. 22. 2 Inſt. 381, 316. 3 Inſt. 34, 35. 3 Rep. 44. Bract. l. 3. fol. 137. a. Layer's Trial 4.

[f] 1 H. H. P. C. 631.

Unleſs by lawful Judgment of his Peers. [g] It is ſaid *Judgment* not *Verdict*, becauſe the Lords of Parliament are not ſworn, but give their Judgment upon their Honour. *His Peers, i. e.* His Equals. [h] For as every one of the Nobility (being a Lord of Parliament) is a Peer to all the other Lords of Parliament, tho' they are of ſeveral Degrees; ſo the Commons are Peers to one another, tho' diſtinguiſhed into Knights, Eſquires,

[g] 2 Inſt. 49.

[h] 2 Inſt. 29, 49.

Gentlemen, Yeomen, *&c.* [i] But this Clauſe is to be underſtood, when one accuſed does appear and plead, and is willing to have his Caſe tried by his Peers. Otherwiſe the Proceedings may be by *Capias*, Outlawry, *&c.* as the Law directs.

Or according to the Law of the Land, i. e. [k] According to the Common Law, Statute-Law, or the Cuſtom of *England*, or by due Proceſs and Courſe of Law.

Note, That theſe Words, *According to the Law of the Land*, do refer to all the precedent Matters in this Chapter of *Magna Charta*. And therefore in every Branch of it you muſt add, *Unleſs by lawful Judgment of his Peers, or according to the Law of the Land.* [See the *Petition of Right*, 3 *Car.* 1. *ch.* .]

Now *Proceſs* according to Law is of two Sorts, (*viz.*) *before* Preſentment or Indictment, and *after* Preſentment or Indictment.

1. The Proceſs *before* Preſentment or Indictment, is either by the King's *Writ* or by *Warrant*.

[l] By the King's *Writ*, to take one without Summons, upon a Suggeſtion; as by the Writ *De vi Laica Removenda*, thoſe that reſiſt, may be forthwith arreſted; by *Ne Exeat Regno*, Perſons going beyond Sea without Leave, may be ſtopp'd and arreſted upon Suggeſtion, *&c.*

By *Warrant*, either *Expreſs*, or *By Law*, [m] *Expreſs*, as where there hath been a private Information, or a Witneſs has depoſed againſt an Offender, he may be taken up by a Warrant from the Privy Council, a Secretary of State, or a Juſtice of Peace, and committed to Priſon. By *Law*, [n] as when a private Perſon arreſts and apprehends one that he *ſuſpects* to have committed Treaſon or Felony, when Treaſon or Felony has been committed. Thus when Treaſon or Felony is committed (for Treaſon or Felony muſt have been done) and the common Fame is, that *A.* is Guilty; or if a great Quantity of Arms, or ſtolen Goods, are found in his Cuſtody; it is lawful for any one, that ſuſpects *A.* to be an Offender, to apprehend him. But whether the Suſpicion is juſt or lawful, may be determined on an Action of falſe Impriſonment. [[a] It ſhould ſeem that where the Perſon turns out to be *in fact Guilty* of ſuch Treaſon or Felony, the Arreſt by a private Perſon, whatever might be his Ground of Suſpicion, is juſtifiable; but where he turns out to be innocent, the Juſtification muſt depend upon the Notoriety, or the Degree of Probability of the Party's Guilt, his general Character, the Apprehender's having or not having any previous Malice towards him, and upon ſo many other Circumſtances, that it is difficult, if not impoſſible, to lay down any preciſe Rules in this Caſe; tho' in order to juſtify a private Perſon's Arreſt of another *without Warrant*, where he turns out to be innocent, the Circumſtances creating the Suſpicion muſt appear to have been very ſtrong, and the Apprehender ſtand entirely free from any ſelfiſh or revengeful Motives.] A private Perſon may arreſt a Nightwalker, and detain him 'till Morning; that, if he can, he may make it appear, he is a Perſon of good Fame. [But *Qu.* If the Arreſt of a Nightwalker, even by a legal Conſtable, much leſs by a private Perſon, upon [b] *a bare Suſpicion only*, without the Party's having been guilty of any Breach of the Peace or any unlawful Act, be juſtifiable.] A private Perſon may arreſt one that is breaking the Peace by an Affray. [c] But after the Affray is ended, an Offender cannot be arreſted without an expreſs Warrant. It is regularly true, that no private Perſon can of his own Authority arreſt another for a Breach of the Peace, after it is over, as he may in Treaſon or Felony; but it ſeems reaſonable [d] that for inferior Offences, ſcandalous. and prejudicial to the Publick, an Arreſt of the Offender by a private Perſon ſhould be allow'd, after the Offence is committed, in order to bring him before a Juſtice of Peace [where the Party is caught in the Fact] Arreſts are not only *allow'd* to private Perſons, but oftentimes [e] *commanded* by the Law. For (as I before hinted) Perſons *preſent* at the committing of a Felony, muſt uſe their Endeavours to apprehend the Offender, under Penalty of Fine and Impriſonment. (See 3 *H.* 7. *ch.* 1. For the amercing of a Townſhip, when a Murderer eſcapes.] [f] Upon *Hue* and *Cry*, every Man, by the Common Law as well as by Statute, *may* and *muſt* arreſt the Perſon ſuſpected, even though the Hue and Cry is [g] feign'd [*Qu.*] And ſo in *Aid*, of an *Officer*, that hath an expreſs Warrant, or a Warrant by Law, every one muſt endeavour to arreſt a Malefactor. In ſuch Caſes, a private Perſon may break open a Houſe, if upon Demand he cannot be admitted, to take the Offender. But upon [h] *Suſpicion* a private Perſon cannot break open the Door of a Houſe, though he may enter, if the Door is open. If a Juſtice of Peace makes a Warrant upon a bare Surmiſe, [i] and by Virtue thereof one breaks a Houſe, to ſearch for a Felon or ſtolen Goods (tho' it is uſually practiſed) it is againſt *Magna Charta*. When a Felon is known or ſuſpected, a Juſtice of Peace may ſend his Warrant to the Conſtable, to go along with the Party, that gives the Information of the Felony, or that ſuſpects one to have committed a Felony, to keep the Peace in apprehending the Felon; but it is the Arreſt of the Party, who cannot break open any Houſe, to arreſt the Felon except in Caſes aforeſaid, where he is *commanded* by Law to apprehend him.

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[i] 3 Inſt. 31.

[k] 2 Inſt. 46, 50, 51, 282.

4 Black. Com. 287

[l] 2 Inſt. 53, 54, 186, 187. 3 Inſt. 118, 209. Finch 340. Dalt. ch. 170. p. 448, 449.

[m] See Hawk. P. C. B. 2. ch. 13 1 Str. 2, 3.

[n] See Hawk. P. C. B. 2, ch. 12.

[a] See Hawk. P. C. B. 2. p. 76, 77.

[b] 2 Ld. Ray. 1301. 2 Str. 884. S. C.

[c] Cromp. Jur. 179. H. P. C. 91.

[d] 2 Inſt. 52, 2 Roll. Abr. 546.

[e] 2 Inſt. 172. 3 Inſt. 53, 117, 118, 139. 4 Inſt. 177. H. P. C. 89, 90, 91.

[f] See p. 363. ante

[g] Hawk. P.C. B. 2. p. 76.

[h] 4 Inſt. 176, 177, 178. 5 Rep. 91, 92. H. P. C. 94.

[i] 2 H H. P. C. 150. 151. See p. 82, ante.

[*By* 17 G. 2. ch. 5. *Private Perſons may apprehend Beggars and Vagrants.*]

[a] When one is arreſted by a private Perſon, he muſt be brought to the Conſtable; but if the Conſtable cannot be found, to a Juſtice of Peace. In the mean Time, a private Perſon may detain the Offender, or Perſon ſuſpected, in a Houſe, in the Stocks, or Cage, 'till he is delivered to the Conſtable or Juſtice.

[a] Dalt. chap. 170. p. 450. H P. C. 91, 92, 93. 4 Black Com. 289,

Note, That whatſoever a private Perſon may do, an *Officer* as a private Perſon may alſo do; as a Juſtice of Peace, Conſtable, *&c.* Thus a Conſtable without Proceſs may impriſon a Perſon ſuſpected of Felony, in a Houſe, Stocks, or Cage, 'till he can bring him before a juſtice of Peace. And moreover the *Conſtable* [b] (with or without Warrant) may break open Doors to take an Offender, [if within the Houſe] after Demand to be admitted, where Felony is committted, or a dangerous Wound given. [See the Statute of *Wincheſter*, or 13 *Ed.* 1. *St.* 2. *ch.* 4. as to the Power of *Bailiffs* of *Towns* and *Watchmen.*] But this, I ſay, is not to be done by Virtue of his Warrant from the Juſtice. [*Qu.* [c]] Indeed a Conſtable in ſuch Caſes hath greater Authority than a private Perſon, [*Qu.* [d] without a Warrant] and the Law takes an eſpecial Notice of him; ſo that on that Account he differs from a private Perſon; but he cannot juſtify an Arreſt for a Breach of the Peace out of his Preſence, without a Warrant for ſo doing.

See Hawk. P. C. B. 2. ch. 13.

[b] See p. 87. ante.

[c] 1 H. H. P. C. 579, 580. Hawk. P. C. B. 2. ch 14.

[d] Hawk. P. C. B. 2. p. 80, 81.

[e] The *King* cannot arreſt any Man for Suſpicion of Treaſon or Felony, as any of his Subjects may. Becauſe, if the King does Wrong, the Party cannot have his Action. If the King commands me by Word of

[e] 2 Inſt 186, 187.

Mouth, to arreſt a Man, and accordingly I do arreſt him, he ſhall have his Action of Falſe Impriſonment againſt me, altho' it was done in the King's Preſence. The King cannot do it by any ſuch extrajudcial Command; but muſt do it by Writ, or by Order or Rule of ſome of his Courts of Juſtice, according to Law.

2. [f] *After* Preſentment or Indictment found in Treaſon or Felony, or on an Appeal of Death, [or Mayhem] the firſt Proceſs is a *Capias*, directed to the Sheriff, to take and impriſon the Offender. [g] On an Indictment, in Treaſon or Felony, an Appeal of Death, or breach of the Peace, a *Capias* out of the *K. B.* lieth againſt a Peer. [h] Here the Sheriff, or others in Aid of him, may break open Doors to take the Offender, if upon Demand they cannot be admitted; for here the King's Writ contains a *Non omittas propter aliquam Libertatem*. But if the Offender cannot be taken, then an *Exigent* is awarded in order to an *Outlawry*, [i] which lies in all Indictments of Treaſon, Felony, Appeals of Felony or Mayhem, and on all Returns of Reſcous, and alſo in all Indictments of Treſpaſs *Vi & Armis*, or any other Crime of a higher Nature. [For the *Capias* and *Exigent*, ſee 5 *Ed.* 3. *ch.* 11. 25 *Ed.* 3. *St.* 5. *ch.* 14. 6 *H.* 6. *ch.* 1. 8 *H.* 6. *ch.* 10. 10 *H.* 6. *ch.* 6. For the *Addition* of the Eſtate and Degree, Myſtery, Town, or Place, and of the County of the Offender, in Proceſs of Outlawry in Indictments and Appeals, ſee 1 *H.* 5. *ch.* 5. [k] And ſee 4 & 5 *W.* & *M. ch.* 22. for a Writ of *Proclamation* upon iſſuing any *Exigent* in criminal Matters according to the Form of 31 *El. ch.* 3.]

[f] H. P C. 209. Hawk. P. C. B. 2. ch. 27.
[g] Finch 335. 3 Inſt. 31.
[h] 5 Rep. 91, 92. 4 Inſt. 177. H. P. C. 94.
[i] Hawk. P.C. B. 2. p. 362, &c. See Chap. 4. ante.
[k] 2 Inſt. 665, &c.

[a] Upon an Indictment on a penal Statute, or in Treſpaſs *Vi et Armis*, or other Crimes of an inferior Nature, a *Venire Facias* is the firſt Proceſs (which is but a Summons to make the Party appear) and if the Party is return'd ſufficient, a *Diſtringas* goeth forth; and ſo a Diſtreſs infinite till the Party appears. But if the Sheriff returns *Nichil*, then a *Capias* is to iſſue out againſt the Offender: After that an *Alias* and *Pluries*, and then an *Exigent* and *Outlawry*. A *Subpœna* goeth firſt out of the Crown-Office on a criminal *Information*, and then a *Capias*, againſt private Perſons, or *Diſtringas* againſt Aggregate Bodies, upon Non-Appearance. But for the proper Proceſs on Informations on *penal Statutes*, it muſt be as in an Action of Treſpaſs *Vi et Armis*. [See 21 *Ja.* 1. *ch.* 4.]

[a] Dalt. ch. 193. p. 529.

Theſe are the common Proceſſes in criminal Cauſes, to make an Offender appear. But ſometimes there are ſpecial Proceſſes appointed by *Statutes*; as upon 33 *H.* 8. *ch.* 9. for unlawful Games; 5 *El. ch.* 4. Againſt a Servant, that runs away into another County; 22 *H.* 8. *ch.* 5. Where Land in one County is chargeable, to repair a Bridge in another County; 5 *El. ch.* 12. § 8. Concerning Foreſtallers, &c.

It may not be improper, to mention here a Proceſs, to bring in an Offender, awarded by the Diſcretion of the Judges upon a Suggeſtion, or their own Knowledge, without any Indictment, Appeal, or Information, *viz.* an *Attachment*; which is uſually granted in Caſes of Abuſe and *Contempt*, eſpecially by the Courts in *Weſtminſter Hall*, againſt inferior Judges, Sheriffs, Bailiffs of Liberties, Attornies, Jurors, &c. where they may proceed in a ſummary Way by Interrogatories upon Oath, or of their own Knowledge, againſt a Perſon preſent in Court; or ſend the Attachment forth againſt one abſent, upon a Complaint on Oath or *Affidavit*, and commit him, till he anſwers Interrogatories.

Hawk. P. C. B. 2. ch. 22.

If an Offender is taken upon Proceſs, he is preſently to be *committed* to the common Gaol, [b] [See 5 *H.* 4 *ch.* 10. 11 & 12 *W.* 3. *ch.* 19. 5 *Ann. ch.* 9. 6 *Geo.* 1. *ch.* 19.] or elſe he is to be bound in a *Recognizance* ſingly, or with Sureties or Bail, according to the Nature of the Offence, to appear at a Day in Court, to anſwer for his ſuppoſed Offence; the Informer being likewiſe bound to proſecute, or to give Evidence againſt him, or both to proſecute and give Evidence at the next General Gaol-Delivery or Quarter-Seſſions, *&c.* [See 1 & 2 *Ph.* & *M. ch.* 13. 2 & 3 *Ph.* & *M. ch.* 10. 10 & 11 *W.* 3. *ch.* 23.

[b] See ante. 4 Black. Com. 293.

By 3 Ja. 1. ch. 10. *Every Perſon committed to any common or uſual Gaol by any Juſtice or Juſtices of Peace, for any Offence or Miſdemeanor, having Means or Ability thereunto, ſhall bear all* Charges *of Conveying, both of himſelf and of thoſe that convey him thither. If he refuſes ſo to do, the Conſtable of the Townſhip where the Offender inhabits, or from whence he is committed, or where he hath any Goods (being within the ſame County) upon a Warrant under the Hand and Seal of a Juſtice of Peace, may ſell ſo much thereof, as in the Diſcretion of the ſaid Juſtice ſhall be thought ſufficient, to ſatisfy the ſaid Charges; the Appraiſement to be made by four of the honeſt Inhabitants of the Pariſh or Tithing where ſuch Goods ſhall be, and the Overplus to be render'd to the Offender.*

If the Offender ſhall not have, or be known to have, any Goods within the County, to ſatisfy the Charges, the Conſtables, Churchwardens, and two or three other the honeſt Inhabitants of the Pariſh, &c. *where the Offender was taken, or, in Default of Conſtables or Churchwardens there inhabiting, four of the principal Inhabitants ſhall make an indifferent Tax or Aſſeſſment to pay the ſaid Charges, the ſaid Taxation to be allowed under the Hand of one or more Juſtices of the Peace,* &c. But ſee 27 *Geo.* 2. *ch.* 3. *in p.* 88, *ante.*]

[a] While he is in Priſon, the Gaoler is bound to give him Suſtenance, and muſt not ſuffer him to die for Want of it. [See 14 *El. ch.* 5. and 12 *G.* 2. *ch.* 29.]

[a] 1 Inſt. 295. a. 9 Rep. 87.

[See 1 & 2 *Ph.* & *M. ch.* 13. 2 & 3 *Ph.* & *M. ch.* 10. For the Examination of *Felons*; and of the *Warrant* and *Mittimus*, *B.* 1. *ch.* 7. *ante*, Tit. *Juſtices* of the *Peace.* See alſo of the *Privy Council*, and *Secretaries* of *State*, *ch.* 1. *ante.*]

II. When the Offender appears, or is taken upon Proceſs, it muſt be conſidered, whether he ought to be admitted to *Bail.* Therefore let us enquire, *what* is *Bail*, *who* may be bailed, and by *whom.*

Of Bail in Criminal Caſes. 4 Black. Com. 293. ch. 22. per totum.

1. [b] *Bail* are Sureties taken by a Perſon authorized, that an Offender ſhall appear at a Day, and anſwer, and be juſtified by Law. This Sort of Bail is different from Bail [c] in *Civil* Cauſes, taken by Sheriffs, *&c.* *Mainpernors (Manucaptores)* are only Sureties, who in caſe the Criminal does not appear, (though he was never arreſted or in Priſon) are to forfeit their Recognizances. But Bail is a Cuſtody; for no Man is bailed, but he that is under an Arreſt, or in Priſon. Therefore the Bail may ſeize the Priſoner, if they ſuſpect he will fly, and carry him before a Juſtice, to find new Sureties, or to be committed in Diſcharge of the Bail. The like may be done by the Juſtices in caſe of inſufficient Bail. No one is bailed, but he that is arreſted or in Priſon. But one may be mainperned, that never was arreſted or in Priſon. Hence it appears, that every Bail is a Mainpriſe, but that every Mainpriſe is

[b] 4 Inſt. 178, 179. H. P. C. 96, 97. Dalt. ch. 166. p. 417. Hawk. P. C. B. 2. ch. 15.

[c] See ch. 4. ante.

not Bail. The Bail ought to be two Sureties at the leaſt. In ſome Caſes, as on a *Habeas Corpus* after a Commitment for Treaſon or Felony, the Practice in the *K. B.* is to require four. If the Bail is inſufficient, the Juſtice of Peace that took it, is finable by the Juſtices of Gaol Delivery, if the Criminal doth not appear. Inſufficient Bail is where the Bail is not of Ability to pay the Sum, in which they were bound. [See 27 *Ed.* 1. *ch.* 3. *De Finibus levatis.*] Therefore the Juſtices may examine the Sureties upon Oath, concerning their Abilities in Reſpect of their Eſtates. [See 1 & 2 *Ph.* & *M. ch.* 13.] Bail is either in a certain *Sum*, as 40 *l.* each, at leaſt, with the Criminal in double the Sum; or *Body* for *Body*, in which Caſe, if the Offender does not appear the Bail ſhall not be executed, but only fined. But however, the Principal is always bound in a certain Sum. [See 1 *W.* & *M. Seſſ.* 1. *ch.* 2. againſt *Exceſſive* Bail.]

This is the *Deſcription* of Bail in Criminal Caſes.

[a] 2 Inſt 42, 186, 189. 2. As to the Perſons that may be *bailed*; it is allowed, that by the [a] *Common Law*, all Perſons might be admitted to Bail, till they were convicted, almoſt in every Caſe. Upon Conviction the Offence does appear.

See Hawk. P. C. B. 2. p 95, 96. By the *Common Law* Perſons were bailed by the Writs *De Homine Replegiando* and *De Odio et Atia*, directed to the Sheriff, who was to take Pledges for them in his County Court, *except* for the *Death* of a Man, or by the *Command* of the King, or his Juſtices, or for the *Foreſt*. [See 1 *Ed.* 3. *St.* 1. *ch.* 8. 7 *Ri.* 2. *ch.* 4] In theſe Caſes the Sheriff was not to intermeddle in his Court, but the Remedy was by *Habeas Corpus*, and ſo theſe were bailed at *Common Law* in the Courts at *Weſtminſter*. But,

By Weſt. 1. *or* 3 Ed. 1. ch. 15. *Perſons* outlawed, *thoſe that have* abjured *the Realm*, Approvers, *ſuch as are taken with the* Mainer, Priſonbreakers, Thieves *openly defamed and known*, *ſuch as be appealed by* Provers *during the Life of ſuch Provers, (if they be not of good Fame)* Houſeburners, Counterfeiters *of the King's* Seal *or* Coin, Excommunicated *Perſons (taken upon the Certificate of the Biſhop) Perſons taken for manifeſt Offences*, Traitors *againſt the King's Perſon, are not* repleviſable *by Common Writ, or without Writ.*

To explain this Statute.

[b] 2 Inſt. 187, 188. H. P. C. 101, 105. Dalt. ch. 166. p. 421, 422. *Perſons outlawed*, and *thoſe that have abjured*, &c. [b] An Outlaw in Felony cannot be bailed, becauſe he is attainted in Law. For the Intendment of the Law in admitting Perſons to Bail, is, becauſe it is uncertain, whether the Party is guilty, or no; which cannot be ſaid when one is attainted. But a Perſon attainted by Outlawry of any Felony may appear in Perſon, and plead *Miſnomer*, or alledge Error in Avoidance of the Outlawry, be it on Indictment or Appeal, and the King's Bench may bail him. Thus one cannot be bailed, if he is attainted by Verdict as well as by Outlawry. Outlawed and excommunicate Perſons ſeem to be put for Examples only in the Statute; implying that all other Perſons under the *like* Circumſtances are excluded.

Approvers, [See *infra.*] Theſe appear to be *guilty* by their own Confeſſion.

Such as are taken with the Mainer. For in this Caſe, *Non ſtat indifferenter*, whether the Party is guilty or no, being taken with the Manner or *Mainer*, *i. e.* with the Thing ſtolen as it were in his *Hands*.

Thieves openly known and notorious; where there is plain Evidence againſt them.

Priſon-breakers. For it is preſumed, that he that is innocent, will never fly or break Priſon.

Perſons taken for manifeſt Offences, under the Degree of Felony, but of a dangerous Nature. Yet the Practice is otherwiſe.

Theſe are under violent Preſumptions of Guilt.

Houſe-burners, *Counterfeiters* of the King's *Seal* or *Coin*, and *Traitors* againſt the King's Perſon, are excluded the Benefit of Bail, by Reaſon of the Heinouſneſs of their Crimes.

By Common Writ, or without Writ, i. e. [c] The Sheriff ſhall not replevy them by the Common Writs *De Homine Replegiando*, *Writ of Mainpriſe*, or *De Odio et Atia* (which are diſuſed) er *Ex Officio* without Writ. [See 28 *Ed.* 3. *ch.* 9. *poſt.*]

By the ſame Statute thoſe that are indicted of Larceny *by Inqueſts taken before Sheriffs or Bailiffs by their Office, or of light* Suſpicion, *or for* Petty *Larceny, not being before guilty of other Larceny*; acceſſory *to any Felony*; *or accuſed of ſome other Treſpaſs, for which he ought not to loſe Life or Member*; *a Man appealed by a Prover, after the Death of the Prover (if he be no common Thief, nor defamed) ſhall be let to Bail before the Sheriff by good Sureties, for which the Sheriff ſhall be anſwerable.*

But then thoſe indicted of *Larceny* ought to be of good Reputation, and there ſhould be no ſtrong Preſumption, that they are guilty. *By Inqueſts taken before Sheriffs or Bailiffs, i. e.* [a] Before Sheriffs in their Turns, or Lords in their Leets, *&c.* [See 1 *Ed.* 4. *ch.* 2. By which the Sheriff ſhall deliver all Preſentments and Indictments taken in his Tourn, to the Juſtices of the Peace at the next Seſſions.]

Light Suſpicion; If they are of a good Character, and are not ſuſpected of Crimes expreſsly excepted by the Statute.

Petit Larceny; If there is any Colour of their being Not Guilty.

[b] All *Acceſſories* before and after the Fact are bailable, if there are not very ſtrong Preſumptions of Guilt. *Principals ſuſpected* only of Burglary and Robbery, though indicted may be bailed. [But ſee *who may take Bail, infra*, and 31 *Car.* 2. *chap.* 2. § 21.]

The Party *accuſed of Treſpaſs*, or any Offence below Felony, muſt be bailable; unleſs ouſted by Statute; or unleſs Judgment be given. [c] For if one hath been indicted, convicted, and hath had Judgment, he cannot be bailed.

Theſe are ſufficient Hints for the Expoſition of *Weſt.* 1. *ch.* 15. which though it relates only to Sheriffs, *&c.* yet I find that the Superior Courts are often governed by it.

[d] He that hath dangerouſly hurt another, may go under Bail till the Party is dead.

By 29 El. ch. 5. ſ. 21. and 31 El. ch. 10. ſ. 20. *Subjects or Denizens ſued or informed againſt in any of the Courts at* Weſtminſter, *on any penal Statute, in Caſes bailable by Law, ſhall not be required to put in Bail, but may appear by Attorney*]

In many Offences Bail is expreſsly *ouſted* by *particular Statutes*, as well as by *Weſt.* 1. *ch* 15.

By 23 H. 6. ch. 9. *Sheriffs*, &c. *ſhall not admit to Bail, ſuch as are in Priſon by Condemnation, Execution,* Capias Utlagatum, *Excommunication, Surety of the Peace, or committed by the ſpecial Command of any Juſtice, and Vagabonds refuſing to ſerve.*

[c] 2 Inſt. 189, 315.

[a] 2 Inſt. 290.

[b] 2 Inſt. 190. H. P. C. 100. Dalt. ch 166. p. 421, 422, 423.

[c] H. P. C. 98, 101. 4 Inſt. 178, 179.

[d] H. P. C. 99. Dalt. ch. 166. p. 420.

Bail is alſo taken away by particular *Statutes*, from unlicenſed *Alehouſe-keepers*, from Perſons *arreſting* in the Name of another, *Bankrupts* refuſing to anſwer before the Commiſſioners, Father and Mother of *Baſtards* not performing Juſtice's Order, Collectors of Money for repairing *Bridges*, *Conſtables*, &c. neglecting their Duty, Killers of *Deer* and *Conies*, *Dyers* convicted of uſing Logwood, *Engroſſers*, Deſtroyers of *Fiſh*, *Forgers*, *Foreſtallers*, unqualified Perſons deſtroying the *Game*, Players at unlawful *Games*, Perſons guilty of *fraudulent* Conveyances, *Hatters* taking above two Apprentices, Deſtroyers of *Hawks*, Surveyors neglecting their Duty concerning the *Highways*, thoſe that *reſiſt* a Diſtrainer ſeizing Horſes, in Waggons or Carts travelling for Hire, above the Number allowed, *Innkeepers* ſelling at unreaſonable Gain, *Labourers* going from Work before it is finiſhed, Abſenters from *Muſters*, Refuſers of the Oath of Allegiance when tendered, Perſons guilty of *Perjury* in any Court of Record, or of perſuading and procuring Soldiers to deſert, *Phyſicians* committed by the College of Phyſicians in *London*, Refuſers to pay Rates to the Poor where no Diſtreſs can be made, Overſeers of the Poor refuſing to paſs their Accounts, *&c.* Depravers of the *Common Prayer*, &c. Diſturbers of *Preachers*, *Recuſants*, Incorrigible *Rogues*, Deniers of the Chriſtian *Religion*, the Trinity, or the Inſpiration of the Scriptures, Unlicenſed *Schoolmaſters*, &c. Seamen quarrelling and fighting in his Majeſty's Yards, *&c.* upon Non-payment of Fine, Miſbehaviour of *Servants* and *Apprentices*, *Sheriffs* neglecting Duty concerning the Election of Knights of the Shire, *Tranſporters* of Horſes without Licence, and of live Sheep, *Takers* away of *Women* unmarried, and under ſixteen Years of Age, *&c.* Theſe *Statutes* are partly mentioned under their particular Heads, and in their proper Places. [But ſee *Dalton ch.* 177, and *Nelſon*'s Juſtice, *&c.* Tit. *Bail.*]

[a] 2 Inſt. 189.

Note, That if an Offender is committed to Priſon, he may be brought up by Writ of *Habeas Corpus*, to the Court of King's Bench; [a] which *may* bail him in all Caſes, unleſs Bail is ouſted by a particular Statute.

[b] H. P. C. 103, 104.
[c] See p. 18. ante.
4 Black. Com. ch. 22. Of Commitment and Bail.
[d] Staund. 18. H. P. C. 98, 99, 103.
[e] 2 Inſt. 185, 186, 189. Kely. 90. H. P. C. 104.
[f] Hawk. P. C. B. 2. p. 114. 1 Str. 2, 3.
[g] Hawk. P. C. B. 2. p. 107.

3. To ſhew *who* may *take* Bail, or bail Offenders, obſerve that Bail may be taken by [b] Virtue of a Writ, or *Ex Officio*. By *Writ*, as by the Writ of *Odio et Atia*, Writ of *Mainprize*, *Homine Replegiando*, *Habeas Corpus* [c]. *Ex Officio.* 1. By the Juſtices of the *King's Bench*, who may in an original Proſecution by Indictment or Appeal before them (or upon an Indictment or Commitment returned to them by *Habeas Corpus* or *Certiorari*) take Bail, where another Court cannot [d], as in caſe of Murder, Appeals of Death, [See 3 *H.* 7. *ch.* 1.] or in Caſes prohibited by *Weſt.* 1. *ch.* 15. [e] For that Statute, beginning with Sheriffs and other inferior Officers, extends not to Judges of any Superior Courts, who have Liberty of admitting to Bail by the Common Law. [But the Court will not [f] admit a Perſon to Bail, who is expreſsly declared by that Statute to be irrepleviſable, without ſome particular Circumſtances in his Favour.] Nay, it is affirmed [g], that this Court may, (upon good Cauſe) admit Perſons to Bail, that are impriſoned by the *King's Special Command*, or by the Order of his *Privy Council*, and this Power is either expreſsly admitted, or at leaſt implied in the following Statutes; ſo that there ſeems to be no Doubt thereof at this Day. [See *Magna Charta*, *ch.* 29. 25 *Ed.* 3. *ch.* 4. 28 *Ed.* 3. *ch.* 3. 42 *Ed.* 3. *ch.* 3. The *Petition of Right*, 3 *Car.* 1. *ch.* 1. and 16 *Car.* 1. *ch.* 10.]

or by Order of either Houſe of *Parliament*, if they manifeſtly appear to have exceeded their Juriſdiction, [*Sed Qu.* *] [or after a Prorogation or Diſſolution [h].] Or [i] by Order of Chancery in ſome Caſes, [*Quære*,] or by Order of inferior Courts. [See for the Power of other Courts in *Weſtminſter Hall*, 31 *Car.* 2. *ch.* 2.] 2. By Juſtices of *Gaol-Delivery*, who may take Bail, where [a] Juſtices of the Peace cannot take it; as of a Perſon convict of Manſlaughter *Se Defendendo*, or by Miſadventure, or of a Perſon convict of Manſlaughter that hath a *Pardon* to plead. [See again 31 *Car.* 2. *ch.* 2. whereby for Treaſon or Felony, plainly and ſpecially expreſſed in the Warrant of Commitment, the King's Bench, Seſſions of *Oyer* and *Terminer* or Gaol-Delivery, may Bail upon Prayer, in Court, of the Offender, to be brought to his Trial, if not indicted during the next Term or Seſſions after Commitment, and ſee *p.* 18. *ante.*] 3. By [b] *Juſtices* of the *Peace*, where they have Cognizance of the Cauſe.

* 2 Ld. Raÿ. 1105.
[h] 1 Ld. Ray. 18, 1107, 1108.
[i] Hawk. P. C. B. 2. p. 111.
[a] Dalt. ch 166. p 423. H P. C. 104, 105.
[b] Dalt. ch. 166. p. 424. H. P. C. 105, 106.

By 3 H. 7. ch. 3. Two *Juſtices of the Peace* (1 Quor.) *have Power to let to Bail Perſons arreſted for light Suſpicion of Felony, or others bailable by Law, until the next Quarter-Seſſions or Gaol-Delivery, and there ſhall certify the ſame, in pain of* 10 l. (*And* 1 Ri. 3. ch. 3. *which gave Power to* one *Juſtice of the Peace to bail Priſoners, is thereby repealed.*)

Coke of Bail and Mainpriſe, ch. 6.

By 1 & 2 Ph. & M. ch. 13. *No Juſtice or Juſtices of the Peace can let any to Bail, which are forbidden to be bailed by* Weſt. 1. ch. 15. *And none arreſted for Manſlaughter or Felony, or Suſpicion of Manſlaughter or Felony, being bailable by Law, ſhall be let to Bail by any* Juſtices of the Peace, *but in open Seſſions, or by* two *Juſtices at leaſt,* (1 Quorum) *being both* preſent *together at the Time of ſuch Bailment; which ſhall be certified in Writing with the* Examination *of the Priſoner taken before Bailment, at the next general* Gaol-Delivery, *under the Penalty of a Fine to be ſet on them by the Juſtices of Gaol-Delivery. The Juſtices of Peace and Coroners within the City of* London *and County of* Middleſex, *and in other Cities, Boroughs, and Towns corporate may follow their Cuſtoms, as to letting Priſoners to Bail; but muſt certify their Bailments, Bonds, and Examinations to the next Gaol-Delivery for the County, City, or Town.*

[And by the ſaid Statute, and 2 & 3 *Ph.* & *M. ch.* 10. Perſons accuſed of Manſlaughter and Felony, being ſent to Gaol for want of Bail, are to be examined, and the *Accuſers* to be bound over, &c.

[c] This Statute of 1 & 2 *Ph.* & *M. ch.* 13. ſeems to admit, that for Manſlaughter, and all other Homicides, except Murder, or for Felonies, the Offender may be bail'd by Juſtices of the Peace. But if in caſe of Manſlaughter, tho' it be *Se Defendendo*, and it does appear ſo to the Juſtices, yet if the Party accuſed *confeſſes* the Fact upon Examination, or it is apparently known, that he kill'd another, they cannot bail him. [See *Weſt.* 1. *ch.* 15. *ſupra.*]

[c] 2 Inſt. 315. 4 Inſt. 178. Dalt. ch. 166. p. 420, 423. H. P. C. 99, 101. 2 H. H. P. C. 138, 139.

If it is *uncertain*, that he was the Slayer, and the Charge is but Manſlaughter, they may bail him; for the Act ſuppoſes, that in ſome Caſes Manſlaughter is bailable by Law. So in the Caſe of Felony.

[d] After Indictment and Proceſs iſſued thereupon in Caſes under Felony, or in caſe of Treſpaſs Miſdemeanor (where Bail is not prohibited by a particular Statute), one may be bailed by two Juſtices of the Peace, whereof one to be of the *Quorum*. Others ſay by one Juſtice.

[d] Dalt. ch. 166. p. 424. H. P. C. 106.

[e] As to *refuſe* Bail, where the Party ought to be bail'd, is a Miſdemeanor, and fineable; ſo to *admit* Bail, when it ought not to be admitted, is

[e] 2 Inſt. 186. H. P. C. 97.

is puniſhable by the Juſtices of Goal-Delivery by Fine, or as a negligent Eſcape at *Common Law*; [or by Information [a] in the Court of King's Bench] and is likewiſe puniſhable by ſeveral *Statutes* [See *Weſt.* 1. *ch.* 15. 27 *Ed.* 1. *ch.* 3. 4 *Ed.* 3. *ch.* 2. 1 & 2 *Ph.* & *M. ch.* 13. 31 *Car.* 2. *ch.* 2.]

[a] 2 Str. 1216.

[b] Dalt. ch. 166. p. 421, 422. H. P. C. 98.

[b] If one is brought before a Juſtice, and it does not appear, that a Felony is committed, he may *diſcharge* him; but if a Felony has been committed; and the Party is only ſuſpected, he muſt bail him or commit him to the Common Gaol. See 6 *Geo.* 1. *ch.* 19. in *p.* 79. *ante.*]

By 28 Ed. 3. ch. 9. *Inqueſts before Sheriffs, are taken away, and the Power to admit to Bail upon Indictments before them.* [See 1 *Ed.* 4. *ch.* 2. *ante.*

Of Indictments.

[c] 3 Inſt. 209. H. P. C. 94, 95.

III. If any Court of Record commits one for a Contempt done in Court, they may diſcharge him by like Order at their Pleaſure. [c] But if they commit him for Treaſon, Felony, or other Crime, or Suſpicion thereof; he cannot be diſcharged till he is *indicted* and acquitted, or *Ignoramus* found, or he is delivered by Proclamation.

And ſo it is, if any be taken and impriſoned by lawful Warrant, or the King's Writ, he cannot be diſcharged without legal Proceeding, but by the King only, though one taken by the King's Writ in a private or civil Action, may be diſcharged and ſet at Liberty by the Plaintiff, even tho' in Execution. [But ſee 31 *Car.* 2. *ch.* 2. the *Habeas Corpus* Act, *p.* 18. *ante.*]

[d] 1 Inſt. 126. b. Weſt's Symb. 3 pt. ſect. 1. Bacon 19. Kely. 8. 4 Black Com. 299.

[d] Now an *Indictment* or *Endictment* (from 'Ενδείκνυμι, to accuſe) is a Bill or Accuſation drawn up in Writing at the Suit of the King for ſome Offence, either criminal or penal, and preferr'd to a *Grand Jury* of twelve Men or more, upon their Oaths, and found by them before a Judge, having Power to puniſh the Offence, being ſufficiently grounded to put the Offender upon Trial by a *Petty Jury* of twelve Men. The Proſecutor and his Witneſſes give Evidence to the *Grand Jury* upon their Oaths. The King's Counſel, as Proſecutors, may manage the Evidence before the Grand Jury.

[e] 2 Inſt. 739. 4 Black. Com. 298.

[e] A *Preſentment* is that which the *Grand Jury* find and preſent to the Court, without any Indictment delivered to them. This is afterwards reduced into the Form of an Indictment. When an Offence is found by Jurors returned to inquire of that particular Offence, it is called an *Inquiſition.*

[f] Hawk. P. C. B. 1. p. 216. 2 H. H. P. C. 155.*

[f] A Grand Juror ought to be a Freeholder; but to what amount is uncertain. 4 *Black. Com.* 299.

[g] Bacon's Elem. 19. 3 Inſt. 30, 31. 4 Black. Com. 301.

[g] When the *Grand Jury* find the Bill of Indictment, they write on the Back of the Bill, *Billa Vera.* But if they think it a groundleſs Accuſation, they indorſe *Ignoramus*; and then the Party is diſcharged without further Anſwer. Upon the Allowance, or Finding of the Bill by the Crand Jury, the Party is ſaid to be indicted. For no one ſhall be convict by Verdict, unleſs the Offence is found by twenty-four Men at the leaſt (*viz.*) By twelve, or above, of the *Grand Jury* indorſing *Billa Vera* upon the Bill of Indictment (for if twelve agree, they ſhall conclude the leſſer Number) and by twelve (not more or leſs) of the *Petty Jury* upon Trial. The Grand Jury cannot find *Billa Vera* for Part, and *Ignoramus* for the reſt. It muſt be the one or the other for the whole.

The *Grand Jury* can regularly inquire of nothing but what ariſeth within the *County* for which they are returned, [unleſs ſpecially enabled by Act of Parliament] and the Trial muſt be by a Jury of the proper County, [unleſs otherwiſe provided by Act of Parliament.] By ſpecial *Cuſtom* Indictments of Offences committed in one County may be tried in a Place out of it; as Indictments of Offences in *Middleſex* are by Cuſtom tried at the Seſſions-Hall at *Newgate* in *London*, as well for *Middleſex* as *London*. [But ſee of *Trial* by the *Country*, *poſt*.]

[a] A Grand Juror may be *challenged* for Cauſe by one before he is indicted.

[a] 3 Cro. 134, 135, 147.

The *Grand Jury*, or thoſe Indictors, ought not to be *de Medietate Linguæ* in any Caſe, nor ought they to have a Keeper, or be without Victuals, as in the Caſe of a *Petty Jury*.

[b] If one of the Grand Jury is outlawed, or taken at the Nomination of another, it avoids the whole Indictment. [See 11 *H*. 4. *ch*. 9. 3 *H*. 8. *ch*. 12.] If one of the Grand Jury diſcovers to a Stranger the Evidence given to him and the reſt of the Jurors, this is an Offence puniſhable by Fine and Impriſonment upon an Indictment.

[b] 3 Inſt. 32, 33, 2 Roll. Abr. 77.

Indictments may be of High Treaſon, Petit Treaſon, Felony, Treſpaſs, and all Sorts of Miſdemeanors or Pleas of the Crown; but of no Injuries of a private Nature, unleſs they ſome way or other concern the King and the Publick. Offences by *Common Law* and thoſe againſt a *Statute* Law are indictable. Where a Statute prohibits an Act of a publick Grievance, or commands a Thing of publick Conveniency, an Offender againſt ſuch a Statute is puniſhable by way of Indictment, as well as at the Suit of the Party grieved [[c] unleſs it is a new Offence made ſuch by the Statute, and a particular Manner of proceeding againſt the Offender is appointed, without any general Words, ſuch as, *or otherwiſe*.] Indictments muſt be at the Suit of the King, and no other.

[c] Hawk. P.C. B. 2. p. 211. 2 Ld. Ray. 991.

[d] It is the beſt Way to join ſeveral Offenders in the ſame Crime in the ſame Indictment, where the Offence doth wholly ariſe from the joint Act of all the Defendants. On ſuch an Indictment ſome may be acquitted, and others convicted. [Some Offences are [e] held to be ſeveral in their Nature, and in ſuch Caſes Judgment cannot be given upon a joint Indictment.]

[d] 2 Roll. Abr. 707, 708.

[e] 2 Str. 921.

In every Indictment theſe Things are requiſite.

1. [f] Indictments (being in the Nature of Declarations for the King againſt Offenders) ought to be *certain* to a general Intent, and muſt not be ſupplied by Implication or Argument. Preciſe Certainty to every Intent is to be obſerved, tho' the Law will not allow Exceptions that are too nice.

[f] 4 Rep. 44. 5 Rep. 121. 1 Inſt. 303. a. Weſt. Symb. § 70. 4 Black. Com. 301. H. P. C. 207. 2 Roll. Abr. 79, 80, 81. Hawk. P. C. B. 2. ch. 25.

2. Further,

By 1 H. 5. ch. 5. *An Indictment ought to ſet forth the* Chriſtian *Name*, Surname, *and* Addition *of the* Eſtate *and* Degree, Myſtery, Town or Place, *and the* County *of the Offender*, &c.

The *Chriſtian* name and *Surname*.

But when the *Name* of one kill'd is unknown, or Goods are ſtolen from a Perſon that cannot be known, it is ſufficient to ſay one *unknown* was kill'd by the Perſon indicted, or that he ſtole the Goods of one *unknown*. And if there is a Miſtake in ſpelling of the Offender's Name, if it ſounds like the true Name, it is good [a]. And it is good if the Party is indicted by another Name, if the Party is known by both. A Miſnomer

[a] Kely. 11, 12.

b 2 H.H. P. C. 175, 176, 238.

Miſnomer of the Defendant's Name of *Baptiſm* may be pleaded in Abatement of an Indictment; but not of his *Surname*, as in an Appeal. [*Qu.*] The Inhabitants of a Pariſh, tho' no Perſon is particularly named, may be indicted for not repairing the Highway.

Eſtate and Degree; whether of the Nobility, or under the Nobility.

Myſtery (i.e.) Art, Trade, or Occupation.

c 1 Cro. 606, 738, 751.

d H.P.C. 264.

The *Place* of *Abode*, or the *Dwelling Place* of the Party indicted (both *Town* and *County*) is expreſsly required. If the *County* is named in the Margin of the Indictment, it is well enough, [*Qu.*] [c] Except in Caſes of Felony, where it muſt be always named in the Body of the Indictment.

If no *Town* is named, or any Place where the Fact was done, the Indictment is void. [See 9 *H.* 5. *ch.* 1. 18 *H.* 6. *ch.* 12.] But a [d] Miſtake of the Place in laying the Offence is not material upon the Evidence, if the Fact is proved at ſome other Place in the ſame County.

e 2 Inſt. 670, 1 Ld. Ray. 345.

The Statnte ſays that the Indictment ſhall abate for any of theſe Omiſſions, by the *Exception* of the Party. For though an Offender hath not ſuch Addition as the Act requires, [e] yet if he appeareth upon the Proceſs and Pleads, taking no Advantage thereof by Exception, he hath loſt the Benefit of this Act. [See for the Expoſition of this Statute, 2 *Inſt.* 665, *&c.*]

f See Hawk. P. C. B. 2. ch. 23.

Generally there is the ſame Law concerning Additions in Indictments and Appeals, though in ſome Things Appeals [f] require more Strictneſs. [See of *Appeal, infra.*]

g 1 Inſt. 283. a. 2 Inſt. 318, 319. 3 Inſt. 230. 4 Rep. 41, 42. Weſt's Symb. Indict. § 70. Kely. 16. H. P. C. 264. 4 Black. Com. 302.

3. [g] The Certainty of the Time wherein the Offence is done, as the certain *Day* and *Year*, is to be expreſſed. But the Crown is not bound to ſet down the very Day, when Treaſon, Felony, *&c.* was committed. The very Day need not be proved upon Trial. [See of *Evidence, poſt.*]

In Caſes of *Omiſſion*, it is not neceſſary, to ſet down the Day and Year; as in an Indictment for not ſcouring a Ditch, *&c.*

h 4 Rep. 39, 5 Rep. 121. 122. 7 Rep. Calvin's Caſe, 5, 6, 10. Weſt's Symb. § 70. H.P. C. 206, 207. 1 Ld. Ray. 1. Sh. Par. Caſ. 186.

a 4 Rep. 48. 2 Inſt. 98. b.

4. The *Nature* of the *Offence* muſt be ſet forth, whether it be Treaſon, Felony, Treſpaſs, Penal Statute, *&c.* Sometimes you muſt uſe *ſpecial Words.* [h] In Treaſon the Indictment muſt ſay *Proditoriè*, and conclude *Contra Ligeantiæ ſuæ Debitum*, in an Indictment of High Treaſon againſt the King's Perſon. In *Murder* it muſt ſay *Murdravit*, for that is a Word of Art which implies Malice. If the Killing was by a Blow with the Hand, or by ſhooting; you muſt alſo ſay *Percuſſit*, not if it was by Poiſoning. [See of *Appeal, poſt.*] In *Burglary*, *Burglaritèr*, or *Burgularitèr*; or *Burgalaritèr*; in *Rape*, *Rapuit*, not *Carnalitèr Cognovit* [only]; in *Felony* and *Mayhem*, *Felonicè* only; but in Mayhem *Felonicè Mayhemavit*; in *Larceny*, *Felonicè Cepit*, not *Felonicè Abduxit* or *Aſportavit*, without *Cepit*. Things *living* muſt be ſet down, as Horſe, Ox, *&c.* *Dead* Things are to be called *Bona et Catalla*, but you muſt expreſs what Goods and Chattles. And in all theſe Caſes, and in *Treſpaſſes*, the Indictment ought to be *Vi et Armis*, and conclude *Contra Pacem.* But ſee 37 *H.* 8. *ch.* 8. 4 *Ann. ch.* 16.] In Offences againſt the Peace only, as Conſpiracies, Deceits, *&c.* Theſe Words *With Force and Arms* are not neceſſary. In a *Forcible Entry*, the Words *Manu forti* amount to it. If the Offence is created by a [a] *Statute*, it muſt conclude *Contra Formam Statut'*, *&c.* The Recital of a publick Statute is not neceſſary, but rather dangerous; for a Miſrecital thereof will ſpoil the Indictment.

The Subſtance and material Words in ſuch Statute muſt be ſet down, concluding *Contra Formam Statut'*, *&c.*

5. The [b] *Value* of the Thing by which the Offence was committed, muſt be expreſſed. It ſeems neceſſary to value Things ſtolen, that it may appear, whether it is Grand Larceny or Petit Larceny. In *Treſpaſs* the Value may aggravate the Offence. But Things *Feræ Naturæ* ought not to be valued, if they were not in Parks or Warrens. If the Indictment is of *living* Things, you muſt ſay *Pretii*, *&c.* If of *dead* Things, you muſt ſay *Ad Valentiam*, *&c.* [*Quære* the Difference.] But it is ſaid that *one* dead Thing only muſt be *Pretii*, not *Ad Valentiam*.

[b] Weſt's Symb. Of Indictments, § 70.

By 23 Geo. 2. ch. 11. *In every Information or Indictment for wilful and corrupt Perjury, it ſhall be ſufficient to ſet forth the Subſtance of the Offence charged, and by what Court, or before whom the Oath was taken (averring ſuch Court or Perſon to have competent Authority to adminiſter the ſame) together with proper Averments to falſify the Matter wherein the Perjury is aſſigned, without ſetting forth the Bill, Anſwer, Information, Indictment, Declaration, or any Part of any Record or Proceeding, either in Law or Equity, other than as aforeſaid; and without ſetting forth the Commiſſion or Authority of the Court or Perſon before whom the Perjury was committed.*

And in every Information or Indictment for Subornation of Perjury, or for corrupt Bargaining or Contracting with others, to commit wilful and corrupt Perjury, it ſhall be ſufficient to ſet forth the Subſtance of the Offence charged, without ſetting forth the Bill, Anſwer, Information, Indictment, Declaration, or any Part of any Record or Proceeding, either in Law or Equity, and without ſetting forth the Commiſſion or Authority of the Court or Perſon before whom the Perjury was committed, or was agreed or promiſed to be committed.

[c] An Indictment lies upon a private Statute, where no particular Penalty is provided, and the Offender ſhall be tried and impriſon'd; if ſuch Statute concerns a Multitude of Perſons. But if it concerns one particular Perſon only, an Action on the Caſe doth lie, not an Indictment.

[c] 8 Rep. 60.

[d] If there is an *Indictment* and *Inquiſition* againſt one for the ſame Offence, one found by the Coroner's Inqueſt, and another by the Grand Jury, he may be tried on both at the ſame Time. For if one is indicted for Murder, and convicted of Manſlaughter, or acquitted, and at the ſame Time there is a Coroner's Inqueſt, he may plead his former Conviction or Acquittal in Bar of the other. If an Indictment is void for Inſufficiency, or if the Trial is in a wrong County, [e] another Indictment may be drawn for the ſame Offence, whereby the inſufficiency may be cured, and the Indictment laid in another County, tho' Judgment was given.

[d] Kely. 108.

[e] 4 Rep. 40, H. P. C. 244.

By the Common Law the Court may *quaſh* any Indictment for any ſuch Inſufficiency in the Caption or Body of it, as will make the Judgment erroneous. By Inſufficiency in the *Caption*, I mean a Default in ſhewing before whom the Indictment was taken, their *Juriſdiction*, the *Place*, where, the *Number* of the Jurors, the *Day* and *Year* when the Court was holden, *&c.*

1 Str. 442. 1 Ld. Ray. 548, 710.

Falſe [a] *Latin* ſhall not quaſh an Indictment. For tho' an original Writ or an Appeal may abate for falſe *Latin*, yet judicial Writs, Fines, or Indictments ſhall not, if the Word is *Latin*; but if the Word is not *Latin*, or allow'd by Law as a Word of Art, or inſenſible, there if it is in a Point material, it makes the indictment inſufficient; as *Murdredum*

[a] 1 Rep. 121. H. P. C. 189. 1 Cro. 108. 3 Cro 465.

dum for *Murdrum*, *Burgariter* for *Burglariter*, &c. [See 4 *G.* 2. *ch.* 26. *infra.*] But nothing which may be rejected as *Surplus*, ſhall vitiate an Indictment.

By 7 & 8 W. 3. ch. 3. *All Perſons indicted of* High Treaſon, (*except for counterfeiting the Coin, Great Seal, Privy Seal, Sign Manual, or Privy Signet*) *or for* Miſpriſion *of ſuch Treaſon, ſhall have a* Copy *of the whole Indictment* (*but not the Names of the Witneſſes*) *five Days at leaſt before his Trial, to adviſe with Counſel thereon*, &c. [See 7 *Ann. ch.* 21. *infra.*]

This Indictment muſt be found within three *Years after the Offence committed, except in Treaſon for an Attempt of an Aſſaſſination on the Body of the King by Poiſon, or otherwiſe.*

No Indictment for any of the Offences aforeſaid, nor any Proceſs, nor any Return thereon, ſhall be quaſh'd *on the Motion of the Priſoner or his Counſel, for miſ-writing, miſ-ſpelling, falſe or improper* Latin, *unleſs Exception for the ſame be made by the Priſoner, or his Counſel, before any Evidence given in Court. Nor ſhall any ſuch miſ-writing miſ-ſpelling, falſe or improper* Latin, *after Conviction, be Cauſe to arreſt Judgment, though any Judgment given upon ſuch Indictment, may be reverſed upon a Writ of Error, notwithſtanding this Statute.* [See more of this Statute *Of Evidence to the Petty Jury, infra.*]

[But theſe Niceties about Abbreviations, and the Latin of Indictments are taken away by 4 *G.* 2. *ch.* 26. which directs, *That all Indictments, Informations, Inquiſitions, Preſentments, and all Proceedings whatſoever in any Courts of Juſtice, ſhall be in the* Engliſh *Language, and in Words at length and not abbreviated.*]

By 10 & 11 W. 3. ch. 23. *No* Clerk *of* Aſſize, Clerk *of the* Peace, *or other Perſon, ſhall have more than Two Shillings for drawing an Indictment againſt a Felon, upon Pain to forfeit* 5 l. *to the Party grieved, with full Coſts of Suit. If they draw any Bill defective, they ſhall make a new one without Fee, under the ſame Penalty.*

See 5 & 6 *W.* & *M. ch.* 11. To prevent Delays of the Proceedings at the Quarter-Seſſions of the Peace by removing Indictments by *Certiorari* into the *King*'s Bench before Trial, &c.

[*By* 5 Geo. 2. ch. 19. *The Quarter-Seſſions have Power to amend Orders, removed before them by Appeal, as to any Defect in Form*; *and the Proſecutor of a* Certiorari *to remove the Order of any Juſtices into the Court of King's Bench, is to enter into a Recognizance of Fifty Pounds, to proſecute with Effect.*]

Of Approvers.
[b] 3 Inſt. 129. H. P. C. 192, 193, 194, 195, 196, 197. Hawk. P. C. B. 2. ch. 24. 4 Black. Com. 324.
[a] 2 H. H. P. C. 228.

IV. [b] An Approver (*Probator, Prover*) is a Perſon indicted of Treaſon or Felony, and in Priſon for the ſame, and not diſabled to accuſe, who upon his Arraignment before any Plea pleaded, [*Qu.* if not at any Time before Verdict [a]] and before competent Judges, does confeſs the Indictment, and takes a corporal Oath, to reveal all Treaſons and Felonies, that he knoweth of, and therefore prays a Coroner to enter his Appeal or Accuſation, againſt thoſe that are Partners in the Crime contained in the Indictment. He is ſworn to diſcover all Treaſons and Felonies; yet he is not an Approver in Law of any but the Offence whereof he is indicted. [See 28 *Ed.* 1. *Stat. de Appellatis.*]

This Accuſation of himſelf, and Oath, makes his Accuſation of another of the ſame Crime to amount to an Indictment; and if his Partners are convicted, the King is to pardon him. [See 5 *H.* 4. *ch.* 2.] But it being in the Diſcretion of the Court, to ſuffer one to be an Approver, this Method of late hath not been put in Practice.

Of Appeals.

V. An [b] *Appeal* (from *Appeller*, to accuſe, or from *Appello*, to call) is an Accuſation of one againſt another, to attaint him of Felony, by Words ordained for it. This is always at the Suit of the Subject. [c] It is the Party's private Action, proſecuting alſo for the Crown in reſpect of the Felony. The Plaintiff is called the Appellant, and the Defendant the Appellee.

[b] 1 Inſt. 123.b. 287. b. Hawk. P. C. B. 2. ch. 23.
[c] Finch 310, 311.

It may be brought in *three Caſes*. 1. For a Wrong to one's *Anceſtor*, whoſe Heir Male he is, and that is only for the Death of his Anceſtor. 2. † For Wrong to the *Huſband*; and this is to be proſecuted by the Wife only, for the Death of her Huſband. 3. For Wrong done to the *Appellants* themſelves, as for Robbery, Rape, Mayhem. This laſt Sort of Appeal is diſuſed, becauſe the Proceſs is more nice and chargeable than by Indictment.

1 Inſt. 123.b. 287. b. 2 Inſt. 316, 317. 4 Black. Com. 324, 310.

An Appeal of *Death* is of *two* Sorts (*viz.*) Of *Murder*, and of *Manſlaughter*. And theſe muſt be brought by the *Wife* for the Death of her Huſband, or by the *Heir* Male for the Death of his Anceſtor. An Appeal lieth not for a Killing *Se Defendendo* or by Miſadventure.

[d] The *Wife* ought to be a Wife *de Jure*; and therefore one may plead, that ſhe was never lawfully married to the Party ſlain. She muſt alſo be a Wife *de facto*, *i. e.* in Poſſeſſion as well as in Right, without Elopement, (*Qu.*) Divorce, *&c.* If ſhe does not continue a Widow, but marries before or pending the Appeal, the Appeal is loſt. If ſhe marries after Judgment, ſhe cannot pray Execution; for the Loſs of a Huſband is the Cauſe of the Appeal. [But *Qu.* [e] What ought to be done with the Appellee in ſuch Caſe.] A Huſband cannot have an Appeal of the Death of his Wife, but the Heir only.

[d] 1 Inſt. 33. b. 2 Inſt. 68, 69, 317, 384. H. P. C. 181. 3 Mod. 157.
[e] See Hawk. P. C. B. 2. p. 164.

The [f] *Heir* muſt be Heir Male, tho' he derives by a Female. For no Female, except a Wife, can maintain an Appeal. And he muſt be Heir according to the Courſe of the Common Law, and Heir at the Time of the Killing of his Anceſtor. If the Appeal is *againſt* the Heir as Guilty of the Killing, the next Heir Male ſhall have the Appeal. If the Wife kills the Huſband, the Heir ſhall the have Appeal. But if the Perſon kill'd by a Stranger hath a Wife ſurviving, the Heir ſhall not have it, tho' ſhe dies within the Year. And if the Heir dies after the Death of the Anceſtor, another Heir ſhall not have the Appeal. No one can bring an Appeal of the Death of a Perſon attainted of Treaſon or Felony, except his Wife; becauſe ſuch a one has no Heir. Therefore if the Perſon kill'd had two Sons at the Time of his Death, and the Elder is attainted of Treaſon or Felony, neither of the Sons can have an Appeal.

[f] 1 Inſt. 25. a. & b. 33. b. 2 Inſt. 68. H. P. C. 181, 182, 183.

[a] An Appeal may be brought either by original *Writ* out of the Chancery, or by *Bill*. By *Bill*, in the King's Bench, before Juſtices of Gaol-Delivery, if the Appellee is in Priſon before them, before Commiſſioners of *Oyer* and *Terminer*, before Juſtices of *Niſi Prius*, and before the Juſtices of the King's Bench, or before the Sheriff and Coroner in the County-Court. But the Sheriff and Coroner can only take and enter the Appeal and Count, and proceed no further; it muſt be remov'd

[a] 2 Inſt. 183, 420. 4 Inſt. 73. 9 Rep. 119. H. P. C. 179, 180. 2 Ld. Ray. 1289.

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† *Nullus capiatur aut impriſonetur propter appellum fœminæ de morte alterius quam viri ſui.* Magna Charta, ch. 34.

by *Certiorari* into the King's Bench. See 3 *H.* 7. *ch.* 1.] An Appeal may alſo be brought before the *Conſtable* and *Marſhal*, of a Felony done *out* of the Realm. [b] There can be no Appeal of Treaſon in Parliament, for it is ouſted by the 1 *H.* 4. *ch.* 14.

[b] 3 Inſt. 5, 31, 132. H. P. C. 180.

By Mag. Chart. *or* 9 H. 3. ch. 34. *No Man ſhall be taken or impriſon'd, upon the Appeal of a Woman, for the Death of any other than her Huſband.*

2 Inſt. 182.

By Weſt. 1. *or* 3 Ed. 1. ch. 14. *The Acceſſory in an Appeal ſhall not be* outlaw'd, *before the Principal is attainted.*

By the Statute of Glouceſter, *or* 6 Ed. 1. ch. 9. *If the Appellor declares the* Deed, *the* Year, *the* Day, *the* Hour, *the* Time of the King, *and the* Town *where the Fact was done, and with what* Weapon, *the Appeal ſhall ſtand, ſo that he ſue* within a Year and a Day after the Fact. [*See* 1 H. 5. ch. 5. *and* 2 Inſt. 665, *&c.*]

Let us explain this Statute.

[c] 2 Inſt. 318. 5 Rep. 122.

The *Deed* — [c] Whether it was *by* Wound or *without* Wound. If *by* a *Wound*, four Things are neceſſary to be ſet forth in the Appeal. 1. In what Part of the Body the Wound was given. 2. Of what Length and Depth, [where the Wound is of ſuch a Quality, as to be aſcertained by that Deſcription] ſo that it may appear to the Court, that the Wound was mortal. But if a Leg or Arm is cut off, there the Length and Depth cannot be ſhew'd. 3. That the Party wounded died of that Wound. 4. It muſt appear, that he died of that Wound within a Year and a Day, after the giving of the Wound. If *without Wound*, it is either by Weapon or without. By *Weapon*, as by Blow, Bruiſing, *&c.* *Without Weapon*, as by Poiſoning, Drowning, Burning, Strangling, *&c.* In both theſe Caſes the Circumſtances muſt be ſet forth.

The Year, *i. e.* The Year of the Reign of the King.

The *Day*, —The natural Day, containing twenty-four Hours. And therefore, if the Fact was done in the Night, you muſt ſay, *In Nocte ejuſdem Diei.* The Kiiling muſt be alledged, to be the Day that one [d] died, not the Day of the Wound or Blow.

[d] 2 Inſt. 318. 3 Inſt. 53. 4 Rep. 41, 42.

[e] 2 Inſt. 318. 1 Ld. Ray. 21, 22.

The *Hour*, — [e] In the Count upon the Appeal one may ſay *about* Ten of the Clock, *&c.* But you muſt not ſay about the Day, Year, or that the Wound or Blow was about any Part of the Body. It is difficult to alledge the true *Hour*, and not ſo of the Day, Year, or the Part of the Body. And yet the Plaintiff in the Appeal is not bound to prove the preciſe Hour, or the Day alledged. In *Indictments* the Hour need not to be alledged. *Between the Hours of ten and eleven* is unintelligible, for there is no Time between the *Hours*.

[a] 1 Inſt. 125. 2 Inſt. 319.

The Time of the King,—— [a] This is added, notwithſtanding Mention was made of the *Year* before, wherein the *Blow*, *&c.* was given; for here the Year wherein *Death* enſued, is to be ſhewn, that it may appear that he died of the Blow, *&c.* within the Year and Day.

2 Inſt. 319, 669.

The *Town*,——If the Murder or Homicide was in a *Town*. Otherwiſe if out of a Town, the *Place* if known, out of any Town, muſt be alledg'd as known in ſuch a County. If the Fact was done in a City, the *Pariſh* muſt be alledged. But in the Country, if a Pariſh contains ſeveral Towns, alledge it in a Town, [See 2 & 3 *Ed.* 6. *ch.* 24. Of *Trial* by the *Country*, *Poſt.*]

[b] 2 Inſt. 319. 3 Inſt. 135. H. P. C. 265.

With what Weapon—— [b] One certain Weapon muſt be alledged in the Count, yet if it be proved in Evidence, that the Wound was given with any other Weapon, the Offender ſhall be found Guilty. But upon ſuch a Count, or in an Indictment, it cannot be given in Evidence that the Party was poiſon'd or drown'd, *&c.* where no Weapon at all was uſed;

it being Murder or Homicide of another Kind. [See of *Evidence* to the Petty Jury, *infra*.]

Tho' this Statute requireth, that the Weapon be mentioned, it muſt be underſtood, where one is kill'd with a Weapon.

So that he ſues within a Year and a Day—— The *Year* muſt be computed according to the Calendar, and not according to twenty-eight Days to the Month; the *Day* is to be intended of the natural Day, and the whole Day is to be taken in. By *Common Law* the Appeal was to be brought within a Year and a Day.[c]

[c] 1 Inſt. 246. a. 255. a. 2 Inſt. 320. 3 Inſt. 53. 4 Inſt. 185. 5 Rep. 1.

If the next Heir of the Dead is within Age, he muſt nevertheleſs bring his Appeal of Death within a Year and a Day, according to this Act.

After the Fact—— *i. e.* [d] After the Felony committed by Homicide, or by the *Death*; not after the *Stroke*, or Wound.

[d] 2 Inſt. 320. 3 Inſt. 53. 4 Rep. 41, 42. Cont. S. P. C. 63.

By 3 H. 7. ch. 1. *An Indictment for Murder may be tried, without ſtaying for the Appeal.*

Although the Principal or Acceſſory is acquit *within the Year and Day, he ſhall be remanded to Priſon, or let to Bail, until the Year and Day is out. And whether they be* attainted *or* acquitted, *yet the Wife or next Heir of the ſlain may within the Year and Day (the Benefit of the Clergy being not before had) proſecute an Appeal againſt them, any ſuch* Attainder *or* Acquittal *notwithſtanding.*

[e] If there is an Indictment and Appeal depending together, the Judges ought to proceed firſt upon the Appeal, if the Proſecutor deſires it, and proſecutes without Fraud. The Indictment may be preferred to the Appeal, if the Court ſhall find that there is like to be a faint Proſecution of the Appeal, in order to acquit the Party. For the Aquittal upon a a faint Proſecution will conclude the King.

[e] 5 Rep. 50. Kely. 107.

If the Murderer is *acquitted* upon the Indictment, or *found Guilty* and *pardon'd* by the King, yet the Wife or Heir may have an Appeal. [f] But if the Party is found Guilty of Manſlaughter, and hath the Benefit of his Clergy, no Appeal lieth. It is ſaid to be unreaſonable, that the Appeal ſhould interpoſe preſently after the Conviction, to prevent the Judgment and Execution in Manſlaughter. For if that ſhould be admitted, then an Appeal might prevent Judgment and Execution upon a Conviction of Murder, as well as Manſlaughter. It is ſaid, that a Verdict finding one guilty of Homicide *Se Defendendo* on an Indictment of Murder, may be pleaded to an Appeal of the ſame Death, as it was at Common Law. For that 3 *H* 7. *ch.* 1. mentions only Perſons *acquitted* or *attainted*, as ſubject to Proſecution upon an Appeal. [See of *Pleas* in *Bar*, *infra*.]

[f] 4 Rep. 40, 45, 46. 3 Inſt. 131. H. P. C. 245. Kely. 94, 107, 108.

[a] An Appeal is to be arraigned by the Counſel in *French*, but enter'd in *Latin*. The Count muſt be, that the Appellant appears *in propriâ Perſonâ*; but the Appeal may be proſecuted by Attorney and Counſel; and defended by Attorney and Counſel. [See 3 *H.* 7. *ch.* 1. and ſee alſo 4 *Geo.* 2. *ch.* 26. 6 *Geo.* 2. *ch.* 14. Whereby all Proceedings in Courts of Juſtice are to be in the *Engliſh* Language.]

[a] 1 Inſt. 262. b. 263. a.

One ſtanding [b] mute in an Appeal of Murder hath the ſame Judgment as on an Indictment.

[b] Kely. 37.

[c] Evidence given for or againſt the Defendant in an Indictment is no Evidence in an Appeal,

[c] 1 Sid. 325.

If one is acquitted, he ſhall have his Damages againſt the Appellant. [See *Weſt.* 2 or 13 *Ed.* 1. *ch.* 12. and the Expoſition thereof, 2 *Inſt.* 383, *&c.*]

The Jury may find the Defendant Guilty of Manſlaughter, or Not Guilty generally. If in an Appeal of Murder the Defendant is found Guilty of the Murder, Judgment is that he ſhall be hanged; and the King cannot pardon it. [d] But if he is acquitted upon the Appeal, he may be arraigned upon an Indictment at the King's Suit. [[e] Though an Acquittal upon an Appeal may be pleaded in Bar to an Indictment for the ſame Murder or Manſlaughter. [See of *Pleas* in *Bar*, *infra.*] [See of *Pardon* and *Judgment*, *infra*; and *Danvers's Abridg.* Tit. *Appeal*, 488, *&c.*

Of Informations.

VI. [f] There may be an *Information* for the King againſt a Criminal, as well as an Indictment, whereby a pecuniary Mulct, or other Penalty, may be inflicted. It does not lie for a capital Crime, or for Miſpriſion of Treaſon. [*Qu.* and ſee 5 *Geo.* 2. *ch.* 30. Concerning Bankrupts; for they may be convicted upon Indictment or *Information*, and ſuffer as Felons without Clergy. And in many Caſes of Felony created by late Acts of Parliament, the Conviction may be upon Information.]

An [g] Information for the King is the ſame with the *Declaration* of a common Perſon. It differs from an Indictment, inaſmuch as *that* is to be *found* by the Oath of twelve Men at leaſt, and this is only the Allegation of the Officer, *&c.* It is not always exhibited directly by the King, or his Attorney General, or the Clerk of the Crown in the Court of King's Bench, (who is Coroner, and Attorney for the King in that Court) but ſometimes by a common Perſon, who informeth as well for the King as for himſelf, upon ſome penal *Statute*. This is different from an *Action* on a penal *Statute*. Therefore remember, that Informations are of two *Kinds* (*viz.*) At the Suit of the King *only*, and partly at the Suit of the King and partly at the Suit of the Party, which is called an Information *Qui tam*.

Information may be alſo for Offences and Miſdemeanors at *Common Law*; where the Offender is liable to pay a Fine to the King, as for Batteries, Cheating, Reſcous, ſeditious Words, Conſpiracies, Libelling, Riots, Extortion, Nuſances, Contempts, *&c.*

When the Clerk of the Crown exhibits an Information, it is generally by Order of Court. But when the Attorney General does it, it is *Ex Officio*.

By 18 El. ch. 5. *Every informer upon a penal Statute ſhall exhibit his Suit in proper Perſon, and purſue the ſame only by himſelf, or by his Attorney in Court, by way of Information or original Action, and not otherwiſe, and ſhall have no Deputy.*

A Note of the very Time of exhibiting the Information ſhall be made, and from thenceforth it ſhall be accounted a Record; before which Time no Proceſs ſhall iſſue out upon it; and upon every ſuch Proceſs the Informer's Name ſhall be indorſed, and alſo the Statute upon which the Information is grounded.

No Informer ſhall compound *with the Defendant before Anſwer, nor after Anſwer, but by Conſent of the Court, on Pain of the Pillory and ten Pounds, and to be incapable of being Informer or Plaintiff in any Suit or Information upon any popular or penal Statute. If he diſcontinues, or is nonſuit,*

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[d] 1 Ld. Ray. 556.

[e] 4 Rep. 40. 2 H. H. P. C. 250. Hawk. P. C. B. 2. p. 374.

[f] Finch 340, 341. Show. 109. 110. Hawk. P. C. B. 2. ch. 26. 4 Black. Com. 304.

[g] Terms of the Law, v. Information.

nonſuit, or hath Verdict or Judgment againſt him, the Court ſhall give the Defendant his Coſts, Charges and Damages.

This Act ſhall not extend to Officers, who have lawfully uſed to exhibit Informations, nor to Informations upon the Statutes of Maintenance, Champerty, buying of Titles, or Embracery, as to the Parties grieved, nor to Informations by Perſons to whom any Forfeiture is given in certain and not generally.

[a] No Suit by Bill or Plaint by a Party grieved, ſuing upon a Clauſe relating to himſelf only is within this Statute.

[See 21 *Ja.* 1. *ch.* 3. and the Expoſition there of 3 *Inſt.* 186, 187, being a Statute againſt thoſe that obtain Power, to *diſpenſe* with penal Laws, and the Forfeitures thereof.]

[See 29 *El. ch.* 5. and 31 *El. ch.* 10. as to Appearance to an Information upon a penal Law by Attorney, without Bail, under Title *Bail*, *ante.* Alſo 31 *El. ch.* 5. 21 *Ja.* 1. *ch.* 4. where the Offence ſhall be *laid* in the proper *County*, and again 31 *El. ch.* 5. where the Information ſhall be brought in *due* Time, *ante*, *ch.* 4. See 21 *Ja.* 1. *ch.* 28. For the Repeal of many obſolete Statutes whereby Informers did vex the People.]

By 4 & 5 W. & M. ch. 18. *The* Clerk *of the* Crown *in the Court of King's Bench ſhall not, without expreſs Order in open Court, exhibit, receive, or file any Information for Treſpaſs, Battery, or other Miſdemeanors, or iſſue out any Proceſs thereon, before he hath taken, or hath had delivered to him, a* Recognizance *from the Informer, with his Place of Abode, Title, or Profeſſion, to the Perſon againſt whom ſuch Information is to be exhibited, in the Penalty of twenty Pounds, to proſecute with* Effect, *and to abide ſuch Order as the Court ſhall direct; which Recognizance the ſaid Clerk of the Crown, or a Juſtice of Peace of the Place where the Cauſe of ſuch Information ariſes, may take; and the Clerk of the Crown ſhall enter the ſame upon Record, and file a* Memorandum *thereof in his Office, for all Perſons to reſort to without Fee. And in caſe the Defendant appears and pleads to iſſue, and the Proſecutor doth not, within one whole Year after Iſſue joined, procure the ſame to be tried, or if upon ſuch Trial a Verdict paſs for the Defendant, or if the Informer procures a* Noli Proſequi, *to be entred, the Court may award to the Defendant his Coſts* [a], *unleſs the Judge ſhall at the Trial in open Court certify upon Record, that there was a reaſonable Cauſe for ſuch Information. And in caſe the Informer ſhall not, within three Months after the Coſts taxed, and Demand made thereof, pay the ſame, then the Defendant ſhall have the Benefit of ſuch Recognizance to compel him thereto,*

This Act ſhall not extend to any other Informations, than thoſe in the Name of his Majeſty's Coroner or Attorney in the Court of King's Bench, commonly called the Maſter of the Crown-Office.

So that the Informations by the *Attorney General* remain as they were at Common Law.

If the Information is tried at the Bar, the Defendant ſhall not have Coſts by this Statute; for the Judges cannot make a Certificate to themſelves, that there was a reaſonable Cauſe for Information.

See 9 *An. ch.* 20. To make the Proceedings upon Informations in the Nature of a *Quo Warranto* more ſpeedy and effectual.

Informations [b] are never quaſhed for Inſufficiency, as Indictments may be. A prior Suit depending may be pleaded to an Information on a penal Statute: So may a Pardon, a Releaſe, a Recovery in a former Suit.

[See 4

[a] 1 Cro. 434, 645.

[a] 2 Str. 1042, 1131.

[b] Hawk. P. C. B. 2. p. 259. 1 Salk. 372. 1 Str. 185, 11[illegible].

[See 4 *H.* 7. *ch.* 20.] The General Iſſue may be, *Not Guilty*, *Nil Debet*, *&c.* [See 2 *Ja.* 1. *ch.* 4. and ſee of *Actions* upon *Statutes*, and where *Actions* muſt be laid, *&c.* in *ch.* 4. *ante.*]

I proceed to the *Arraignment* of the Priſoner upon *Indictments* and *Appeals*, whether Principal or Acceſſory.

Of the Arraignment of the Criminal. [c] 1 Inſt. 262. b. 263. a. Raym. 408. Hawk. P. C. B. 2. ch. 28. 4 Black. Com. ch. 25. of Arraignment. [d] 2 Inſt. 315, 316. 3 Inſt. 34, 35. H. P. C. 212. Kely. 10. [e] 3 Inſt. 35. 8 E. 2. cor. 432. Lawyer's Trial 4.

VII. An [c] *Arraignment* (from *Arraigner*, to ſet in Order) of a Priſoner, is to take care, that the Priſoner does appear, to be tried, and to hold up his Hand at the Bar for the Certainty of the Perſon, and to plead a ſufficient Plea to the Indictment. The Priſoner is to hold up his Hand only in Treaſon and Felony; but this is only a Ceremony; if he owns that he is the Perſon, it is ſufficient without it; and then upon his Arraignment his [d] Fetters are to be taken off, [after he has put himſelf upon the Country;[e]] and he is to be treated with all the Tenderneſs imaginable. No Man is ſaid to be arraigned, but at the Suit of the King, upon an Indictment found againſt him, or other Record, wherewith he is to be charged. We may arraign an Aſſize or Appeal, but the Tenant or Appellee is not arraigned; becauſe theſe are at the Suit of the Subject.

The Arraignment of a Criminal muſt be in *Engliſh.* See 37 *Ed.* 3. *ch.* 15. But Appeals are ſaid not to be within this Statute; for they are to be arraigned in *French*, and the Plea of the Defendant is to be read in *French. Quære*, The Reaſon of this Difference. [But *now by* 4 G. 2. ch. 26. *All Proceedings in Courts of Juſtice muſt be in* Engliſh.]

[a] 3 Inſt. 139. H. P. C. 221, 224.

[a] If the *Principal* is acquitted, or convict of Manſlaughter, or *Se Defendendo*, or before Attainder hath his Clergy, or is pardon'd, or dies, the *Acceſſory* ſhall not be arraign'd. [But ſee 1 *Ann. St.* 2. *ch.* 9. 5 *Ann. ch.* 31. which are taken Notice of in *B.* 3. *ch.* 2. *ante*, Concerning *Principal* and *Acceſſory*; where more relating to the *Arraignment of Principal* and *Acceſſory* is mention'd.] By theſe Statutes the ancient Law concerning Arraignment of Principal and Acceſſory is very much alter'd. [See *Dalt. ch.* 185. *p.* 515, 516, 517. For the Solemnity of the *Arraignment* and *Trial* of a Priſoner.]

Of the Behaviour of the Criminal upon his Arraignment. 4 Black. Com. ch. 25, 319. [b] S. P. C. 159. b. 2 Inſt. 177, 178. H. P. C. 225, 226. Kely. 36, 37, 57. Hawk. P. C. B. 2. ch. 30. [c] 3 Inſt. 217. H. P. C. 226. [d] Kely. 27, 28.

VIII. The Priſoner either ſtands *mute*, or *confeſſes* the Fact, or *pleads* upon his Arraignment.

1. If one arraigned of Petit Treaſon or Felony ſtands [b] *mute*, or anſwers nothing at all, it ſhall be inquired, whether he ſtands mute on Purpoſe, or whether he is dumb. If he ſtands mute out of Stubborneſs, or if he hath cut out his Tongue, or he does not plead * directly to the Fact, or does not put himſelf upon a Trial by God and his Country, if a Commoner, or if a Peer by God and his Peers, after he has pleaded Not guilty, he ſhall be put to the Penance. [c] The *Penance* in Caſes of Petit Treaſon and Felony is the *Pain Fort et Dure*, with Forfeiture of Goods. [d] But before the Judgment paſſes, the Court orders his Thumbs to be tied together with Whipcord, and to be drawn together by the whole Strength of two Men, to give the Criminal a Taſte

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* *Idem eſt nihil dicere, et inſufficienter dicere.* 2 Inſt. 178.

of the Pain to be endured, if he will not then comply. This is the Practice at *Newgate* Seſſions, if he continues ſtubborn. The [e] Judgment of *Pain Fort et Dure* is by the *Common* Law, that the Man or Woman ſhall be remanded to Priſon, and laid there in ſome low and dark Room; where they are to lie naked on the Ground, with Hands and Legs extended; and there ſhall be laid upon their Bodies as much Weight as they can bear, and more, till they are dead. [f] This Puniſhment ſome have endured, becauſe it works no Attainder, or Forfeiture of Lands, or Corruption of Blood. [But he forfeits his Goods.[g]] [h] In an *Appeal* of Felony, if the Priſoner ſtands mute, he ſhall have Judgment to be preſſed, as upon an Indictment. And this is by the Common Law. But upon ſtanding mute obſtinately in caſe of *High Treaſon*, the Criminal ſhall have ſuch Judgment, as if he had been convicted by Confeſſion or Verdict. [See *Weſt.* 1. *ch.* 12.]

e 2 Inſt. 178, 179.
H. P. C. 227.

f 1 Inſt. 391. a.

g Hawk. P. C. B. 2. p. 331.

h 2 Inſt. 177, 178, 179.
Kely. 37.
Hawk. P. C. B. 2 p. 329.
Contra, H. P. C. 226.

[i] This Statute does not extend to High Treaſon, the higheſt Offence; nor to Petit Larceny, the loweſt of all Felonies. For ſuch Offenders ſhall have like Judgments, as if they had confeſſed their Crimes.

i 1 Inſt 391. a.
2 Inſt. 177.
3 Inſt. 217.

The 28 *H.* 8. ch. 15. allows the *Pain Fort et Dure* in caſe of [k] *Piracy*, where a Pirate ſtands mute.

k 3 Inſt. 114.

By 33 H. 8. ch. 12. *(intitled,* The Bill for the Houſhold) *Traitors, Felons,* &c. *ſtanding mute upon their Arraignment within the King's Palace, ſhall be deemed guilty of the Offence, of which they are indicted.*

[See 3 *W.* & *M. ch.* 9. 1 *Ann. St.* 2. *ch.* 9. In what Caſes a Priſoner ſtanding *mute* loſeth Clergy, which he had at Common Law, and conſequently ſhall in thoſe Caſes undergo the Puniſhment of *Pain Fort et Dure* in *p.* 383 & 387. *ante.*] [a] *Quære,* What ſhall be done with the Priſoner, if he peremptorily *challenges* above twenty Jurors, whether the Challenge ſhall be over-ruled, or the Priſoner hang'd, or preſſed to Death? [See of *Challenge, poſt.*]

a 2 Inſt. 178.
3 Inſt. 227.
Kely. 36.
H. P. C. 226 229.

[In ſome late Statutes, it is enacted, that the Priſoner, for the Offences within thoſe Acts, ſhall ſuffer the ſame Puniſhment upon ſtanding mute, as if he had been convicted.]

Haw. P. C. B. 2. p. 327
2 H. H. P. C 268, 269, 316, 399.

2. If the Priſoner *confeſſes* [b] the Fact, the Court has nothing more to do than to proceed to * Judgment againſt him. The Confeſſion may be receiv'd, and [c] the Plea of Not guilty may be withdrawn, though recorded. But there is a Confeſſion indirectly made, or implied, as well as directly or expreſs. An indirect or implied Confeſſion is, where the Defendant, in a Caſe not Capital, doth not directly own himſelf Guilty, but will own his Guilt, and ſubmit to a ſmall Fine, rather than contend. In which Caſe, if the Court thinks fit, they may in Diſcretion accept of ſuch Submiſſion to the King's Mercy. By which [d] indirect Confeſſion the Defendant ſhall not be barr'd, to plead Not guilty to an Action for the ſame Fact, as he will be where he directly and expreſly confeſſes the Indictment. [See of *Judgment, infra.*]

b Hawk. P. C. B. 2. ch. 31.

c Kely. 11.
4 Black. Com. 319, 324.

d Lamb. B. 4. ch. 9.
Trials per Pais, ch. 25.
Terms of the Law. v. Battery.

3. If the Priſoner [e] *pleads* upon his Arraignment, he either pleads *Sanctuary*, the *Benefit* of the *Clergy*, *demurs* to the Indictment, pleads in *Abatement*, or in *Bar*, or he pleads the *General Iſſue*.

e H. P. C. 228, 243.

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* *Confeſſus in judicio pro judicato habetur.* 11 Rep. 30. 4 Inſt. 66.
Cum confitente mitius eſt agendum. Ibid.

4 Black. Com. 326.

1. The Plea of *Sanctuary* with *Abjuration* is taken away by the 21 *Ja.* 1. *ch.* 28. as before obſerved. [See the Expoſition of *Magna Charta*, *ch.* 29. *ſupra*, and *Staundford's P. Cr. B.* 2. *ch.* 40.]

4 Black. Com. 327.

2. Or he pleads the *Benefit* of the *Clergy*. But the Uſe is not to put the Offender to pray the Benefit of the Clergy, till he has otherwiſe pleaded. [See of the *Benefit* of the *Clergy*, *B.* 3. *ch.* 2. *ante*, where the particular Offences are ſet down, in which the Benefit of the Clergy is allowed, and where ouſted by Act of Parliament.]

[f] S. P. C. 150. 2 Inſt. 178. H. P. C. 243. 4 Black. Com. 327.
[g] Hawk. P. C. B. 2. p. 334.

3. A [f] *Demurrer* is, when the Criminal joins Iſſue upon a Point of Law in an Indictment, allowing the Fact to be true, as laid in the Indictment or Appeal. If the Indictment, or Appeal, proves to be good in Law, in the Opinion of the Judges, they proceed to Judgment and Execution, as if the Party had been convicted by Confeſſion or Verdict. [*Qu.* [g] If in *Capital* Caſes he ſhall not be allowed to plead over to the Felony, *&c.*] For he ſhall not be put under the *Pain Fort et Dure*, though by his Demurrer he refuſes to put himſelf upon the Inqueſt according to the Letter of the Law; yet he is out of the Reaſon of the Law, becauſe a Demurrer is allow'd to be tried by the *Judges*, and not by the Inqueſt. [See again *Weſt.* 1. *ch.* 12.]

[a] Hawk. P. C. B. 2. ch. 34. 4 Black. Com. 328.
[b] 2 H. H. P. C. 175, 176.

4. In *Abatement*, [a] as that there is a Miſnomer in his Chriſtian or Surname. If the Priſoner pleads Miſnomer of his *Surname* to an Appeal, it goes in Abatement. But in caſe of an Indictment, he ſhall be put to anſwer the Treaſon or Felony. [*Qu.* [b]] Miſnomer in the *Chriſtian* Name goes in Abatement to an Indictment, but then the Priſoner muſt give his true Name, and by that Name he may be forthwith indicted.

[c] Hawk. P. C. B. 2. ch. 35. 4 Black. Com. 329.
[d] S. P. C. 105. 3 Inſt. 213. H. P. C. 244, 245.
[e] 3 Inſt. 213, 214. 4 Rep. 44, 45.

5. Or he pleads in *Bar*; as [c] *Auterfoits Acquit*, *Auterfoits Convict* before Judgment, *Auterfoits Attaint*, or a *Pardon*.

[f] Kely 25, 26. H. P. C. 244.
[g] 4 Rep. 45, 46. 3 Inſt. 213, 214.
[h] Kely. 30.

1. [d] *Auterfoits Acquit*, *i. e.* That he was heretofore acquitted of the ſame Treaſon or Felony. For one ſhall not be brought into Danger of his Life for the ſame Offence, more than once. [e] In an *Appeal* of Death, *Auterfoits Acquit* upon an *Indictment* of the ſame Death, is no Bar. [See 3 *H.* 7. *ch.* 1.] But *Auterfoits Acquit* in an *Appeal*, is a good Bar to an Indictment, unleſs the Appeal was erroneous in Subſtance, or by a wrong Perſon. Acquittal upon a void Indictment is no good Plea, when indicted again; nor if one is *heretofore Acquit* as [f] *Principal*, can it be a Bar to an Indictment againſt him as *Acceſſory after* the Fact. [g] If it is found in an Indictment or Appeal of Death, that one kill'd another in his own Defence, he is acquitted of the Felony for ever. [h] One acquitted of Burglary, and ſtealing the Goods of one Man, may be indicted for Felony, for ſtealing the Goods of another out of the ſame Houſe.

[i] Hawk. P. C. B. 2. ch. 36.
[k] 3 Inſt. 214. 4 Rep. 40, 45, 46. H. P. C. 247. Kely. 90, 93. 94, &c. 103, 104, &c.

2. [i] *Auterfoits Convict* before Judgment, *i. e.* That he was heretofore convicted. [k] *Auterfoits Convict* by Confeſſion or Verdict of Manſlaughter in an Indictment, is a Bar in an Appeal of Murder, if the Perſon ſo convicted is admitted to his Clergy, or at leaſt hath pray'd it, thoʼ not

call'd to Judgment. [See 3 *H.* 7. *ch.* 1.] A Conviction of Manſlaughter in an Appeal of Death may be pleaded in Bar of a ſubſequent Indictment for the ſame Death.

A Conviction on an Indictment of Felony may be pleaded to an Indictment for the ſame Felony. But *Auterfoits Convict* upon an Indictment in this and the like Caſes, is ſaid to be no Plea in Bar, where one is not call'd to Judgment; as Conviction of Manſlaughter upon an Indictment of Murder is to an Appeal for the ſame Death, without being call'd to Judgment, if the Party prays his *Clergy*. The Difference is wholly owing to 3 *H.* 7. *ch.* 1. which leaves the Benefit of the Clergy as it was at Common Law. [See 8 *El. ch.* 4. 18 *El. ch.* 7. and of the *Benefit* of the *Clergy*, *B.* 3. *ch.* 2. *ante.*]

4Black. Com
329, 330.

3. *Auterfoits, Attaint, i. e.* Heretofore attainted for the *ſame* Offence, or for *another* Offence.

4 Black. Com.
330.

For the ſame Offence; [1] This is a good *Plea in Bar* to free one from anſwering again, tho' the Record is erroneous; [if the Attainder is not actually reverſed.] If one is attainted by *Outlawry* in Treaſon or Felony, he ſhall not anſwer to a new Indictment, or Appeal, for the Treaſon or Felony for which he is outlaw'd: if the Outlawry in Treaſon or Felony is not void. For if one is already attainted, to what Purpoſe ſhall he be attainted a ſecond Time?

1 S. P. C. 107.
3 Inſt. 212,
213.
6 Rep. 13.

But in [a] an Appeal of Death at the Suit of the Party, *Auterfoits Attaint* upon Indictment of the ſame Death is no Plea: But in caſe of Indictment at the Suit of the King, *Auterfoits Attaint* is a good Plea. *Heretofore attainted* of *Murder* is a good Plea to an Indictment, &c. of *Petit Treaſon* of the ſame Death. So if one is attainted of *Manſlaughter*, it is a good Bar to an Indictment of Murder, and *è Converſo*, of the ſame Death.

[a] 3 Inſt. 213.
H. P. C. 246,
247.

For *another Offence*. [b] If one is attainted of Treaſon, he cannot be afterwards attainted of a former Treaſon. *Auterfoits Attaint* of one *Felony* is a Bar to an Arraignment of a former Felony; except in ſome particular Caſes[c]: As, [d] One indicted of a Robbery by one of the Perſons robbed, and attainted thereon, may again be indicted by another Perſon robbed at the ſame Time; becauſe by 21 *H.* 8. *ch.* 11. the Party ſhall have Reſtitution of his Money or Goods. If one is attainted of [e] Petty Larceny, he may be afterwards attainted of Felony, for which he may have Judgment of Death; becauſe it is a higher Offence, and it is to have another Judgment. If one is adjudged to the Penance, *Pain Fort et Dure*, yet he may be proſecuted for any former Felony, becauſe the Judgment of Penance was not given for the Felony but for Contumacy. [f] Beſides, the Penance is no Attainder.

[b] 3 Inſt. 213.
[c] See Hawk. P. C. B. 2. p. 373, &c.
[d] H. P. C. 248.
[e] 3 Inſt. 213.
[f] 1 Inſt. 391. a.

In what I have ſaid of the Plea of *Auterfoits Attaint*, you muſt ſuppoſe it not to be reverſed for [g] *Error*; or that the Attainder at the Suit of the King cannot [h] be pleaded with reſpect to a Proſecution upon an Appeal (though in all other Caſes the Plea is of the ſame Force as it was at Common Law) or that one attainted of Felony is not afterwards indicted of *High Treaſon* committed before or after his Attainder; or that it muſt not be underſtood with a Relation to ſeveral Indictments of Larceny, ſince 21 *H.* 8. *ch.* 11. which intitles every Proſecutor to a *Reſtitution* of his Goods, if the Offender is found Guilty, as before hinted; or that an Indictment for a *Treſpaſs* is a Bar to an Indictment of Larceny for

[g] S. P. C. 106.
4 Rep. 45.
12 Rep. 100.
H. P. C. 247.
[h] S. P. C. 107.
2 Inſt. 590.
3 Inſt. 213.
Cont.
H. P. C. 212,
248.

for the ſame taking, *&c.* For a Bar in an Action of an inferior Nature will not bar another, that is of a higher Nature. In all theſe Caſes *Auterfoits Attaint* is of no Force.

[i] 1 Inſt. 274. b. 3 Inſt. 233. Hawk. P. C. B. 2. ch. 37. 4 Black. Com. 331.

4. One may plead a *Pardon* in *Bar.* [i] A *Pardon* (*Perdonatio*) is a Work of Mercy, whereby the King either before Conviction or Attainder, or afterwards, forgiveth any Crime, Offence, Puniſhment, Execution, *&c.* Pardons of Treaſon, Felony, *&c.* come from the King, [See 27 *H.* 8. *ch.* 24.] who by the Common Law had Power to pardon all Offences; but this Power is in ſome Caſes reſtrained by *Statutes.* [See *infra.*]

A Pardon is either of *Courſe* or of *Grace.*

[k] 2 Inſt. 316, 317. H. P. C. 250. Kely. 122, 123.

Of *Courſe* [k] and Right, as for a Perſon convict of Homicide *Se Defendendo*, or by Chancemedley, upon an Indictment for Homicide *Se Defendendo*, or upon an Indictment or Appeal of Murder. [See 6 *Ed.* 1. *ch.* 9.]

Of *Grace*, where ſome Things are required for their Allowance by the *Common Law*, and by *Statute.* By *Common Law*, as when they are conditional, and not abſolute, as upon Condition of Tranſportation, *&c.* By *Statute*, For,

By 27 Ed. 3. St. 1. ch. 2. *In a Pardon of Felony upon Suggeſtion, the Suggeſtion, and the Name of him that makes it, muſt be compriſed.*

By 13 Ri. 2. St. 2. ch. 1. *In a Pardon for* Murder, *or for the Death of a Man ſlain by Await, Aſſault, or Malice prepenſed,* Rape, *or* Treaſon, *the Offence committed muſt be ſpecified in the Pardon, otherwiſe it ſhall not be allowed.* [See 16 *Ri.* 2: *ch.* 6.]

[a] 1 Inſt. 391. a. 3 Inſt. 235, 238. 1 Sid. 366, 430. 6 Rep. 13. H. P. C. 251. * Hawk. P. C. B. 2. p. 383, 384.

[a] A general Pardon of all Murders, *Robberies*, &c. to one indicted and convicted of Murder, Robbery, *&c.* is not good, without Recital of the Indictment and Conviction. For it ſhall be intended, that the King knew not of that Conviction. But if the Party is neither indicted nor attainted, a Pardon of all Felonies in general (except as in the Statute of *Rich.* 2. abovementioned is excepted) is good. [*Qu.**]

By 5 & 6 W. & M. ch. 13. *The Statute of* 10 Ed. 3. ch. 2. *For finding Sureties for the good Abearing, upon a Pardon of Felony is repealed.*

Provided, That if any Charter of Pardon is pleaded for any Felony, the Juſtices before whom ſuch Pardon ſhall be pleaded, may *at their Diſcretion remand or commit ſuch Perſon to Priſon, there to remain till he enters into Recognizance with two ſufficient Sureties, for his good Behaviour for any Time not exceeding ſeven Years.*

Femes Covert and Infants ſhall find two ſufficient Sureties only.

See 4 *Geo.* 1. *ch.* 11. where the King may pardon or diſpenſe with *Tranſportation*, and allow of the Return of an Offender.

[b] 3 Inſt. 233, 234. H. P. C. 250, 252. 5 Rep. 49. 6 Rep. 79. 1 Ld. Ray. 709.

Pardons of *Grace* are either [b] *general* or *particular.* 1. *General*, either by *Act* of *Parliament*, or by *Charter* of the King. A general Pardon by *Act* of Parliament muſt be taken Notice of by the Court, if it is abſolute, though the Party waives it, or does not plead it. But if it hath Exceptions of Offences or Perſons, the Court cannot take Notice of it; neither can the Party have Benefit thereof, unleſs he pleads that he is none of the Perſons excepted. But commonly Advantage is given to the Offender by the Act itſelf, without pleading. The *Charter* of the King muſt be always [c] pleaded under the Great Seal; and the Party may waive the Benefit of it if he pleaſes. But general Pardons are moſt commonly made by Act of Parliament; and of late Years have very

[c] 3 Inſt. 233.

rarely been granted by the Charter of the King. It ſhall always be taken moſt beneficially for the Subject, and moſt ſtrong againſt the King. A Pardon of all Miſpriſions, Treſpaſſes, Offences and Contempts, will pardon any Crime which is not Capital. [d] *Particular*, as at the Coronation, or at any other Time, of any Offence, as alſo of any *exemplary* Puniſhment. If abſolute without Condition, it needs not any Writ of Allowance (*viz.*) That he has found Sureties, *&c.* [See 5 *&* 6 *W. & M. ſupra.*] But it muſt be ſhewed under Seal.

[d] 2 Inſt. 200. 3 Inſt. 233, 234.

The [e] Acceptance of a Pardon is an Argument of Guilt; and he that pleads it, confeſſeth the Fact. [*Qu.*]

[f] Gloves are due to the Judges on Allowance of a Pardon. If a *Peer* hath a Pardon, he muſt plead it before the Judges, where he is indicted.

[e] 4 Rep. 43. 3 Inſt. 235, 239. Kely. 25.
[f] Hult. 88. Kely. 25.

[g] If one obtaineth a Pardon before Conviction, he ſhall forfeit nothing. [See a Form of a *general*, and of a *particular*, Pardon, 3 *Inſt.* 234, 235.]

[g] 5 Rep. 110.

Let us now ſee where the King *cannot* pardon.

The King cannot pardon an Offence that is *Malum in ſe*, [a] before it is committed.

[a] Finch 234, 235. 4 Rep. 35. Dav. 75.

The King [b] *cannot pardon* the Defendant in an *Appeal of Death*, whether attainted by Outlawry or Judgment; for the Appeal is at the Suit of the Party. But if in Appeal of Murder the Defendant is found guilty of Manſlaughter, the King may pardon the Burning of the Hand; for that is collateral, and by the Statute of the 4 *H.* 7. *ch.* 13. [*Qu.*[c]]

[b] 3 Inſt 237. H. P. C. 251. 5 Rep. 50.

A Pardon of all [d] Felonies extends only to Petit Treaſon and common Felonies, and not to High Treaſon.

No Pardon of Felony ſhall be extended beyond the expreſs Words. Therefore a Pardon of all Felonies is no Bar to Execution, if a Felon is attainted. And a Pardon of all Attainders, or of Executions, does not pardon the Felony.

If one is outlawed, and the King pardons him the Outlawry and all his Goods; it is void for the Goods, for he muſt have a Grant of them.

[c] See Hawk. P. C. B. 2. p. 393. 3 Wms. 486, &c.
[d] 1 Inſt. 8. a. 391. a. 3 Inſt. 15, 233, 236, 238, 240. 6 Rep. 13. H. P. C. 251.

A Pardon of all Felonies does not extend to *Piracy*.

A Charter of Pardon after Attainder in Treaſon or Felony does not reſtore the *Blood.* That muſt be by *Parliament.* [See of *Reſtitution*, *infra.*]

[e] The King cannot pardon a *common Nuſance*, nor a *Recognizance* to keep the Peace, before the Peace is broken; nor an *Informer*'s Part upon any penal Statute after the Action is brought by him; nor *Damages* recovered; nor where any legal Intereſt is veſted in the Subject.

[e] 2 Inſt. 200. 3 Inſt. 237, 238.

When Sentence is given in a Cauſe *Pro Reformatione Morum*, or *pro Salute Animæ*, in the Eccleſiaſtical Court, and Coſts *taxed* for the Plaintiff, tho' the King may pardon the Offence (whether the Proceedings are *Ex Officio*, or betwixt Party and Party, as for Defamation, *&c.*) he cannot pardon as to the [f] *Coſts*; becauſe a particular Intereſt is veſted in the Plaintiff, by taxing the Coſts; which he hath a Right to, tho' the Day of Payment of them is aſſigned after the Date of the Pardon. But if one is impriſoned on a Writ of *Excommunicato Capiendo* for Contumacy

[f] 5 Rep. 50, 51. 8 Rep. 69. 2 Inſt. 200. 3 Inſt. 238. 3 Cro. 199. 2 Roll. Abr. 178. 2 Vent. 194.

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[e] *Non poteſt Rex gratiam facere cum injuria aliorum.* Bracton, Lib. 3. fol. 122. 3 Inſt. 236, 237.

in not paying Coſts, and afterwards the King pardons all Contempts, the Party ſhall be diſcharged of his Impriſonment; becauſe it is grounded on the Contempt, which is pardoned, therefore a new Monition for Payment of Coſts muſt iſſue forth.

A Suppreſſion of Truth, or a falſe Suggeſtion, doth avoid a Pardon. [See 27 *Ed.* 3. *St.* 1. *ch.* 2.] for the King was not rightly informed. It is a general Rule, that where the King appears to have been deceived, his Grant is void.

By 12 & 13 W. 3. ch. 2. *No Pardon under the Great Seal is pleadable to an* Impeachment *by the* Houſe *of* Commons.

The King cannot by his Pardon reſtore a *Simoniſt* to his Church; [See 5 & 6 *Ed.* 6. *ch.* 16. 31 *El. ch.* 6.] nor a corrupt Officer to his Office: [Though it may ſave him from any Criminal Proſecution on Account of ſuch corrupt Bargain.]

a 3 Inſt. 236.
2 Roll. Abr. 179.
See p. 21 ante.

Divers Acts of Parliament have reſtrained the King's Power of granting Charters of Pardon in ſeveral Caſes. But it has been ſaid that the King may diſpenſe with theſe Statutes by a *Non Obſtante*, be thoſe Statutes general or ſpecial. [But whatever was the Power of the Crown formerly in this Caſe, or whether it had any ſuch Power or not, it is now ſettled and declared by [a] 1 *W. & M. Seſſ.* 2. *ch.* 2. *That no Diſpenſation by* Non Obſtante *of or to any Statute, or any Part thereof, ſhall be allowed.*]

A Pardon may be *obtained* by *Diſcovery* of *Accomplices.* [See the 4 & 5 *W. & M. ch.* 8. 10 & 11 *W.* 3. *ch.* 23. 6 *Geo.* 1. *ch.* 23. *ſ.* 8. For the Diſcovery of *Highwaymen*, or thoſe guilty of *Burglary*, Houſebreaking, or of *Felony*, not within the Benefit of the Clergy, in ſtealing a Horſe, Money, Wares, or Goods. 6 & 7 *W.* 3. *ch.* 17. For the Diſcovery of Accomplices in *counterfeiting* or *clipping* the *Coin.* 5 *Ann. ch.* 31. For the Diſcovery of thoſe guilty of Burglary, or the felonious breaking and entering any Houſe in the Day-Time. 6 *G.* 1. *ch.* 21. For the Diſcovery of Accomplices in forcibly hindering, beating or wounding an *Officer* of the *Cuſtoms* in the Execution of his Office, *&c.* 8 *Geo.* 1. *ch.* 18. and 9 *Geo.* 2. *ch.* 35. For Diſcovery of Accomplices in ſmuggling the Cuſtoms, *&c.*]

Thus far of Pleas in *Bar.*

b H.P.C. 254.
4 Black Com. 332.

6. One may plead the *General Iſſue.* [b] The General Iſſue is a Plea to the *Fact Not Guilty.* If you take Iſſue, the immediate Conſequence is a Trial.

Of Trial in Criminal Caſes.

IX. I have deſcribed before, what is meant by *Trial*, [See of *Trial*, *ch.* 4. *ante.*] Here in Criminal Caſes it is either by *Peers*, or by the *Country.*

c 1 Inſt. 156. b. 294. a.
4 Black. Com. 342.
2 Inſt. 49.
3 Inſt. 28, 30.
4 Inſt. 23.
Kely. 54, 55, 56. 57.
St. P. C. Lib. 3. ch. 1.

1. The *Trial* of a [c] *Peer* of the Realm muſt be *Per Pares*, by *his Peers.* The Method of Trial of a Peer differs from the Trial of one under the Nobility. For 1. There may be twelve *Peers* or *above*, to try the Fact. (But there *muſt* be twelve at leaſt; and it is not neceſſary that all the Peers preſent ſhould agree in Judgment, but the Majority of them, ſuch Major Part being twelve or more, may determine.) 2. The Trial may be in any *County* of *England.* 3. The Peers are not *ſworn* upon the Trial; (but give their Judgment upon their *Honour*, *ſeriatim*, beginning with the loweſt.) 4. The Priſoner cannot challenge any of

his Peers. 5. They give their Verdict in the Abſence of the Priſoner. 6. In caſe of High Treaſon, all the Judgment is uſually pardoned, except the Beheading.

If a Lord of Parliament does not appear, and cannot be taken, he ſhall be [d] *outlawed* by the Coroner. [d] 2 Inſt. 49.

He ſhall not be tried by his Peers, but only at the Suit of the [e] King, 3 Inſt. 31.
upon an Indictment of High Treaſon, or Miſpriſion of the ſame, Petit [e] 2 Inſt. 48, 49, 50.
Treaſon, Murder or other Felony, or Miſpriſion of Felony, (or upon an 3 Inſt. 26, 50.
Impeachment of the Houſe of Commons.) And here he cannot waive 9 Rep. 30, 117.
his Trial by his Peers, and be tried by the Country. In the Caſe of S. P. C. Lib.
Præmunire, *&c.* though it is at the Suit of the King, he ſhall be tried 3. chap. 1.
by Freeholders, and not by his Peers: And ſo in an *Appeal* of Felony at Dyer 360.
the Suit of the Party. And though one is noble, yet if he is not a Lord of Parliament, he ſhall be tried by Freeholders, as a Lord of *Ireland*, *France*, *&c.* And ſo it muſt be with the Son of a Duke, Marquis, Earl, *&c.* if he is no Lord of Parliament. No Treaſon committed in *Ireland* by an *Iriſh* Peer, is triable in *England*; for he is to be tried by his Peers in *Ireland*.

The Queen, being the King's Conſort, and the Queen Dowager, ſhall be tried, in caſe of Treaſon, by their Peers.

By 20 H. 6. ch. 9. Ducheſſes, Counteſſes, *and* Baroneſſes, *for Treaſon or Felony, ſhall be tried by ſuch Peers as a Nobleman, Peer of the Realm, ought to be.*

[a] Marchioneſſes and Viſcounteſſes are not named in this Act, but they [a] 1 Inſt. 16. b.
ſhall be tried by their Peers. If a Woman, noble by Marriage, marries [a] Inſt. 50.
one under the Degree of Nobility, ſhe ſhall be tried by the Country; but not if noble by Birth.

By 7 & 8 W. 3. ch. 3. ſ. 11. *Upon Trial of any Peer or Peereſs for Treaſon or Miſpriſion, (except on an Impeachment in Parliament, and for High Treaſon in counterfeiting the Coin, the Great or Privy Seal, Sign Manual, or Privy Signet) All the Peers, who have a Right to vote in Parliament, ſhall be ſummoned twenty Days at leaſt before the Trial, every ſuch Peer taking the* Oaths *made* 1 W. & M. *and alſo ſubſcribing and repeating the* Declaration *mentioned in* 30 Car. 2. St. 2. ch. 1.

When a Peer indicted of Treaſon or other Capital Offence, is arraigned in the upper Houſe of [b] Parliament, the Lords Spiritual withdraw, [b] S.P.C. 153.
and make their Proteſt. [See Of *Biſhops*, *B.* 1. *ch.* 4. and of the *Court* 3 Inſt. 31.
of the *Lord High Steward*, *B.* 4. *ch.* 1. *ante.*]

Lords in Parliament are not to give Judgment againſt a [c] Commoner [c] 2 Inſt. 50.
for Treaſon or Felony, [unleſs upon an Impeachment of the Houſe of Commons.]

2. *Trial* by the *Country (Per Patriam)* is a Trial by a *Jury* of twelve 4 Black. Com.
Men, call'd the *Petty Jury*. Now to know the Law concerning *Petty* 342.
Juries, it may be proper to inquire, in what *County* the *Iſſue* ought to be tried; and then what is the Proceſs againſt the Petty *Jury*; of *Challenges* to the Petty Jury; of the *Evidence* given to them, and of their *Verdict*. Almoſt ſuch a Method was propoſed in the former Chapter, concerning the Way of Trial by a Jury in *Civil* Caſes.

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[d] *Ubi quis delinquit, ibi punietur.* 6 Rep. 47. 3 Inſt. 34, 80.

1. The

[d] 2 Rep. 93. 6 Rep. 47. 3 Inſt. 80. 135.

1. The *Iſſue* in Criminal Caſes, regularly ought to be tried in the [d] *County*, where the Offence was committed. But ſeveral Statutes have introduced an Alteration in the Law, in ſome *Capital* Caſes. [See 26 *H.* 8. *ch.* 13. 35 *H.* 8. *ch.* 2. 5 & 6 *Ed.* 6. *ch.* 11. For *Treaſons* committed *out of the Realm*, See of the *Court* by *Commiſſion* according to the Statute of 28 *H.* 8. *ch.* 15. in *chap.* 1. *ante.* For Treaſons and other Capital Offences committed at *Sea.* See alſo 1 *Ann. St.* 2. *ch.* 9. For Trial of Captains and Mariners deſtroying Ships 11 & 12 *W.* 3. *ch.* 7. 4 *G.* 1. *ch.* 11. and 18 *G.* 2. *ch.* 30. For Trials of Pirates, Felons and Robbers. 2 & 3 *An. ch.* 20. For Trial of Officers and Soldiers, that either upon Land out of *Great Britain*, or at Sea, hold Correſpondence with a Rebel or Enemy, *&c.* 11 & 12 *W.* 3. *ch.* 12. For Trial of Governors of the Plantations for Crimes committed by them in the Plantations. And ſee *ch.* 1. *ante*, and the *Statutes infra.* Offences againſt the Statute 9 *Geo.* 1. *ch.* 22. called the *Black Act*, may be tried in any County.]

[a] 3 Inſt. 27. H. P. C. 162, 163, 255.

An Indictment being found in the proper County, it may [a] by ſpecial Commiſſion of *Oyer* and *Terminer* be heard and determined in any other County, but the Trial muſt be by Jurors of the proper County. And this is warranted by the Courſe of the Common Law; and if one is indicted of *Treaſon*, he may plead a foreign Plea, and it ſhall be tried in the foreign County. But in Petit Treaſon, Murder, or *Felony*, the *foreign Plea* ſhall be tried in the County where the Indictment was taken, unleſs this is altered by ſpecial Commiſſion. [See 22 *H.* 8. *ch.* 14. § 5.]

By 1 & 2 Ph. & M. ch. 10. *All* Trials *hereafter to be had for any Treaſons, ſhall be according to the Courſe of the Common Law.*

[b] 3 Inſt. 24. Hawk. P. C. B. 2, p. 258.

[c] Ibid.

By this Statute all Trials of High Treaſon, Petit Treaſon, or Miſpriſion of Treaſon, contrary to the Courſe of the Common Law (as 33 *H.* 8. *ch.* 23, *&c.*) are abrogated. [But [b] Miſpriſion of Treaſon ſeems not to be within 1 & 2 *Ph.* & *M.*] Therefore an Alien, that liveth under the Protection of the King, there being Amity betwixt the two Kings, ſhall be tried for High Treaſon according to the Common Law, and not *Per Medietatem Linguæ*, as he ſhall be in Petit Treaſon, [*Qu.* for it is held [c] that 1 & 2 *Ph.* & *M.* extends to Petit Treaſon] Murder and Felony, if he deſires it.

By 26 H. 8. ch. 6. *Felonies committed in* Wales *ſhall be inquired of, heard and determined in the* Engliſh *County next adjoining.* [See 34 & 35 H. 8. ch. 26.]

By 2 & 3 *Ed.* 6. ch. 24. *Where any one is feloniouſly ſtricken or poiſoned in* one *County, and dieth of ſuch Stroke or Poiſoning in* another *County, an Indictment thereof found by Jurors of the County where he dies, ſhall be good in Law. And the Juſtices of Gaol-Delivery, and* Oyer *and* Terminer, *in the County where ſuch Indictment is taken, as alſo the Juſtices of the* King's Bench, *when ſuch Indictment is removed before them, may proceed thereon, as if ſuch Stroke or Poiſon, and Death had happened in one and the ſame County.*

Alſo an Appeal *may be commenced, taken and ſued in the* County *where the Party ſo ſtricken or poiſoned ſhall die, as well againſt the Principal as Acceſſory, in whatſoever County ſuch Acceſſory be guilty thereof.*

Where any Murder or Felony is committed in one County, and any other Perſon is Acceſſory *to it in another County, an Indictment found againſt ſuch Acceſſory in the County where ſuch Perſon is Acceſſory, ſhall be good in Law, as if the principal Offence had been committed in the ſame County,* &c. [See 3 *Inſt.* 135, 136. 9 *Rep.* 117, 118. and alſo *B.* 3. *ch.* 2. *ante.* Of *Principal* and *Acceſſory.*]

By 1 Ja. 1. ch. 11. (againſt Polygamy) *The Parties offending ſhall receive ſuch Trial and Execution, in the County where ſuch Perſon or Perſons ſhall be* apprehended, *as if the Offence had been committed in ſuch county.*

Kely. 79, &c.

[See 2 *Geo.* 2. *ch.* 21. For Trial of Murders, where either the Stroke, or Death, only happens in *England*, in p. 346. *ante.*]

By Common Law, if one guilty of Larceny in one County carries the Goods ſtolen into another, he may be indicted and tried in either County. [See 3 *W.* & *M. ch.* 9. Of Perſons convicted for ſtealing Goods in any other County.] If a Fact done in one County proves a * Nuſance to another, it may be indicted and tried in either.

*H.P.C. 203.

See 6 *G.* 1. *ch.* 23. and 16 *G.* 2. *ch.* 15. For Trial of Offenders, that have been tranſported, and do return before the Expiration of the Term for which they were tranſported. 8 *Geo.* 1. *ch.* 18. for Trial of Smugglers of the Cuſtoms.

2. As to the *Proceſs* againſt the Petty Jury, I have ſpoken of it before [a]. At the Quarter-Seſſions a *Precept* goes to the Sheriff, to ſummon a Seſſions, and for Return of Juries, &c. and therefore no particular Precept is requiſite to ſummon a Petty Jury.

[a] See Ch. 4. ante.
S P.C. 154. b.

[b] The Juſtices of *Goal-Delivery* may have their Panel returned by the Sheriff, without any Precept, by bare Award. But Juſtices of *Oyer* and *Terminer* cannot. Neither Juſtices of *Oyer* and *Terminer*, nor Juſtices of the Peace, can make their *Venire Facias* to try an Iſſue, returnable the ſame Seſſions; [*Qu.*] but Juſtices of Goal-Delivery may. [But ſee 4 & 5 *W.* & *M. ch* 24. and 7 & 8 *W.* 3. *ch.* 32]

[b] 2 Inſt. 568.
4 Inſt. 164, 168.
H. P. C. 256.
Kely. 7.
Hawk. P. C. B. 2. ch 41.

[c] The *Venue* muſt come from ſuch a Place, as that all who live in or near it, may reaſonably be preſumed to have ſome Knowledge of the Perſons living in it; as of the Reputation of the Priſoner and Witneſſes. It may come, not only from a Town, but from a Pariſh, Hamlet, or other Place, known out of a Town.

[c] Hawk. P. C. B. 2. p. 182.

[d] If a full Jury does not appear, or if they are challenged in an Indictment or Appeal, there may be a *Tales*. [But *Qu.* [e] as to the Power of Juſtices of *Oyer* and *Terminer*, or of Goal-Delivery, to grant a *Tales.*] [See of the *Jury. ch.* 4. *ante.*]

[d] S. P. C. 155.
H. P. C. 257.
[e] Hawk. P. C. B. 2. p. 409.

[f] The Sheriff uſually returns fifty or ſixty Jurors, becauſe of the Challenges that may be made to them. [See *Weſt.* 3. *ch.* 38. For Civil Cauſes; 7 & 8 *W.* 3. *ch.* 32. For *Yorkſhire*; and of the Jury, *ch.* 4. *ante.*]

[f] Kely. 16.

By 3 H. 8. ch. 12. *The Juſtices of* Gaol-Delivery, *or* Juſtices *of the* Peace (1 Quorum) *in their open Seſſions, may reform the Panel returned by the Sheriff to inquire for the King at Diſcretion; and the Sheriff ſhall return the Panel ſo reform'd.* [See 33 *H.* 6. *ch.* 2. For *Lancaſhire.*]

By 7 & 8 W. 3. ch. 3. *All Perſons indicted of High Treaſon, or for Miſpriſion of Treaſon (except for counterfeiting the Coin, Great Seal, Privy Seal, Sign Manual, or Privy Signet) ſhall have a* Copy *of the* Panel *of the* Jurors, *who are to try them, two Days at leaſt before their Trial* [See 7 *An. ch.* 21. *infra.*]

4 Black. Com. 346.

3. Of *Challenges* [g] to the Petty Jury. [h] In caſe of Life and Death the King may challenge the *Array* for Favour, but the Priſoner cannot. And as to the [i] *Polls*, the Challenge may be either *peremptory*, or for any *juſt Cauſe.*

[g] See Ch. 4. ante.
[h] 1 Inſt. 156. a. & b.
2 Roll. Abr. 645, 646.
[i] S. P. C. 157.
1 Inſt. 157. b.
Hawk. P. C. B. 2. ch. 43.

A *peremptory* Challenge, or without Cauſe, is not allowable, but only in caſe of Life and Death; and then it is reſtrained to a certain Number, as will preſently appear.

By 33 Ed. 1. St. 4. *The* King *ſhall not challenge without aſſigning Cauſe.*

[k] 1 Ventr. 309, 310.

This the King might have done at *Common Law.* [k] He need not ſhew the Cauſe of Challenge preſently, or before the Clerk has gone thro' the Panel (as a common Perſon muſt do) but it is Time enough after the Peruſal of the Panel; and if there are enough beſides, no Cauſe ſhall be ſhewn of the Challenge.

This Statute being general extends both to Criminal and Civil Cauſes.

A *Priſoner* at the *Common Law* upon an Indictment of Treaſon or Felony, or Appeal of Death might have peremptorily challenged thirty-five, which was under the Number of three Juries. But,

By 22 H. 8. ch. 14. *No Perſon arraigned for* Petit Treaſon, Murder, *or* Felony, *ſhall challenge* peremptorily *above the Number of twenty.*

[a] 3 Inſt. 227. 228. H. P. C. 260. Kely. 36. 2 H. H. P. C. 339, 345. [b] Hawk. P.C. B. 2. p. 414. 4 Black. Com. 346.

If he doth, the Challenge ſhall be [a] over-ruled, and the Party ſhall be put upon his Trial; [*Qu.*[b]] [See 25 *H.* 8. *ch.* 3.] But ſubſequent Statutes exclude from Clergy, thoſe that peremptorily challenge above twenty.

By 3 W. & M. ch 9. *Offenders that challenge peremptorily above twenty, ſhall loſe the Benefit of the Clergy, if, by Virtue of any former Statute, they were excluded Clergy, upon Conviction by Confeſſion or Verdict.* [See 1 *An. ch.* 9.] So that in this Caſe the Offender ſhall be hanged. But if the Offence is within the Benefit of the Clergy, the Challenge ſhall be over-ruled.

3 Inſt. 227.

In Caſes of High Treaſon and Petit Treaſon, the peremptory Challenge of thirty-five is reſtored by 1 & 2 *Ph. & M. ch.* 10.

[c] 2 Inſt. 178, Kely. 36. H. P. C. 259. Cont. 3 Inſt. 227.

Here if the Priſoner challengeth thirty-ſix peremptorily, [c] the uſual Judgment ſhall be pronounced againſt him, as if he had been found Guilty by Verdict. Tho' formerly it was held that in Petit Treaſon he ſhould be preſſed to Death, becauſe he refuſed Trial, as if he had ſtood mute.

A Challenge for *juſt Cauſe* is not at all reſtrained to any Number. This may be in reſpect of *Honour.* [See *Magna Charta, ch.* 29.] *Defect* of *Birth*, as Aliens born, or of *Eſtate.* [See 2 *H.* 5. *ch.* 3. 23 *H.* 8. *ch.* 13. 4 & 5 *W. & M. ch.* 24. which do not extend to Aliens, (*Qu.* as to the *Engliſh* half of the Jury) ſee alſo 3 *G.* 2. *ch.* 25.] Or for *Affection* or *Malice*, or for *Crime.* [See of *Challenges* of a *Juror, ch.* 4. *ante.*]

[d] 1 Inſt. 156.b. 294. a. 3 Inſt. 27. Kely. 54.

There muſt be no Challenge on Trial by [d] *Peers.*

See 3 *H.* 7. *ch.* 14. Concerning the Compaſſing and Imagining to kill the King or any of the Privy Council, by any Servant of the King's Houſhold, where there is no *Challenge* to be allow'd but for *Malice.*

[e] S. P. C. 158, 159. 4 Black. Com. 346. 3 Inſt. 27. H. P. C. 261. Hawk. P. C. B. 2. p. 420, [f] Hawk. P. C. B. 2. p. 258.

He that will have Advantage of Trial *per Medietatem Linguæ*, muſt pray [e] for it; for he cannot have Benefit of it by way of Challenge. (*Qu.*) There is no *Medietas Linguæ* to be allowed in *High Treaſon*, as there may be in Petit Treaſon, Murder and Felony. [*Qu.* The Reaſon, that Petit Treaſon is not held to be included under the Word [Treaſon] In 1 & 2 *Ph. & M. ch.* 10. as to this Matter, as well as to the Matter of Challenges and Evidence [f]] [See 1 & 2 *Ph. & M. ch.* 10.] *Ægyptians* are excluded from it by 1 & 2 *Ph. & M. ch.* 4. [See 27 *Ed.* 3. *St.* 2. *ch.* 8. 28 *Ed.* 3. *ch.* 13. 8. *H.* 6. *ch.* 29.]

4. Of the *Evidence* to the Petty Jury. It muſt be always given in the Preſence of the Priſoner in Treaſon or Felony. [See of *Evidence* in Civil Cauſes, *ch.* 4. *ante.*]

Every one ſhall be admitted to give Evidence for the King, but always upon Oath. And regularly [a] *one* Witneſs is ſufficient, where the Trial is by a Jury; it is much diſputed, whether the *Common* Law required a certain Number of Witneſſes in any Caſe, even in High Treaſon. [But ſee the *Statutes, infra.*]

H. P. C. B. 2. ch. 46.
B. 2. ch. 46.
4 Black. Com. 349, 350.
[a] Kely. 49, 50.
3 Inſt. 26.
1 H. H. P. C. 298.

Upon an Indictment for Battery, *&c.* the *Party grieved* may be a *Witneſs* againſt the Defendant, becauſe the Proſecution is at the Suit of the King. [b] A *Wife* cannot be a Witneſs againſt her Huſband, or a Huſband againſt his Wife, except in High Treaſon, [and in ſome other Caſes] as hath been ſaid. But an *Infant* [c] of nine Years of Age hath been allowed to be examined in ſome Caſes. [c] A *Commiſſioner* in a Commiſſion of Gaol-Delivery, *&c.* for the Trial of a Priſoner, may come from the Bench, and be a Witneſs, and give Evidence for or againſt a Priſoner. A *Juror* alſo may be a Witneſs. One of the Defendants in an Information, if no Evidence is given againſt him, may be a Witneſs for the other. *Confederates* in the ſame Treaſon or Felony, may be Witneſſes againſt their Companions. But a Promiſe of Pardon to a Confederate on Condition to give Evidence againſt the reſt, may take off the Force of his Evidence, if it does not wholly diſable him. Traitors or Felons pardoned, even after a Conviction or Attainder, may be good Witneſſes. A Pardon of Burning in the Hand on a Conviction of Manſlaughter, as well as the Burning, reſtores the Party to his Credit.

[b] 1 Inſt. 6. b. 112. a.
H. P. C. 263.
Raym. 1.
See p. 60. ante.
[c] 1 Strange 700.
[d] Kely. 12, 17, 18, 33.
H. P. C. 262.
1 Sid. 237.
Trials per Pais 148.
1 H. H. P. C. ,06.

A Witneſs by Hearſay of a Stranger will not be allowed; unleſs perhaps to confirm the Evidence of a Witneſs that ſpoke of his own Knowledge, *&c.* [See of *Witneſſes* under *Evidence, ch.* 4. *ante.*]

[e] A *Witneſs againſt* the King in *Treaſon* or *Felony* ought not to be examined upon Oath by the Common Law. [But ſee 31. *El. ch.* 4. and 7 & 8 *W.* 3. *ch.* 3. 1 *An. ch.* 9.] By the two laſt Statutes, Witneſſes for a Priſoner are to be ſworn, in like Manner as Witneſſes for the King are obliged to be, and Proceſs for their Appearance may be taken out in Treaſon and Felony. The Evidence for the Defendant in an Appeal, Indictment, or Information for a Miſdemeanor muſt alſo be upon Oath.

[e] 3 Inſt. 79.
Dalt. ch. 185. p. 517.
H. P. C. 264.

[f] Tho' the Indictment in Caſes Capital or not Capital, is laid to be on *one Day*, and the Evidence is of *another Day*, either before or after, the Jury may find generally, that the Priſoner is Guilty. Yet if it is alledged, before the Offence done, the Jury ought to find the Day, when it was done; becauſe the Forfeiture ſhall relate to the Day found in the Verdict. If the Indictment ſets forth the Treaſon or Felony to be committed at *one Place*, and the Evidence is of *another Place* in the ſame County, it maintains the Indictment. For the Place, being laid only for the Venue, is not material upon the Evidence. Otherwiſe, where a certain Place is made Part of the Deſcription of the Offence. [See 2 & 3 *Ed.* 6. *ch.* 24. 9 *Geo.* 1. *ch.* 22.] If the Indictment and Evidence differ in the *Kind* of Murder or Homicide, it cannot maintain the Indictment; as where an Indictment is of Poiſoning, and the Evidence is of Stabbing, Drowning, *&c.* But if the Indictment and Evidence differ only in the

[f] 1 Inſt. 283. a.
2 Inſt. 318, 319.
3 Inſt. 230.
9 Rep. 67.
H. P. C. 264. 265.
Kely. 16.

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[a] *In criminalibus probationes debent eſſe luce clariores.* 3 Inſt. 26, 210.

[c] *Jurato creditur in Judicio.* 3 Inſt. 97.

Sort of *Poiſon*, they agree well enough; for the Subſtance of the Indictment was the Poiſoning. So if the Indictment and Evidence differ as to the *Kind* of *Weapon*, with which one was kill'd, they agree in Subſtance and in the Kind of Homicide, in the Cauſe, *viz.* by a Weapon. If the Indictment is, that *A.* gave the mortal Blow, and that *B.* was preſent and abetting, and the Evidence varies as to the *Perſon*, (*viz.*) that *B.* gave the Blow, and that *A.* was preſent and abetting; yet this Evidence maintains the Indictment.

[a] Kely. 15, 33. 4 Black. Com. 350. [b] H.P.C. 203.

[a] Evidence in Treaſon may be of Overt-Acts in other Counties, than thoſe laid in the Indictment; provided the Overt-Act in the County laid in the Indictment is fully proved. [But ſee 7 & 8 *W.* 3. *ch.* 3. § 8. *infra*, which has made an Alteration in this Reſpect.] [b] But for ſcandalous Words againſt a Peer; or other Matter tranſitory upon an Indictment, if upon Evidence it appears, that the Words were ſpoken in any other County, the Evidence does not maintain the Indictment, *&c.*

[c] 3 Inſt. 29, 137, 230. Dr. & Stud. Dial. 2. c. 48. Hawk. P. C. B. 2. p. 401.

[c] While the Evidence is giving, the Priſoner may have *Counſel* aſſign'd him, for every Matter of Law ariſing on the Fact, or general Iſſue, in Caſes of Treaſon or Felony. But otherwiſe he ſhall have no Counſel in Treaſon [but ſee *infra*] or Felony, whether he is a Peer or Commoner; becauſe the Evidence muſt be ſo plain, that it cannot be denied, and becauſe the Court ought to be of Counſel for the Priſoner, and to allow him all Things, that make for his Advantage. And it is lawful for any one in Court, eſpecially one learned in the Law, (as *Amicus Curiæ*) to inform the Court, leſt they ſhould err. In an Appeal, whether Capital or not, and Offences under Felony, a Defendant is allow'd the ſame Benefit of Counſel as on any Action.

[d] 1 Inſt. 6. b. 3 Inſt, 26, 27.

[d] The Evidence of Witneſſes to the Jury is no Part of the Trial, for the Trial is by the Verdict, as before is ſaid.

By 5 & 6 Ed. 6. ch. 11. *No Perſon ſhall be indicted, arraigned, convicted, or attainted, for any Treaſon that now is, or hereafter ſhall be made ſo by any Statute, unleſs the Offender be accuſed by* two *lawful Accuſers, who, at the Time of the Arraignment of the Party, ſhall be brought in Perſon before the Party accuſed; unleſs he willingly without Violence does confeſs the Offence.* [See 1 *Ed.* 6. *ch.* 12.]

This Act extends to Petty Treaſon as well as High Treaſon. For the Words are *any* Treaſon.

[e] 3 Inſt. 25, 26. H. P. C. 208.

[e] By lawful *Accuſers* we muſt underſtand *lawful Witneſſes. Without Violence*, (*i. e.*) without *Torture. Confeſs the ſame*, (*viz.*) upon his Examination, not before the Judge. See 7 & 8. *W.* 3. *ch.* 3. *poſt.*]

I ſaid before, that *by* 1 & 2 Ph. & M. ch. 10. *All Trials to be had, awarded, or made, for any Treaſon, ſhall be had according to the Courſe of the Common Law,*

[f] S. P. C. 90, 164. 3 Inſt. 24. 25, 26, 27. Contr. Kely. 18, 49.

Now this Act does not take away the Neceſſity of two Witneſſes upon the [f] Indictment, required by 5 & 6 *Ed.* 6. It mentions only Trials. Neither doth this Statute extend to Miſpriſion of Treaſon. Therefore there muſt be two lawful Witneſſes as well upon the Trial as the Indictment. [See 7 & 8 *W.* 3. *ch.* 3. *infra.*]

Petit Treaſon is within this Statute, as well as within the 5 & 6 *Ed.* 6. but is not within 7 & 8 *W.* 3. *ch.* 3. Therefore there two Witneſſes muſt be upon the Indictment, though not upon the Trial.

By 1 & 2 Ph. & M. ch. 11. *In High Treaſon for Counterfeiting and Impairing the* Coin *current within this Realm, the Offender ſhall be* indicted,

dicted, arraigned, tried, convicted, *and* attainted *by ſuch like Evidence, and in ſuch Manner and Form, as before the firſt Year of* Ed. 6.

This Act, in caſe of High Treaſon concerning the *Coin*, hath reſtored the Evidence required by the Common Law, as well upon the Indictment as Trial.

By 21 Ja. 1. ch. 27. *A Mother of a Baſtard Child, concealing its Death, muſt prove by* one *Witneſs, that the Child was born Dead, otherwiſe Felony without Clergy.*

[a] *Concealment* is taken *Prima Facie* to be an undeniable Evidence, that the Mother murdered the Baſtard-Child. But if ſhe called for Help, and could get none; or if ſhe confeſſed herſelf with Child beforehand, *&c.* and was ſurprized, and delivered when no one was preſent, ſhe is not within the Act.

[a] Kely. 32, 33; 4 Black. Com. 352.

By 7 & 8 W. 3. ch. 3. *Every Perſon indicted, arraigned, or tried for* High Treaſon, *whereby any Corruption of Blood may be made, or for* Miſpriſion *of ſuch Treaſon, ſhall be admitted to make his full Defence by* Counſel, *not exceeding two, who ſhall have free Acceſs to him at all ſeaſonable Hours; and to make any Proof by lawful* Witneſſes *upon* Oath, *who ſhall be compelled by Proceſs to appear for him in like Manner as Witneſſes are compellable to appear againſt him.*

No Perſon ſhall be indicted, tried, *or* attainted *of ſuch* High Treaſon, *or Miſpriſion of ſuch Treaſon, but by and upon the Oaths and Teſtimony of* two *lawful* Witneſſes, *either both to the ſame Overt-Act, or one of them to one, and the other to another Overt-Act of the ſame Treaſon; unleſs the Party indicted, and arraigned or tried, willingly, without Violence in open Court does confeſs the ſame, or ſtands mute, or refuſes to plead, or in Caſes of High Treaſon challenges peremptorily above thirty-five of the Jury.*

Where two or more diſtinct *Treaſons of divers Kinds ſhall be alledged in one Bill of Indictment, one Witneſs produced to prove one, and another Witneſs to prove another of the ſaid Treaſons, ſhall not be deem'd two Witneſſes to the ſame Treaſon within the Meaning of the Act.*

No Evidence ſhall be admitted of any Overt-Act, that is not expreſſly laid in the Indictment.

This Act ſhall not extend to any Impeachment, *or other Proceedings in Parliament, nor to any Indictment of High Treaſon for counterfeiting the* Coin, *the* Great Seal, Privy Seal, Sign Manual, *or* Privy Signet.

By 1 An. ch. 9. Witneſſes *for* Priſoners, *upon Trials for* Treaſon *or* Felony, *ſhall be* ſworn *as Witneſſes for the King are obliged to be, and ſhall be ſubject to the Pains and Penalties for Wilful Perjury.*

If the Witneſſes muſt be ſworn, Proceſs ſurely may be taken out againſt them of Courſe.

So that it appears by theſe two laſt Statutes, that *Counſel* is only to be allow'd in Caſes of High Treaſon, whereby any Corruption of Blood may be made, or for Miſpriſion of ſuch Treaſon; that *Witneſſes* for the Priſoner ſhall be *ſworn* in all Caſes of *Treaſon* or *Felony*; and that there muſt be *two* Witneſſes in High Treaſon, wherein there is Corruption of Blood, or for Miſpriſion of ſuch Treaſon, to prove the Overt Acts laid in the Indictment; or at leaſt one to one Overt-Act, and one to the other, therein ſpecified. [See of *Witneſſes* under *Evidence, ch.* 4. *ante*, and 7 & 8 *W.* 3. *ch.* 3. As to the Priſoner's having a *Copy* of the Indictment in High Treaſon, *&c.* under Title *Indictments, ante*; and 7 *An. ch.* 21. Concerning a *Copy* of the *Indictment* for Treaſon, a Liſt of the *Names* of the *Witneſſes* and *Jurors* to be delivered to the Party indicted for High Treaſon, ten Days before the Trial, after the Deceaſe of the *Pretender, &c.*]

By 20 Geo. 2. ch. 30. *Perſons* impeach'd *by the Commons of High Treaſon, whereby any Corruption of Blood may be made, or for Miſpriſion of ſuch Treaſon, may make their full Defence by Counſel, not exceeding two to be aſſigned them at their Requeſt.*

[a] H. P. C. 193, 264. Kely. 18, 19. 5 Mod. 167.

The [a] *Confeſſion* of the Defendant to private Perſons, or to a Magiſtrate, out of Court, is allow'd to be given in Evidence againſt the Party confeſſing; but this Confeſſion cannot be made uſe of againſt any other. But where a Man's Confeſſion is made uſe of againſt him, it ought to be taken all together, and with that Part which makes for him, as well as with that which makes againſt him. But 7 & 8 *W.* 3. *ch.* 3. requires two Witneſſes to the Overt-Act in High Treaſon or Miſpriſion of Treaſon, unleſs the Party ſhall willingly without Violence, *confeſs in open Court*, &c.

By 1 & 2 Ph. & M. ch. 13. *and* 2 & 3 Ph. & M. ch. 10. *One accuſed of* Manſlaughter *or* Felony, *let to Bail, or ſent to Gaol for want of Bail, muſt be* examined, *before Bailment or the ſending to Gaol, and the* Accuſers *muſt be bound over to give Evidence againſt him*; *and* Juſtices *muſt take the* Examination *of the Priſoner in Writing, with the* Information *of the Accuſers, and certify them at the next Gaol-Delivery. The* Coroner *alſo, upon any Inquiſition found before him, whereby any Perſon ſhall be indicted for Murder or Manſlaughter, or as Acceſſory thereto before the Fact, ſhall put in Writing the Effect of the Evidence given to the Jury before him, and bind the* Witneſſes *to appear at the next General Gaol-Delivery, and certify the Evidence and Recognizance*, &c.

The ſaid Juſtices and Coroner have Power, to bind by Recognizance or Obligation, all ſuch as can declare any Thing againſt the Priſoner, to appear at the next Gaol-Delivery, and there ſhall make Certificate of the ſaid Recognizance or Obligation.

[b] 1 Ld. Ray. 729. 1 Salk. 281. S. C. 5 Mod. 165.

[c] H. P. C. 262, 263. Kely. 55. Hawk. P. C. B. 2. p. 429, 430.

The 1 & 2 *Ph. & M.* extends only to thoſe that are let to Bail, but the 2 & 3 *Ph. & M.* extends to thoſe that are committed to Priſon for Manſlaughter or Felony. By theſe Statutes the *Informations* of the Accuſers in Manſlaughter or Felony, being put in Writing and certified, may be given in Evidence, [b] as well as the *Confeſſion* of the Priſoner. Tho' this is not *expreſly* mentioned in either of thoſe Acts, yet it hath been held, that they may be read in the Caſes hereafter mentioned; but *Qu.* If the Defendant muſt not be preſent at the Time they are taken in order to make them good Evidence.] But the Information of a Witneſs in other Caſes cannot be admitted, though the Witneſs is dead. [c] The Examination of the *Offender* muſt not be upon Oath; but muſt be ſubſcribed by him, if he confeſſes the Fact, and then given in Evidence upon Oath by the Juſtices at the Trial. But the Examination of *others* muſt be upon Oath. And a Juſtice or his Clerk, or a Coroner upon an Inquiſition of Death taken before him, may be ſworn to the Truth of the Examination of thoſe upon *Oath*, upon the Trial of ſuch Inquiſition, or of an Indictment for the ſame Felony, (but not upon an Appeal) if it is proved that they are dead, or unable to travel, or kept away by the Priſoner.

If it is a ſmall Felony, the Examination muſt be certified by the Juſtices to the Quarter-Seſſions; otherwiſe to the next Gaol-Delivery.

By 3 & 4 W. & M. ch. 9. *A Tranſcript certified by the Clerk of the Crown, of the Aſſizes, or of the Peace, of the Tenor of the Indictment* *and Conviction, and of a Perſon's having had the* Benefit *of the* Clergy, *ſhall be a ſufficient Proof, that ſuch Perſon hath had the Benefit of the Clergy.*

By 10 & 11 W. 3. ch. 23. *No* Clerk *of* Aſſize, Clerk *of the* Peace, *or other Perſon, ſhall take any Fee of Perſons bound by any Juſtice of Peace, to appear as Evidence againſt any Traitor or Felon, for Diſcharge of their Recognizance.*

By 6 Geo. 1. ch. 23. *A* Tranſcript *certified by the Clerk of the Aſſize, or of the Peace, of the Tenor of an Indictment, Conviction and Order for* Tranſportation, *ſhall be a ſufficient Proof upon an Indictment for returning before the Expiration of the Term, that the Perſon hath been convicted and ordered for Tranſportation.*

Similitude of *Hands* upon Compariſon, [a] is little or no Evidence of one's Handwriting in Criminal Caſes, whether Capital or not Capital [*Qu* [b] if ſuch Evidence is admiſſible, eſpecially if not attended with ſome Circumſtances of Confirmation, as, the Papers being found in the Cuſtody of the Priſoner, or the like.]

[a] Hawk. P. C. B. 2. p. 431.
[b] 1 Ld. Ray. 40.

[[c] The Declarations of a dying Man againſt his Murderers may be given in Evidence.]

[c] 1 Str. 500.

Violent *Preſumption* is in ſome Caſes taken for full Proof. [See of *Preſumption*, under *Evidence*, *ch* 4. *ante*.]

5. [d] The *Verdict* in Caſes Capital muſt be actually given, and if the Jury cannot agree upon their Verdict, they muſt be carried round the Circuit, till they do all agree, if the Priſoner will not conſent to their Diſcharge. If the *Peers* do not agree upon their Verdict, they may adjourn and go Home. [*Qu*.[e]] And the Verdict by the Peers is good, if only the greater Number (being Twelve) do agree.

[a] Hawk. P.C. B. 2. ch. 47.
4 Black Com. 354.
1 Inſt. 227. a. & b. 281. b. 282. a.
2 Inſt. 425.

The Verdict muſt be given openly in Court, and not as a Privy Verdict; tho' a Privy Verdict may be given on *Informations*, as in Civil Caſes, and in Criminal Cauſes where the Defendant is not to be perſonally preſent at the Time of the Verdict.

3 Inſt. 28, 30, 110.
1 Ventr. 95.
Kely. 56, 57.
H. P. C. 267.
Raym. 84, 193.

It may be found *Specially*; as in an Indictment of Murder, and Not guilty pleaded, the Jury may find one Guilty of Manſlaughter *Se Defendendo*, or by Chancemedley, or that he was not of ſound Mind and Memory at the Time of the Killing, *&c.* If they find *Se Defendendo*, or by Chancemedley, they muſt find the Manner of the Killing, that the Court may judge thereof; [f] for the Court may judge the contrary. So in a ſpecial Verdict, or Verdict at large, for the Value or Manner of the Larceny, there is no Neceſſity of finding the Value of the Thing ſtolen as laid in the Indictment. The Jury cannot find a greater Value, but they may find a leſs.

[e] Hawk. P. C. B. 2. p. 425.
[f] Kely. 50.
2 Ld. Ray. 1581, &c.

[g] Jurors have been amerced for undervaluing Goods forfeited.

[g] Kely. 58.

The Courſe of laying a Fine upon Jurors [a] barely for giving a Verdict contrary to Evidence, or contrary to the Directions of the Court, is condemned as illegal, and diſuſed. [See of *Verdict*, *ch*. 4. *ante*.]

[a] Kely. 50.
Vaugh. 135.
T. Jones 50.

The Court cannot ſet aſide a Verdict, which *acquits* a Defendant of a Criminal Proſecution, as they may a Verdict that *convicts* him contrary to Evidence.

Of Conviction and Attainder.

X. One is [b] *convicted*, when he confeſſes the Offence, or when he is found guilty by the Verdict of the Jurors. This is before Judgment is paſſed upon him.

[b] 1 Inſt. 390. b. 391. a.
Perk. 27, 28, 29.
4 Black. Com. ch 27.
Of Trial and Conviction per totum.

He is *attainted (attinctus)* when Judgment is paſſed upon him; tho' theſe Words *Conviction* and *Attainder* are ſometimes confounded. The Judgment may be paſſed on *Outlawry*, *Confeſſion*, or *Verdict*. Outlawry itſelf is a Judgment and an Attainder in Law. [See of *Judgment* and of *Forfeiture*, *infra*.] [c] When one is attainted by Judgment, for Offences that are to be puniſhed by Death, he is dead in Law; yet his Body is ſubject to Arreſts or Execution for Debt, &c. for his Body is not forfeited to the King, till Execution. By Attainder of Treaſon or Felony, his Blood is [d] *ſtained* and *corrupted*, both upwards and downwards; ſo that he cannot be Heir to any Anceſtor, nor his Children Heirs to him, nor to any of his Anceſtors, [from whom they cannot claim but through him.] But the Sons of one attainted, born before the Attainder, may inherit one another; and though, as to thoſe born after the Attainder, ſome have denied it, becauſe the Father had no inheritable Blood in him; (yet it ſeems to be the better Opinion that theſe alſo may inherit to one another.) If he is of the Nobility, or a Gentleman, he and all his Poſterity are by this Attainder made ignoble and baſe. This Corruption of Blood is ſo high, that it cannot be abſolutely reſtored but by Authority of Parliament. [See of *Reſtitution*, *poſtea*.]

[c] 3 Inſt. 213, 215. 1 Cro. 516.

[d] 1 Inſt. 8. a. 391. b. 392 a. 3 Inſt. 211, 233. 1 Lev. 59, 60. 1 Ventr. 413.

Upon Conviction or Attainder of the Felon, the Owner ought to have his Goods again that were ſtolen from him. For,

By 21 H. 8. ch. 11. *Reſtitution ſhall be made of ſtolen Goods, or Money, to the Owner, after the Felon is found guilty thereof, or otherwiſe attainted by Reaſon of the Evidence given by the Party robbed, or Owner, or by any other by their Procurement. The Juſtices, before whom the Felons are found guilty, may award Writs of Reſtitution for the ſaid Goods, in like Manner as if the Party had been attainted on Appeal.*

[e] Executors and Adminiſtrators are within this Statute; and they ſhall have Reſtitution, notwithſtanding a Sale in Market-Overt. This Statute has altered the Common Law as to that Point. But the Reſtitution muſt be only of the Goods expreſſed in the Indictment. If Goods are ſtolen and not waived in Flight, or ſeized for the King, the Party may take his Goods again without Proſecution. [*Quære*, [f] Whether the Proſecutor is intitled to Reſtitution, if the Priſoner ſtands *mute?*]

[e] 2 Inſt. 714. 3 Inſt. 242. 5 Rep. 109, 110. 6 Rep. 80. Kely. 48, 49.

[f] Hawk. P. C. B. 2. p. 331, 332.

XI. The [g] *Judgment* [See what is a *Judgment*, *chap.* 4. *ſupra*,] in Criminal Caſes, is either by the *Common Law*, or by *Statutes*. It is alſo in Treaſon or Felony either *expreſs* or *implied*. *Expreſs*, when upon Appearance, &c. an expreſs Judgment is given; as that the Criminal ſhall be hanged by the Neck, &c. *Implied*, when the Offender makes Default, and is *outlawed*; where the like Execution ſhall be, as in caſe of expreſs Judgment. [See *Poſtea*.]

Of Judgment in Criminal Caſes. 4 Black. Com. ch. 29. Of Judgment, &c.

[g] 3 Inſt. 52, 210. Hawk. P. C. B. 2. ch. 48.

The *Judgment* in *High Treaſon*.

One and [a] the ſame Judgment is given in all High Treaſons, except for *counterfeiting* the *Coin*, and except in the Caſe of a *Woman*. [See *infra*.] The Offender ſhall be drawn upon a Hurdle, (formerly with a Rope about his Neck) to the Gallows, and there hanged by the Neck, and cut down alive, his Intrails taken out and burned, his Head cut off, his Body quartered, and his Head and Quarters diſpoſed of at the King's Pleaſure. But [b] *beheading* being Part of the Judgment, the King may pardon all the *reſt* under the Great Seal; as is uſually done in caſe of Nobility.

[a] 3 Inſt. 15, 17, 18, 210, 211. H. P. C. 19, 268. S. P. C. 182. 1 Ld. Ray. 1, 2.

[b] 3 Inſt. 31, 52.

The Judgment for [c] *counterfeiting the Coin* is by Common Law, and is only to be *drawn* upon a Hurdle, and to be *hanged*. But whereas *Clipping* is made High Treaſon by ſubſequent Statutes, the Judgment is, To be hanged, drawn, and quartered, as ſome contend, (*Qu.*) For the Practice is otherwiſe. [And it ſeems to be now ſettled, that the Judgment ſhall be the ſame as for counterfeiting the Coin at Common Law, upon a *reaſonable* Conſtruction of the Statutes.] The Judgment for a *Woman* in all Caſes of High Treaſon is to be *drawn* on a Hurdle, and *burnt*. She ought not to be beheaded or hanged. [See of *Forfeiture, poſt.* There are ſeveral Precedents of changing this Judgment to Beheading by the King's Warrant.]

The *Judgment* in *Miſpriſion* of *Treaſon.*

The Offender is to be condemned to *Perpetual Impriſonment* [d], [See 1 & 2 *Ph. & M. ch.* 10. and ſee of *Forfeiture, infra.*]

The *Judgment* in *Petty Treaſon.*

For ſtanding *mute*. [See of the *Behaviour of the Priſoner* upon his *Arraignment, ſupra.*] But if it appears that the Party is *guilty*, Judgment is to be given thus, (*viz.*)

4 Black. Com. 378.

The [e] *Man* is to be *drawn* on a Hurdle, and *hanged*, till he is dead.

A *Woman* is to be *drawn* on a Hurdle and *burnt*. [f] But if a Wife is acceſſory only to the Death of her Huſband, both the Principal and Acceſſory ſhall be hanged. [See of *Forfeiture, infra.*]

The *Judgment* in *Felony* of Death, as Murder, Burglary, *&c.* and *Larceny* above *Twelvepence.*

For ſtanding *mute* [See of the Behaviour of the Priſoner, *ſupra.*] If *guilty*, [g] one Judgment in all Caſes, (*viz.*)

A *Man* or *Woman* is to be *hanged* till Dead. [h] This cannot be altered by the King to a Beheading, though ſome Examples are to the contrary. [It ſeems not to be clear, that it may not be done on the *Petition* of the Delinquent *himſelf*, in which Caſe it may be conſidered as an Inſtance of Royal Mercy ſhewn to the Criminal in the *Mitigation* of his Puniſhment, or at leaſt of the Infamy of it.] But if the Party may have the Benefit of the Clergy for the Felony, he ſhall be ſent (if the Judges think fit) to the Houſe of Correction, at leaſt for *ſix* Months, and not above *two* Years from the Conviction. Upon Eſcape, for not leſs than twelve Months, nor more than *four* Years from the Retaking. [See 5 *Ann. ch.* 6.] But,

By 31 Car. 2. ch. 2. *If any one convicted of Felony, ſhall in open Court pray to be* tranſported, *it* may *be done, if the Court thinks fit.* And,

By 4 Geo. 1. ch. 11. *Perſons convicted of* Larceny, *or ſtealing from the* Perſon *or* Houſe *of another, or in any other Manner, who by Law are intitled to the Benefit of the Clergy (except Perſons convicted for receiving or buying ſtolen Goods, knowing them to be ſtolen) the Court inſtead of Burning in the Hand, or Whipping, may order ſuch Offenders to be* tranſported *to any of the King's Plantations in* America *for ſeven Years; and where for other Felony not within the Benefit of the Clergy, the King ſhall think fit to extend Mercy on Condition of Tranſportation, or to any Perſon convicted of receiving or buying ſtolen Goods knowing them to be ſtolen, the proper Court may allow ſuch Offenders the Benefit of a Pardon, and order them to be*

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[c] 3 Inſt. 17. 211. H. P. C. 19. 268. 3 Cro. 383. Cont. S. P. C. 182. 2 Lev. 98. 1 H. H. P. C. 352, &c.

[d] 3 Inſt. 218. H. P. C. 269.

[e] 3 Inſt. 211. H. P. C. 268.

[f] Pult. de Pace, &c. 213.

[g] 3 Inſt. 53, 211.

[h] H. P. C. 268. 2 Inſt. 629.

tranſported for the Term of fourteen Years, if ſuch Condition of Tranſportation is general, or for ſuch other particular Time, as is ſpecified in ſuch Condition.

If ſuch Offenders ſhall return within the Time, they ſhall be executed, as Perſons attainted of Felony without Benefit of Clergy.

Nevertheleſs, the King may diſpenſe with ſuch Tranſportation, and allow of the Return of ſuch Offender, &c.

[See 6 *Geo.* 1. *ch.* 23. For the more effectual Tranſportation of Felons, *&c.*

Note, That if an Act of Parliament directs in any Caſe, that there ſhall be Judgment of *Life and Member*, &c. Judgment ſhall be given as in caſe of Felony, (*viz.*) to be hanged by the Neck till he is dead; and conſequently his Blood corrupted, and he ſhall forfeit as in caſe of Felony. [See Of *Forfeiture in Felony, poſt.*]

By 25 Geo. 2. ch. 37. *Perſons found guilty of wilful Murder ſhall be executed the Day next but one after Sentence paſſed, unleſs the ſame be a* Sunday, *and then on the* Monday *following. In* London *or* Middleſex *the Body of the Murderer ſhall be delivered to the Surgeons Company, and be diſſected and anatomized; in other Counties to ſuch Surgeon as the Judge ſhall direct for the Purpoſe aforeſaid. Sentence ſhall be pronounced in open Court immediately after Conviction of the Murderer, unleſs the Court ſhall ſee reaſonable Cauſe to poſtpone the ſame; in which Sentence ſhall be expreſſed not only the uſual Judgment of Death, but the Time appointed for the Execution, and the Marks of Infamy before directed. After Sentence, if there ſhall appear reaſonable Cauſe, the Judge may ſtay Execution at his Diſcretion. The Judge may appoint the Body of ſuch Criminal to be hung in Chains; but in no caſe to be buried, unleſs after diſſected and anatomized as aforeſaid. After Judgment ſuch Criminal is to be kept apart from other Priſoners, and no Perſon, except the Gaoler and his Servants, to have Acceſs to him, without Licence under the Hand of the Judge or of the Sheriff or Under-Sheriff. The Judge, if he reſpites Execution, may relax any of the above or after mentioned Reſtraints. After Sentence, the Criminal to be fed on Bread and Water only, (except in caſe of receiving the Sacrament, or of any violent Sickneſs) in which Caſe ſome known Phyſician, Surgeon, or Apothecary may be admitted.*

In *Manſlaughter*, the Offender is to be *burnt* in the Hand. See Of *Forfeiture, infra.*]

The *Judgment* upon *Outlawry* in Treaſon or Felony.

[a] 1 Inſt. 13. a. 3 Inſt. 212. Finch 467.

There is no Judgment pronounced, becauſe the Outlawry itſelf is a Judgment. But Execution ſhall be awarded, as [a] in Treaſon or Felony upon Confeſſion or Verdict, according to the Crime for which he is outlawed. [See 1 *Ed.* 6. *ch.* 12. 4 *&* 5 *Ph. & M. ch.* 4. 8 *El. ch.* 4. 18 *El. ch.* 7. 22 *Car.* 2. *ch.* 5. 3 *W. & M. ch.* 9. [b] where one outlawed loſeth the Benefit of the Clergy; and Of *Forfeiture, poſt.*]

[b] See p. 382, ante.

He that is indicted of a Treſpaſs and outlawed, ſhall be fined.

The *Judgment* in *Petit Larceny.*

[c] 2 Inſt. 177. 3 Inſt. 218.

A Man or Woman was to be [c] *whipt*, and ſent to the Houſe of *Correction.* [See 5 *Ann. ch.* 6.] But now they may be *tranſported.* [See 4 *Geo.* 1. *ch.* 11. 6 *Geo.* 1. *ch.* 23. *ſupra*; and of *Forfeiture, poſt.*]

If one ſtands *Mute* on an Arraignment for Petit Larceny, he ſhall have the ſame Judgment, *&c.* as if he had confeſſed the Indictment.

The *Judgment* in *Chancemedley*, or *Se Defendendo.*

There is no [d] expreſs Judgment. But the Offender is let to Mainpriſe, to ſue out his Pardon of courſe. [See the Statute of *Marlebridge*, or 52 *H.* 3. *ch.* 26. and the Statute of *Glouceſter*, or 6 *Ed.* 1. *ch.* 9.] The Lord Chancellor may do it without Warrant from the King. [See of *Forfeiture*, *poſt.*]

[d] 2 Inſt. 148, 149, 315, 316, 317, 3 Inſt. 220. 11 Rep. 32.

The *Judgment* in *Miſpriſion* of *Felony.*

To be [e] fined and impriſoned. [See of *Forfeiture*, *infra.*]

[e] 1 Inſt. 36.

The *Judgment* in *Appeal* of *Death.*

To be [f] *hanged.*

[f] 2 Inſt. 183. 2 Inſt. 212.

The *Judgment* for *ſtriking* in *Weſtminſter Hall*, &c. ſitting the Courts, though *no Blood* is drawn.

The [g] *Right Hand* is to be cut off, and the Offender is to be *impriſoned* during Life.

[g] 2 Inſt. 549. 3 Inſt. 140, 141, 142, 218.

The *Judgment* for *ſtriking* and *drawing Blood* in the *King's Palace*, where the King is reſident.

[h] The *Right Hand* is to be cut off, and the Offender is to be *fined* at Diſcretion, and to be *impriſoned* during Life. [See 33 *H.* 8. *ch.* 12. And of *Forfeiture*, *poſt.*] If no Blood is drawn, he ſhall not loſe his Right Hand.

[h] 3 Inſt 140. 218.

The *Judgment* in *Præmunire.*

[a] To be out of the King's *Protection*, and to be *impriſoned* during Pleaſure.

[See 16 *Ri.* 2. *ch.* 5.] But if the Offender is not in Priſon, the Judgment alſo is *Quod Capiatur*. Here is no Corruption of Blood. [See 5 *El. ch.* 1. And of *Forfeiture*, *poſt.*]

[a] 1 Inſt. 129. b. 130. a. 3 Inſt. 125, 218.

The *Judgment* in *Conſpiracy.*

[b] The *villainous* Judgment at the *Common Law*, at the Suit of the King, is out of Uſe. [See of *Conſpiracy*, *p.* 414. *ante.* See alſo [c] *Artic. ſuper Chartas*, or 28 *Ed.* 1. *ch.* 10.]

[b] 3 Inſt. 222.

[c] 2 Inſt. 561, 562.

The *Judgment* in *Attaint.*

[d] The Judgment in *Attaint* againſt the Petty Jury is as in the Caſe of *Conſpiracy* at the Suit of the King. In thoſe two Caſes only that *villainous* Judgment was given. But now ſee the 23 *H.* 8. *ch.* 3. whereby the Severity of the Puniſhment at *Common Law* is moderated if the Writ of Attaint is grounded upon that *Act.*

[d] 1 Inſt. 294. b. 3 Inſt 222, 223.

The

The *Judgment* in *Miſdemeanors.*

The Judgment and Puniſhment for *Miſdemeanors* may be a *Fine*, Fine and *Pillory*, *Fine* and *Whipping*, *Papers* to be fixed on the Head or Breaſt, or to be read in publick Places, by Way of Acknowledgment of the Offence, *&c.* [c] A *Fine* here is a Sum of Money which one is to pay to the King for any Contempt or Offence againſt the Government. Where a Delinquent is to be fined, the Judgment is *Quod Capiatur*, (*i. e.*) to be impriſon'd till the Fine is paid. [f] But if the Fine is tender'd, there ought to be no Impriſonment. [See 5 *&* 6 *W. & M. ch.* 12.] When a Defendant is to be amerced, and not fined, then the Defendant is *in Mesericordia*. A Fine may be mitigated in the ſame Term in which it was ſet, but after the Term it cannot be altered. [*Qu.* [g]] [h] Some ſay that a *Fine* and *Ranſom* are the ſame. Others ſay, that Ranſom *(Redemptio)* implies that an Offender ought firſt to be impriſon'd, and then to be delivered in Conſideration of a Fine.

[c] 1 Inſt. 126. b. 3 Inſt. 218. 8 Rep. 59. [f] 1 Ventr. 116. [g] 1 Keb. 276. [h] 1 Inſt. 127. a. Dalt. ch. 82. p. 203.

[i] Where a Statute enacts, That an Offender ſhall be fined at the King's Pleaſure, it is to be underſtood, that the King's Judges, before whom the Party is convicted, ſhall ſet the Fine.

[i] 2 Inſt. 168. 186, 187.

It is a common Practice in the King's Bench, to give a Defendant Leave to ſpeak with the Proſecutor (*i. e.*) to make Satisfaction for the Coſts of the Proſecution, and alſo for the Damages ſuſtained by him, that there may be an End of all Suits; the Court at the ſame Time ſhewing on that Account, an Inclination to ſet a moderate Fine on the Behalf of the King.

[a] *Pillory* is derived from *Pilaſtre* or *Pillar*. For it is a Wooden Pillar, wherein the Neck of the Offender is put and preſſed, upon which Account it is called *Colliſtrigium*. By *Statutes* it is appointed for Bakers, Foreſtallers, for thoſe that uſe falſe Weights, for Perjury, Forgery, *&c.*

[a] 3 Inſt. 219, 220.

The Judgment of the Pillory, or Tumbrel [b] (a Dung-Cart), doth make the Delinquent infamous. Therefore the Judges ought to conſider, before they give ſuch Judgment, Fine and Impriſonment for Offences fineable, is a fair and ſure Way; eſpecially for Offenders of Quality, Note, or Figure.

[b] Lamb. Eir. 61. Keilw. 138.

There are particular Puniſhments appointed by divers *Statutes* for ſeveral Offences. In *ſuch* Caſes the Puniſhment cannot be mitigated. [See 4 *Geo.* 1. *ch.* 11. and 12 *Geo.* 2. *ch.* 21. Concerning *Tranſportation* of unlawful Exporters of Wool and Woolfels; 6 *G.* 1. *ch.* 21. § 34. and 9 *G.* 2. *ch.* 35. Concerning the *Tranſportation* of thoſe that forcibly hinder, wound, or beat any Officer of the Cuſtoms in the Execution of his Office, *&c.* in *p.* 343, 344. *ante.* And 5 *Geo.* 1. *ch.* 28. Concerning the Tranſportation of Deer-ſtealers, in *p.* 433. *ante.* And 6 *Geo.* 1. *ch.* 23. For the more effectual Tranſportation of Offenders; and for *Tranſportation* of thoſe that maliciouſly aſſault any Perſon in the Streets or Highways, with Intent to tear or ſpoil their Clothes, *&c.*]

Of Forfeiture.

XII. [c] *Forfeiture* (*Foriſfactura, Foris aut extra Legem facere*) is a Penalty for an Offence committed, extending to *Freehold* and *Copyhold Lands*, and to *Goods* and *Chattels*. It is more or leſs, according to the Nature of the Offence, and may be by *Conviction* or *Attainder*. A Traitor's, or Felon's Goods and Chattels are forfeited upon *Conviction*, but Lands or Tenements upon *Attainder*, and not before.

[c] 1 Inſt. 59. a. 391. a. 3 Inſt. 227. Hawk. P. C. B. 2. ch. 49.

Forfeiture in High Treaſon.

[d] It is implied in the *Judgment* of High Treaſon. 1. That the Delinquent ſhall forfeit to the King all his Lands, Tenements, and Hereditaments in Fee-ſimple or Fee-tail (or for Life, as to the Profits during the Offender's Life) holden or not holden of any other Uſes, Conditions, Entries, *&c.* (not Rights of Action where the Entry is taken away) which he had at the Time of the Treaſon committed, or afterwards, the Right of all others being ſaved. [See 26 *H.* 8. *ch.* 13. 33 *H.* 8. *ch.* 20. 5 & 6 *Ed.* 6. *ch.* 11. *infra.*] There is no Forfeiture of Lands, or Tenements, or Rights in *Auter Droit*, (as in Right of the Church; in Right of a Wife, but only during the Coverture; nor of a Founderſhip of a Houſe of Religion in *Frank Almoign*; for that is annexed to the Blood of the Founder.) And in clipping, the Hereditaments are forfeited only for Life. [See 5 *El. ch.* 11. 18 *El. ch.* 1.] 2. That his Wife ſhall loſe her Dower, not her Jointure. So it is in Petit Treaſon. [But ſee 5 *El. ch.* 11. 18 *El. ch.* 1. 8 & 9 *W.* 3. *ch.* 26. for Clipping, *&c.*] 3. That his Blood ſhall be corrupted, by becoming baſe as to his Birth, and that his Children ſhall not inherit to him or any of his Anceſtors through him. [See of *Conviction* and *Attainder*, *ſupra*]. In Counterfeiting the Coin or Clipping there is no Corruption of Blood. [See again 5 *El. ch.* 11. 18 *El. ch.* 1. 8 & 9 *W.* 3. *ch.* 26.] 4. That all his Goods and Chattels ſhall be forfeited from the Time of the *Conviction.* For as Goods and Chattels forfeited, there ſhall be no Relation to the Crime committed, as it is in Forfeiture of Lands. A Traitor or Felon after the Treaſon or Felony committed, and before Conviction, may [a] ſell his Goods *Bona Fide*, whether Chattels Real or Perſonal for his Maintenance. I ſay, he may *ſell* them *Bona Fide.* But if one, to prevent Forfeiture by Treaſon, Felony or Outlawry, maketh a *Gift* of all his Goods, and afterwards is attainted or outlaw'd, theſe Goods are forfeited. See 13 *El. ch.* 5.] An Executor cannot forfeit the Goods which he hath as Executor.

[d] 1 Inſt. 37. a. 41. a. 392. a. & b. 3 Inſt, 19, 211. 3 Rep. 10, 82.

[a] 3 Rep. 82. 8 Rep. 171.

[b] If one commits Treaſon, and dies before Attainder, or is ſlain in actual Rebellion; he forfeits nothing, if not attainted by Act of Parliament. [See 34. *Ed.* 3. *ch.* 12.] But if the Chief Juſtice of the *King's Bench*, (who is Head Coroner of all *England*) in Perſon, upon View of the Body of him that was ſlain in open Rebellion, makes a Record thereof, and returneth it into the *King's Bench*, he ſhall forfeit his Lands and Goods. [*Qu.*]

[b] 3 Inſt. 12. 4 Rep. 57. H. P. C. 17. 1 H. H. P. C. 342, &c. 2 H. H. P. C. 53. Hawk. P. C. B. 2. p. 447.

[c] Thoſe that are hang'd by *Martial* Law, in Time of War, forfeit no Lands.

[c] 1 Inſt. 13. a. 3 Inſt 21.

By 7 *Ann. ch.* 21. After the Deceaſe of the *Pretender*, (and all his Sons, by 17 *G.* 2. *ch.* 39.) no Attainder for Treaſon ſhall diſinherit the Heir, *&c.*

In *Gavelkind*, if the Father is hang'd for Treaſon or Felony, the Sons ſhall inherit. [See 17 *Ed.* 2. *St.* 1. *ch.* 16.]

Forfeiture in *Miſpriſion* of *Treaſon.*

[d] Forfeiture of Goods and Chattels, and Profits of Land during Life, for his Concealment. [See 1 & 2 *Mar. ch.* 10.] But the Wife is dowable. [See 1 *Ed.* 6. *ch.* 12.]

[d] 1 Inſt. 392 b. 3 Inſt 36, 218. H. P. C. 269.

Forfeiture in *Petit Treaſon* and Felony.

e 3 Inſt. 227, 228. H. P. C. 226. 227. Kely, 36.

e For ſtanding *mute*, and adjudged to Penance in Caſes of Petit Treaſon and Felony, Forſeiture of Goods and Chattels. So it is for *challenging* above thirty-five Jurors. But not for challenging above twenty, and under thirty-ſix; for no Law giveth Forſeiture for challenging above twenty. Neither is one convicted by the challenging above twenty, as one was by the Common Law by Challenge of three Juries. [*Qu.*f]

f Hawk. P, C. B. 2. p. 414.

g 1 Inſt. 37. a. 41. a. 391. a. 392. a. & b. 3 Inſt. 212.

h 3 Inſt. 21.

The Forfeiture is g as in High Treaſon as to Lands and Tenements upon *Attainder*, and as to Goods and Chattels upon *Conviction*; except that upon Attainder in Petit Treaſon or Felony, Lands and Tenements intailed are forfeited only during the Life of the Tenant in Tail. [See 33 *H.* 8. *ch.* 20. *infra.*] The Inheritance goes to the Iſſue. h The King ſhall have the Profits of Inheritances that are not holden, during the Life of the Perſon attaint in Felony; but after his Deceaſe, the Inheritances that are not holden extinguiſh. Again, it muſt be obſerved, that upon Attainder of *Petit Treaſon*, the Wife is not dowable; but upon Attainder of *Felony* ſhe is dowable. [See 1 *Ed.* 6. *ch.* 12. 5 & 6 *Ed.* 6. *ch.* 11.]

Pirates, Robbers, and Murderers on the Sea, attainted before Commiſſioners, by Virtue of 28 *H.* 8. *ch.* 15. *forfeit* Lands, and incur Corruption of Blood. But not if they are tried before the Lord Admiral in the Court of Admiralty, according to the Civil Law.

a 1 Inſt. 13, a: & b. 390. b.

b 1 Inſt. 391. a.

The Forfeiture of Lands relates to the a Time alledged in the Indictment, for avoiding any Eſtates, Charges, and Incumbrances made by the Felon after the Felony committed. But for the mean Profits of the Lands, it ſhall relate only to the Judgment upon the Indictment. b If a Felon is *convict* by Verdict or Confeſſion, he doth forfeit his Goods and Chattels, Real and Perſonal, preſently. But Lands and Tenements are not forfeited, nor Blood corrupted, before Attainder, or before Judgment (as before was ſaid in general) and then it relates to the Time alledged in the Indictment, for avoiding Eſtates, *&c.* Where Tenant in Fee-ſimple committeth *Petit Treaſon* or *Felony*, and is attainted, the King ſhall have a c Year, Day and Waſte in his Lands; or rather a Year and Day in lieu of Waſte; and afterwards it cometh to the Lord by Eſcheat. [See *Magna Charta*, *ch.* 22. 17 *Ed.* 2. *ch.* 16. 42 *Ed.* 3. *ch.* 1.] But the Lord may compound with the King, and have the Eſtate preſently. It muſt be a Tenant in Fee-ſimple, not Tenant in Tail, or for Life. For the King ſhall have the Profits only of *their* Lands during their Lives. A Copyhold Eſtate is of Common Right preſently forfeited to the Lord of the Manor in caſe of Felony. This muſt be underſtood of Felonies puniſhable with Death, not of Petit Larceny. But if a Copyholder for Life is attainted of Felony, and Pardon'd, he in the Reverſion for Life ſhall have the Eſtate. [See 24 *H.* 8. *ch.* 5. where one who is indicted or appeal'd for the Death of another, who attempted to murder or rob him, ſhall forfeit nothing.]

c 2 Inſt. 36, 37, 38. 3 Inſt. 111. Coke's Copyh. § 58.

Forfeiture

Forfeiture of *Felo de ſe.*

[d] A *Felo de ſe* forfeits all his Goods and Chattels Real and Perſonal, which he hath in his own Right; and all ſuch Chattels Real which he hath jointly with his Wife, or in her Right; but not until it is lawfully found by the Oath of twelve Men before the Coroner *Super Viſum Corporis*, that he is *Felo de ſe.*[e] He forfeits alſo Bonds, or Things in Action, belonging ſolely to himſelf, and all entire Chattels in Poſſeſſion [*Qu.*]; except in the Caſe of Merchants, where a Moiety only of joint Chattels, as may be ſevered, is forfeited. He does not forfeit any Lands of Inheritance; for he was not attainted in his Lifetime; nor the Goods and Chattles which he poſſeſſed as Executor or Adminiſtrator, [f] nor a Guardianſhip in Soccage or by Nature; becauſe here he had nothing to his own Uſe. [See of the *Court* of the *Coroner*, *ch.* 1. *ante.*]

[d] 3 Inſt. 55.
[e] 1 Lev. 8. contra.
[f] 1 Inſt. 84 b. 88. b.

Forfeiture in *Manſlaughter.*

[g] Forfeiture of Goods and Chattels upon Conviction.

[g] S. P. C. 185. 1 Inſt. 391. a. 2 Inſt. 149.

Forfeiture in *Chancemedley,* and *Se Defendendo.*

[a] All Goods and Chattels, Debts and Duties whatſoever, are forfeited upon Conviction, but no Freehold or Inheritance. Yet the Offenders have their Pardon of Courſe.

[a] 1 Inſt. 391. a. 3 Inſt. 220.

Forfeiture upon *Outlawry* in *Treaſon, Felony,* &c.

[b] Upon *Outlawry* in *Treaſon* or *Felony* the Offender ſhall loſe and forfeit as much as if he had appear'd, and Judgment had been given againſt him, as long as the Outlawry is in Force.

Thoſe that tarry till the *Exigent* in Treaſon, Felony or Petit Larceny, forfeit their *Goods* and *Chattels*, though they render themſelves to Juſtice, and are acquitted; for it was a Flight in Law. [See 26 *H.* 8. *ch.* 13. 5 & 6 *Ed.* 6. *ch.* 11. *infra,* and of the *Proceſs after Indictment, ſupra.*]

[b] 3 Inſt. 52, 212, 232. Finch 352. 5 Rep. 110, 111. H. P. C. 271.

[c] Upon Attainder of Felony by *Outlawry* on an *Appeal*, the Defendant ſhall forfeit only ſuch *Lands* as he had at the Time of the Outlawry pronounced. For if, hanging the Proceſs, the Defendant conveyeth away his Land, and after is outlaw'd, the Conveyance is good, and ſhall defeat the Lord of his Eſcheat. But if one is indicted of Felony, and hanging the Proceſs againſt him, he conveyeth away his Land, and after is outlaw'd, notwithſtanding the Conveyance, the Lord ſhall have his Eſcheat. For in an *Appeal* the Writ (whereon the Forfeiture is grounded) containeth no Time when the Felony was committed, as an Indictment doth. Therefore the Eſcheat in an Appeal can relate only to the Outlawry pronounced; whereas it relates to the certain Time of the Fact ſet forth in the *Indictment*. But though in an Indictment the Forfeiture ſhall relate to the Time alledged in the Indictment, for avoiding Eſtates or Incumbrances made by the Felon after the Felony committed, the mean Profits of the Lands ſhall relate only to the Judgment, as well in caſe of Outlawry, as in other *Caſes.*

[c] 1 Inſt. 13. a, & b. 390. b. 3 Inſt. 232.

[d] Finch 351. 1 Lev. 33. Noy's Max. 3. Ray. 17.

By Outlawry in [d] *Actions* all the Offender's Goods and Chattels are forfeited to the King, whether Real as a Term for Years, or Perſonal as Goods not fixed to the Freehold, Debts due by Specialty, but not by a ſimple Contract, Profit of the Lands as Rents, Corn, (but not the Land itſelf) wherein the Offender hath Freehold or Inheritance. But before the Time that the Outlawry appears of Record, the Defendant does not forfeit his Goods and Chattels; nor the Profits of his Lands, if a Feoffment is made before Seizure.

Forfeiture in *Petty Larceny.*

[e] 1 Inſt. 391. a. 3 Inſt. 218, 233.

[e] The Offender upon Conviction, forfeits Goods and Chattels; but no Freehold or Inheritance. [See *Forfeiture* upon *Outlawry*, &c. *ante.*]

Forfeiture upon *Flight.*

[a] 3 Inſt. 218, 233. H. P. C. 271. 5 Rep. 109.

[a] If* *Flight* is found by Indictment *Super Viſum Corporis* before the Coroner in caſe of Death; or if the Jury find *Flight* in Treaſon, Felony, or Petit Larceny, upon Acquittal; it is a Forfeiture of the Goods and Chattels, which one had at the Time of the Indictment or Acquittal. [See of *Falſifying Attainders, poſt.*]

Forfeiture upon *Appeal* of *Death.*

[b] 5 Rep. 13. a. 390. b.

[b] The Defendant forfeits as in Felony, and the Lord ſhall have his Land by Eſcheat. But the Forfeiture of the Land on Appeal relates to the Judgment only; whereas the Forfeiture on an Indictment of Felony ſhall relate to the Day on which it was committed. [See of Forfeiture in Felony and upon *Outlawry* on *Appeal, ſupra.*]

Forfeiture for *Drawing a Weapon upon a Judge*, or for *Striking* in *Weſtminſter Hall*, &c. *ſitting the Courts.*

[c] 3 Inſt. 140, 141, 218. H. P. C. 131. 2 Roll. Abr. 76, 77.

[c] The Offender forfeits Lands and Tenements, Goods and Chattels. Some ſay the Profits of his Lands only during Life. Others ſay the Land ſhall be forfeited during Life.

Note, That for ſtriking or drawing *Blood* in the King's Palace, where his Royal Perſon reſides, there is no Forfeiture of Lands or Goods. [See 33 *H.* 8. *ch.* 12.]

Forfeiture in *Præmunire.*

[d] 1 Inſt. 129. b. 130. a. 391. a. 3 Inſt. 126, 218. 3 Cro. 172, 173.

[d] Lands and Tenements in Fee-ſimple are forfeited, with Goods and Chattels. But Eſtates in Tail or for Life are forfeited only during Life. *Quære*, Whether an Attainder in a *Præmunire* ſhall have Relation to the Offence as to the Forfeiture of Lands, or only to the Time of the Judgment. It extendeth not to Forfeiture of Fairs, Markets, Rent-

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* *Fatetur facinus, qui judicium fugit.* 3 Inſt. 188. 5 Rep. 109.

Charges, Warrens, Annuities, or other Hereditament that is not within the Word *Land*.

Forfeiture *for* Aſſaulting *or* Challenging *to* Fight *for* Money won at Play, *&c.*

By 9 Ann. ch. 14. *The Offender forfeits his* Perſonal *Eſtate.*

Forfeiture *by* Papiſts.

By 1 Geo. 1. St. 2. ch. 55. *Papiſts not taking the* Oaths, &c. *or in Default thereof not* regiſtering *their Names and Eſtates, forfeit the Fee-ſimple and Inheritance of all ſuch Lands, Tenements, and Hereditaments, not regiſter'd, or fraudulently regiſter'd, wherein they or any in Truſt for them were ſeiſed*; *and the full Value of the Inheritance of* all ſuch Lands, *&c.* [See of Abſence or Non-conformity to the Church, *B.* 3. *ch.* 3.]

Forfeiture *by* Artificers *exerciſing or teaching their* Trades *in* Foreign Parts.

By 5 Geo. 1. ch. 27. *If any Artificer in Wool, Iron, Steel, Braſs, or any other Metal, Clockmaker, Watchmaker, or other Artificer or Manufacturer of* Great Britain, *ſhall go into any Country out of his Majeſty's Dominions, there to exerciſe or teach his Trade, or ſhall there exerciſe or teach his Trade, and ſhall not return into this Realm within ſix Months after Warning from the Ambaſſador, Envoy,* &c. *in ſuch Country, or one of the Secretaries of State, and from thenceforth continually inhabit within this Realm*: *he ſhall be incapable of taking any Legacy, or of being Executor or Adminiſtrator, or of taking any Lands or Tenements, and ſhall* forfeit *all his Lands, Tenements, and Goods to his Majeſty's Uſe, and ſhall be deem'd an Alien, and out of the King's Protection.*

By 33 H. 8. ch. 20. *If any Perſon ſhall be attainted of* High Treaſon, *the King ſhall be deemed and adjudged in actual Poſſeſſion of the Lands, Tenements, Hereditaments, Uſes, Goods, Chattels, and all other Things of the Offender ſo attainted, which the King might lawfully have, or which the Offender might lawfully forfeit, if he had been attainted by Parliament, without any* Office *or* Inquiſition *found.*

Saving to all others (except the Offender attainted of High Treaſon, his Heirs and Aſſigns, and all other Perſons claiming by him, or to his Uſe after the Treaſon committed) all ſuch Rights, Titles, Intereſts, &c. *which any of them ought to have, if this Act had never been made.*

This Act doth veſt the actual Poſſeſſion in the King[a] preſently by the Attainder, as well in the Life as after the Death of the Perſon attainted, and as well of Lands in Tail as of Lands in Fee-ſimple. [a] 3 Rep. 10.

It alſo extendeth to all Manner of Attainders for Treaſon, whether by Confeſſion, Verdict, Proceſs, or Outlawry, or Attainder by Parliament.

In the Caſe of Purchaſe by an Alien, and in caſe of a Perſon attainted of[b] *Felony*, who is not the King's Tenant, *Præmunire*, Alienation in Mortmain, Condition broken, *&c.* The Inheritance or Freehold of Land is not veſted in the King, till Office found by Force of a Commiſſion under the Great Seal; for that is an Office of *Intitling*, not under [b] 5 Rep. 52. 3 Co. 173.

the Exchequer Seal; for an Office found by Force of a Commiſſion from the Exchequer, is only an Office of *Inſtruction*, or to inſtruct the King and his Officers of the Certainty of the Land, *&c.* by which it may be put in Charge.

By 1 Ri. 3. ch. 3. *None ſhall ſeize the* Goods *of any Perſon arreſted for Felony or Suſpicion thereof, before he is* convict *or* attaint *of ſuch* Felony; *upon Pain to forfeit double the Value of the Goods ſo taken.*

[c] 1 H.H.P.C. 366, &c.
[d] 4 Inſt. 66.

The Goods of any Delinquent cannot be ſeized, before they are forfeited; though they may be inventoried, and the Town may be charged therewith before Indictment. [*Qu.* [c]]

[d] In ſome Statutes it is ſaid *upon Forfeiture to be at the King's Will of Body, Lands, and Goods*, &c. But this is not to be extended further than Impriſonment, Lands, and Goods.

Of Arreſt or Reverſal of Judgment in Criminal Cauſes, and of falſifying Attainders.
Hawk. P. C. B. 2. ch. 50.
[a] Salk. 78.
2 Str. 845.
The King. v. Robinſon, K. B. Eaſt.T. 32 G. 2.
[b] 1 Inſt. 259.b.
2 Inſt. 670.
3 Inſt. 31, 32, 33, 210, 214, 215.
2 Str. 824.
1 Ld. Ray. 154.

XIII. A Judgment may be *arreſted* and *ſtaid* for good Cauſe, as well in Criminal as Civil Caſes, if the Indictment is inſufficient or void, though not for falſe or improper *Latin*. [See the 7 & 8 *W.* 3. *ch.* 3. *infra.*] and ſee 4 *Black. Com. ch.* 30. *per totum.*

Four Days are allow'd in the *King's Bench*, to move in Arreſt of Judgment: [[a] but a Motion in Arreſt of Judgment in Criminal Caſes may be made any Time before Judgment is ſigned.]

[b] A Judgment may be *reverſed* in Treaſon or Felony, with reſpect to an *Outlawry*, or the *Judgment* on a *Verdict*.

1. Upon *Outlawry* in Treaſon or Felony it may be reverſed by Writ of Error, or by Plea. See for Outlawry the 1 *H.* 5. *ch.* 5. 6 *H.* 6. *ch.* 1. 8 *H.* 6. *ch.* 10. and obſerve, That few Outlawries for Treaſon, Felony, or Treſpaſs are valid, becauſe theſe Acts are not purſued. [See 4 & 5 *W.* & *M.* *ch.* 18. For the more eaſy Reverſal of Outlawries in Offences *under* Treaſon and Felony.]

By 26 H. 8. ch. 13. *and* 5 & 6 Ed. 6. ch. 11. *Proceſs of* Outlawry *againſt one for* Treaſon, *being* out *of the Realm, or beyond Sea, ſhall be good in Law. And if the Party within one Year after the Outlawry, or Judgment thereon, ſhall yield himſelf to the Chief Juſtice of* England, *and offer to traverſe the Indictment or Appeal, whereupon he was out-law'd, he ſhall be admitted to ſuch Traverſe, aud being acquit, ſhall be diſcharged of ſuch Outlawry, and of all Penalties, as if no ſuch Outlawry had been.*

So that now in caſe of *Treaſon* one by theſe Statutes is barr'd of his Writ of Error, if he does not come in within a Year after the Outlawry, though he was out of the Realm, or beyond Sea.

Note, That after an Outlawry of Treaſon or Felony is reverſed, the Party muſt plead to the Indictment.

2. If a *Judgment* on a *Verdict* is erroneous, both the Judgment and the Execution, and all the Proceedings, may be reverſed by Writ of Error. But if the Indictment is inſufficient, and the Party acquitted thereon, the King need not bring a Writ of Error; for the Party may be again indicted. [See of the *Proceſs* in Treaſon or Felony after Preſentment or Indictment, *ante.*]

By 7 & 8 W. 3. ch. 3. *No Miſwriting or Miſ-ſpelling, or falſe or improper* Latin *in any Indictment of High Treaſon, whereby any Corruption of Blood may be made, or for Miſpriſion of ſuch Treaſon, after Conviction, ſhall be Cauſe to* arreſt *Judgment: Yet any Judgment given upon ſuch Indictment may be* reverſed *by Writ of Error, as formerly.*

Attainders may be [c] *falſified* (proved to be *falſe*) by *Writ* of *Error* or by *Plea*, in reſpect of *Lands* and *Goods*.

[c] 1 Inſt. 104.b.

1. Attainders in reſpect of [d] *Lands* may be falſified by the *Party himſelf*; as when the Attainder is *void*, as by ſuch as had no Commiſſion, *&c.* [See *infra.*] or by Plea of *Pardon* by Act of Parliament; for if the Treaſon or Felony, is pardoned, the Attainder cannot ſtand. [See *infra.*] By others; as by a *Purchaſer*, &c. if the Purchaſe was before the Attainder, and the Offence is alledged in the Indictment before it was done to their Prejudice, and the Offender is found guilty *generally*. Here he may falſify in reſpect of the *Time*, but not for the Offence. But if one enfeoffeth another of his Lands, and after is indicted of Felony, ſuppoſed to be committed before the Feoffment, and is thereupon *outlaw'd*, the Feoffee may traverſe either the Felony or the Time, though the Party himſelf is bound by it. And ſo it is, if one is indicted of Felony, and is attainted by his own Confeſſion, the Feoffee may falſify the Attainder, by denying the Felony. But if the Attainder is by Verdict of twelve Men, the Feoffee ſhall not falſify by traverſing the Offence, but the Time only. [a] If there is an Attainder of Treaſon or Felony, and then the Treaſon is pardon'd by Act of Parliament, the *Heir* may falſify the Attainder by Plea, as well as the Party.

[d] 3 Inſt. 230, 231, 232. H. P. C. 270, 271.

[a] 3 Inſt. 232. H. P. C. 721.

The *Heir* of a Perſon attainted of Treaſon may (with the King's Licence, or Conſent of the Attorney-General, but not otherwiſe) bring his Writ of Error, to reverſe the Attainder of his Anceſtor; tho' properly ſpeaking, a Perſon attainted can have no Heir. [b] But this is ſuffered, becauſe otherwiſe he would be without Remedy. Nay, the Perſon himſelf may have a Writ of Error, to reverſe his Attainder, if he aſſigns his Errors, and hath Leave from the Court, to proſecute his Writ. [c] The *Heir* may falſify by Plea an Attainder of the Acceſſory in Felony, where the Principal has reverſed an Outlawry, and has been acquitted by Verdict. So the Reverſal of the Attainder of the Principal *ipſo facto* reverſes the Attainder of the Acceſſory. An *Executor* may bring a Writ of Error, to reverſe an Attainder of Treaſon or Felony, as well as the Heir.

[b] 3 Inſt. 215. 4 Inſt. 21. 1 Sid. 69.

[c] 3 Inſt. 231. 5 Rep. 111. 9 Rep. 119.

Note, [d] That where the Judgment is void, or *coram non Judice*, the Party is not driven to his *Writ of Error*, but may falſify the Attainder by *Plea*; ſhewing the ſpecial Matter which makes it void. Thus one may plead a Pardon of the Treaſon or Felony by Act of Parliament, and avoid the Attainder by *Plea*; for he hath no other Remedy. The King's Letters Patent cannot reverſe an Attainder.

[d] 3 Inſt. 231, 232. 2 Roll. Abr. 489.

2. Attainders may be falſified in reſpect of [e] *Goods* and *Chattels*, by the *Party himſelf*, or by *others*. By the *Party himſelf*; as if one is indicted before the Coroner for the Death of another, and it is found that he *fled* for the ſame. Here all his Goods and Chattels are forfeited, which he had at the Time of the Verdict given. This cannot be falſified by Traverſe, but it may be falſified by Matter of Law; for where the

[e] 3 Inſt. 232, 233. 5 Rep. 111. 9 Rep. 119. H. P. C. 271.

the Indictment is void or inſufficient, there is no Forfeiture. By *others*, as where one is indicted before Juſtices of *Oyer* and *Terminer*, and is acquitted by Verdict, but the Jury find, that he fled for the ſame; and alſo find in particular, what Goods he had at the Time of the Verdict; any one that had Property in thoſe Goods may traverſe the Finding. So when an *Exigent* is awarded, and the Defendant is in Priſon, *&c.* the Party, or his *Executors* or *Adminiſtrators*, ſhall have a Writ of Error, to reverſe the Award of the Exigent.

There is a Flight in *Law*; as when one is indicted of Felony, and Proceſs continued againſt him upon his Default of Appearance, and an *Exigent* is awarded. For altho' he appeareth, all his Goods and Chattels are forfeited by the Award of the Exigent, tho' he is afterwards acquitted. But the Outlawry may be falſified by Matter of *Law*, if the Indictment is inſufficient, or the Proceſs in *Exigent* erroneous. Thus alſo upon Matter of *Fact* or *Record*, one may *excuſe* his Abſence; as where one was in Priſon, or beyond Sea, at the Time of the *Exigent* awarded: Or if the King before the *Exigent* does grant his Pardon.

By 33 H. 8. ch. 20. *If any Perſon ſhall be attainted of* High Treaſon *by the Courſe of the* Common Law *or Statutes of this Realm, every ſuch Attainder by the* Common Law *ſhall be of as great Force and Effect, as if it had been done by Authority of Parliament.*

[a] 3 Inſt. 31, 215.

This Statute is to be intended of [a] *lawful* Attainders by the due Courſe of the Common Law, and not of erroneous or void Attainders; which therefore may be avoided by Writ of Error.

By 29 El. ch. 2. *No Record of Attainder, that* now *is, of any Perſon for Treaſon, where the Party attainted* is *or* hath *been executed for the ſame Treaſon, ſhall hereafter be reverſed by any Plea or Writ of Error.*

[b] 3 Inſt. 31, 215.

Note, This Statute extends only to Attainders of Treaſon [b] *before* the Statute.

Of Execution in Criminal Caſes.
4 Black. Com. ch. 32. Of Execution.
[c] 3 Inſt. 31, 52, 211, 212, 217. Finch 478. H. P. C. 272. Hawk P. C. B. 2. ch. 51.
[d] 3 Cro. 176.
[e] 1 Lev. 61.

XIV. [c] *Execution* muſt be according to the Judgment. [See of *Judgment*, *ſupra.*] But ſome Examples have been to the contrary by Virtue of the Privy Seal. (*Qu.* and ſee of Judgment in Felony, *ante.*) The Execution ought to be in the ſame [d] County, where the Party was tried and convicted; except the Record of the Attainder is removed into the King's Bench, which may award the Execution in the ſame County, where it ſits, *&c.* The *King's Bench* hath Power to award Execution againſt Perſons attainted in Parliament, the Record and the Perſon being remov'd thither. The Judgment belongs to the Judge, but the Execution muſt be done by the Sheriff, *&c.* who in caſe of Life and Death *may* do it upon the Precept of the Judge under his Seal, without any Writ. If the Sheriff, or other proper Officer, alters the Execution, or any other doth execute the Offender, or if he is ſlain without Authority of Law, it is Felony, and the Law implies Malice. But (as has been ſaid before) the King may pardon Part of the Execution in Treaſon, (*viz.*) all but the Beheading. If one condemn'd to be hang'd comes to Life after he is hang'd, [f] he ought to be hang'd again till he is *dead*.

[f] Finch 389, 467.

As the Body of a Traitor or Felon is forfeited to the King by the Execution, ſo in High Treaſon the Quarters were formerly, but now the

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[c] *Executio eſt executio juris ſecundum judicium.* 3 Inſt. 212. *Judicandum eſt legibus, non exemplis.* Ibid. 4 Rep. 33.

Head only is, uſually ſtuck up in ſome publick Place; and in Felony for barbarous Murder, the Body of the Felon after Execution is uſually hung upon a Gibbet near the City, Town, or Village, where the Crime was committed, and near the Highway. Now, by 25 *Geo.* 2. *ch.* 37. the Body is either to be hung in Chains, or anatomized, as before ſet forth.

XV. A [g] *Reprieve*, (from *Repris*, taken back), is to take back, or to ſuſpend the Execution of a Criminal, and the Proceedings of the Law, for a Time. Every Judge that has Power to order the Execution has, of common Right, a Power to grant a Reprieve.

If a Woman is convict and attainted of High Treaſon, Petit Treaſon, or Felony, and is found by an Inqueſt or Jury of Matrons, impanelled by the Sheriff, *&c.* in a private Room, [a] *quick* with Child, (for *Privement Enſeint*, or with Child, is not enough) Execution ſhall be reſpited till her Delivery. But ſhe ſhall take this Favour but once, though ſhe is again quick with Child.

Oftentimes Execution is ſtopp'd upon Condition of *Tranſportation.* [See 22 & 23 *Car.* 2. *ch.* 7. Alſo ſee 4 *Geo.* 1. *ch.* 11. *ſupra.*]

Of a Reprieve.
[g] Terms of the Law, v. Reprieve.
4 Black.Com. ch. 31. Of Reprieve and Pardon.
[a] S. P. C. 198. Finch 478. H. P. C 272. 1 H. H. P. C. 413.

[b] No Priſoner convicted for any Felony, for which he cannot have his Clergy, at the Seſſions of the *Old Baily* for *London* and *Middleſex*, *&c.* ought to be reprieved but in open Seſſions, and not otherwiſe, without the King's expreſs Warrant, and not by Order of any of the Juſtices of *Gaol-Delivery*, or *Oyer* and *Terminer*.

[b] Kely. 4.

XVI. [c] *Reſtitution*, is where one being attainted of Treaſon, Petit Treaſon or Felony, (whereby the Blood is ſtain'd and corrupted), he, or his Heirs, is reſtored to his *Lands*, &c. He may be reſtored upon a Pardon, and the *Heir* may be reſtored, if the Anceſtor is executed. [d] The King may reſtore by his Charter, Lands, Goods, and Chattels forſeited to him by any Attainder; [e] but if by Attainder the *Blood* is corrupted, that muſt be reſtor'd by Parliament. Of Reſtitutions by Parliament, ſome are in Blood only. Some are General Reſtitutions to Blood, Honours, Dignities, Inheritance, and all that was loſt by Attainder.

The King may reſtore the Party or his Heirs to his Lands, becauſe no Perſon is prejudic'd by it. But Reſtitution of Blood cannot be made by him, becauſe it would be a Prejudice to others. The King's Pardon *in Effect* reſtores the Blood, as to all Iſſue born after the Pardon.

Of Reſtitution.
[c] 3 Inſt. 240, 4 Black.Com. 385.
[d] 3 Inſt. 233.
[e] 1 Inſt. 8. a. 391. b. 392. a. 3 Inſt. 233, 240, 241. 1 H. H. P. C. 358.

Thus of our *Courts* of Juſtice, or of the *Juriſdiction* of *Courts*, and of the ſeveral *Kinds* of *Courts*; of *Remedies* without Suit in Court, and of the *Proceedings* in *Civil* and *Criminal* Cauſes; which concludes the Fourth *Object* of our *Engliſh Laws*, (*viz.*) the *Perſons* of which *England* is compoſed; their *Eſtates*; the *Crimes* and *Miſdemeanors* that may be committed by them; and the *Courts* of *Juſtice* or *Juriſdiction* of *Courts*.

All which I ſubmit to the Correction of the Learned, having made this *Attempt* to *methodize* the Study of our Laws, with Hopes that others, by finding Faults in it, may (for the Good of our Country) direct me at laſt to make it more perfect.

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G.R III
BRITISH MUSEUM

—*DEUS Nobis Hæc Otia Fecit.*

FINIS.

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